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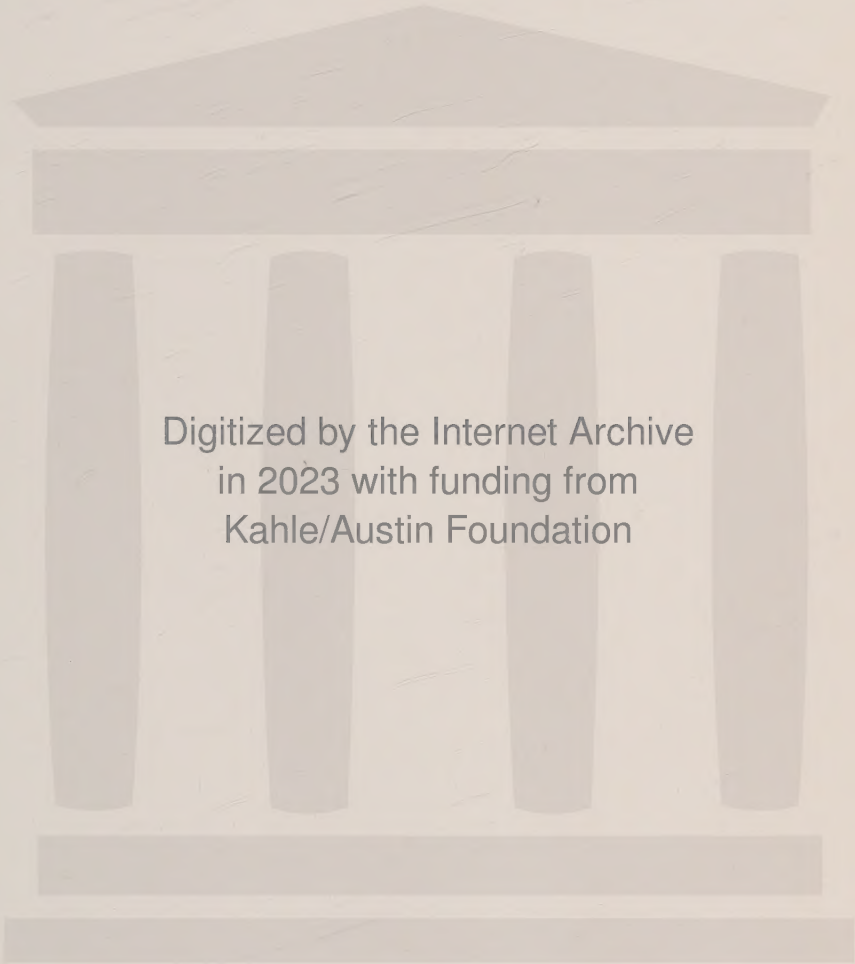

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[2] Became Associate Justice of Supreme Court Mar. 26, 1959.

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[2] Became Associate Justice of Supreme Court, Mar. 26, 1959.
[3] Appointed, took office April 14, 1959.

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51 Cal.2d 331

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, Appellant,

v.

SOUTHERN CALIFORNIA EDISON COMPANY (a California corporation), Respondent.

L. A. 24935.

Supreme Court of California,
In Bank.
Dec. 19, 1958.

Rehearing Denied Jan. 14, 1959.

Action by flood control district for declaratory relief against public utilities maintaining facilities that must be relocated in public streets to make way for the construction of storm drains by the district, wherein a public utility cross-complained. A severance was granted as to the utility. From a judgment of the Superior Court of Los Angeles County, Arnold Praeger, J., the flood control district appealed. The Supreme Court, Traynor, J., held that the cost of relocating utilities in public streets made necessary by construction of storm drains by the flood control district must be borne by the utilities involved.

Judgment reversed with directions.

Carter, Schauer and McComb, JJ., dissented.

1. Municipal Corporations ⇐688

Generally, a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for proper governmental use of the streets.

2. Municipal Corporations ⇐708

The laying of storm drains by a municipality is a governmental function as distinct from a proprietary function.

3. Levees and Flood Control ⇐20

Fact that principal use of drains using the public streets would be to drain the entire area served and drainage of the streets was only incidental thereto did not require that the flood control district pay for the relocation of facilities of public utilities that must be relocated to make way for construction of the storm drains by the district, since such use does not affect the character of the public use or limit the public's right in the public streets. West's Ann.Pub.Util.Code, §§ 6201–6302; Los Angeles County Flood Control Act, § 2, West's Ann.Water Code, App. § 28–2; West's Ann.Const. art. 11, § 19.

4. Municipal Corporations ⇐57

Grants of power to municipalities are to be strictly construed and any doubts resolved against the existence of the power claimed.

5. Levees and Flood Control ⇐1

The Los Angeles County Flood Control Act authorizing the district to construct, maintain and operate drains involves the exercise of the police power of the state. West's Ann.Water Code, App. § 28–2.

6. Gas ⇐7(1)

Where gas company accepted its franchise rights in public streets subject to implied obligations to relocate its facilities at its own expense when necessary to make way for proper governmental uses of the streets, there was no need in the Los

Angeles County Flood Control Act authorizing the district to construct, maintain and operate drains to impose such obligations on the gas company to relocate its facilities at its own expense when necessary to make way for proper governmental uses of the streets. Los Angeles County Flood Control Act, § 2, West's Ann.Water Code, App. § 28–2.

7. Levees and Flood Control ⇐20

The amendment to the Los Angeles County Flood Control Act providing that nothing in the act shall authorize the district in exercising its powers to require the relocation of any facility or any other structure unless just compensation therefor be first made as required by the constitution is not construable as meaning that compensation is to be made in the manner and to the extent that would be "required" if the constitutional provisions required compensation, so as to obligate the district to pay for utility relocations unless constitutional provisions so required. Los Angeles County Flood Control Act, § 16 as amended 1953, West's Ann.Water Code, App. § 28–16.

See publication Words and Phrases, for other judicial constructions and definitions of "Required".

8. Gas ⇐7(1)

The provision of the Los Angeles County Flood Control Act granting the district a franchise to use the streets does not mean that the district rights are no greater than those of any other franchise holder and hence that it must bear the costs of relocating the facilities of an earlier user of the streets such as a gas company. Los Angeles County Flood Control Act, §§ 15, 16, West's Ann.Water Code, App. §§ 28–15, 28–16.

9. Levees and Flood Control ⇐20

Enumeration in the Franchise Act of 1937 what the legislature considers the most important of a utility's obligation could not under the maxim "expressio unius exclusio alterius est" be interpreted as an express direction of the legislature to pass a utility's common-law obligations over to the taxpayers of relocating its utilities at its own expense to make way for construction of storm drains by flood control district in the public streets. West's Ann.Pub.Util. Code, §§ 6294, 6297, 6201–6302; West's Ann.Civ.Code, § 1069.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Norman S. Sterry, Ira C. Powers and Martin E. Whelan, Jr., Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff, Los Angeles County Flood Control District, appeals from a judgment entered in favor of defendant, Southern California Edison Company, in an action brought for declaratory relief against numerous public utilities maintaining facilities that must be relocated in the public streets to make way for the construction of storm drains by the District. Edison cross-complained to recover the costs of certain relocations and for declaratory relief with respect to others not included in the complaint. A severance was granted as to Edison, and the only parties to the trial and this appeal are Edison and the District.

The relocations involved are all located within various cities in the County of Los Angeles other than the City of Los Angeles. No question is presented as to the cost of relocating facilities in the unincorporated area of the county or within the City of Los Angeles. In the cities that are involved, Edison operates under various types of franchises; franchises granted pursuant to Article XI, section 19 of the California Constitution as it existed before 1911, franchises granted by charter cities, franchises granted by both charter and non-charter cities pursuant to the Franchise Act of 1937 (now Public Utilities Code §§ 6201–6302), and other franchises not granted under the 1937 Act but which Edison contends have the same legal effect for the purposes of this action.

The District is engaged in a comprehensive flood control program involving among

other things the construction of storm drains throughout its territory. It is conceded that Edison may properly be required to relocate its facilities in the public streets to make way for the construction of the drains. The sole issue is whether Edison or the District must bear the cost of such relocations.

[1, 2] In Southern California Gas Company v. Los Angeles, 50 Cal.2d 713, 329 P. 2d 289, 290, we stated that "In the absence of a provision to the contrary it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets. [Citations.] The laying of sewers is a governmental as distinct from a proprietary function under the foregoing rule. [Citations.]" In this respect no distinction has been made between sanitary sewers and storm drains or sewers. New Orleans Gas Co. v. Drainage Comm., 197 U.S. 453, 461–462, 25 S.Ct. 471, 49 L. Ed. 831; Chicago, B. & Q. Railway Co. v. State of Illinois ex rel. Drainage Com'rs, 200 U.S. 561, 591, 26 S.Ct. 341, 50 L.Ed. 596; see also, Matter of Leake & Watts Orphan Home, 92 N.Y. 116, 119; City of Cincinnati v. Penny, 21 Ohio St. 499, 508; Stoudinger v. City of Newark, 28 N.J.Eq. 446, 448; Cummins v. City of Seymour, 79 Ind. 491, 41 Am.Rep. 618, 625; Scranton-Pascagoula Realty Co. v. City of Pascagoula, 157 Miss. 498, 128 So. 73, 74; Kiley v. Bond, 114 Mich. 447, 72 N.W. 253, 254.

[3] Edison contends, however, that the use of public streets for storm drains can only be considered a primary use of the streets when the principal purpose of the drains is to drain the streets themselves. When, as in this case, the principal use of the drains will be to drain the entire areas served and drainage of the streets will be only incidental thereto, Edison contends that use for drainage is on a parity with its own use, and that therefore the District must pay for relocating Edison's pre-existing facilities. We find no basis in the cases for the distinction Edison seeks to draw based on what may be the primary purpose of any particular drain. Thus in the New Orleans Gas Company case, the defendant's purpose was to provide drainage for the entire city and not merely the streets thereof. It would be manifestly impossible to provide drainage for the public streets without also draining the surrounding land, and the right of abutting owners to discharge surface waters onto the public streets is recognized as a customary use of the streets. Portman v. Clementina Co., 147 Cal.App.2d 651, 659–660, 305 P.2d 963; see also, Kramer v. City of Los Angeles, 147 Cal. 668, 674–676, 82 P. 334. Moreover, the fact that a comprehensive flood control system requires construction of trunk drains that primarily service areas other than the streets under or across which they are located does not affect the character of the public use or limit the public's right in the public streets. Thus, in the Los Angeles Gas Company case, although the city's sewer served incidentally at most the county street under which it passed, we held that the company's franchise obligations were not affected. "Such obligations rest on the paramount right of the people as a whole to use the public streets wherever located, and the fact that a franchise is granted by one political subdivision as an agent of the state [citations], does not defeat the right of another such agent acting in its governmental capacity to invoke the public right for the public benefit. [Citations.]" Southern California Gas Co. v. Los Angeles, 329 P.2d at page 291.

[4–6] Edison contends that any obligation to relocate its facilities at its own expense rests in the police power of the state and that the state has not delegated its police power in this respect to the District. It invokes the rule that grants of power to municipal corporations are to be strictly construed and any doubts resolved against the existence of the power claimed. See, Harden v. Superior Court, 44 Cal.2d 630, 641, 284 P.2d 9, and cases cited. Section 2 of the Los Angeles County Flood Control Act expressly authorizes the district

to "construct, maintain and operate," the drains here involved. West's Water Code—Appendix, § 28–2. In doing so it is exercising the police power of the state. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 392, 153 P.2d 950; O'Hara v. Los Angeles County Flood etc. Dist., 19 Cal.2d 61, 64, 119 P.2d 23. By insisting that Edison is obligated to relocate its facilities at its own expense, the District is not seeking to exercise an implied authority to impose additional burdens upon Edison, but is relying on the claimed existence of obligations that arose when Edison accepted its various franchises. See, City of San Antonio v. San Antonio St. Ry. Co., 15 Tex. Civ.App. 1, 39 S.W. 136, 139; New Orleans Gaslight Company v. Drainage Commission of New Orleans, 111 La. 838, 35 So. 929, 933, affirmed 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831. If, as the District contends, Edison accepted its franchise rights in public streets subject to implied obligations to relocate its facilities at its own expense when necessary to make way for proper governmental uses of the streets, there was no need expressly to authorize the district to impose such obligations, for Edison had already assumed them.

[7] Edison contends, however, that the 1953 amendment to section 16 of the Los Angeles County Flood Control Act provides for the payment of its relocation costs by the District. The amendment, which follows the Act's enumeration of the powers of the board of supervisors of the District, states, "provided, however, that nothing in this act contained shall be deemed to authorize said district in exercising any of its powers to take, damage or destroy any property or to require the removal, relocation, alteration or destruction of any bridge, railroad, wire line, pipeline, facility or other structure unless just compensation therefor be first made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California." Stats.1953, Ch. 1139, p. 2635, § 1, West's Ann.Water Code, App. § 28–16. This provision cannot reasonably be interpreted, as Edison contends, to mean that compensation is to be made in the manner and to the extent that would be required if the constitutional provisions required compensation. It clearly provides for compensation only as "required" by those provisions. Had the Legislature intended that the District should go beyond constitutional requirements in making compensation it is reasonable to assume that it would have adopted language similar to that found in many other flood control acts adopted before, after, and contemporaneously with the 1953 amendment. For example the Marin County Flood Control and Water Conservation District Act provides that the district shall "in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location * * *." Stats.1953, c. 666, p. 1915, 1919; West Water Code—Appendix, § 68–5(13). It is true that if the amendment does no more than require compliance with the state and federal constitutions, its enactment was unnecessary, and given the Legislature's awareness of the problem as evidenced by provisions of other flood control acts enacted at the same session, it is at least dubious that by expressly reaffirming the District's constitutional obligations, it was intended by implication to negative others that might also exist. Had the Legislature in 1953 clearly not wanted the District to pay relocation expenses, it could have expressed this intent also more clearly than by merely reaffirming the District's constitutional obligations. Nevertheless, the fact remains that the plain language of the 1953 amendment provides for payment only to the "extent required" by the constitutional provisions, and if it is anything more than an admonition to obey the constitutions, it constitutes legislative recognition that the District is not obligated to pay for utility relocations unless constitutional provisions so require.

[8] Edison contends that section 15 of the Act grants the District a franchise to

use the public streets and that therefore its rights therein are no greater than those of any other franchise holder and, accordingly, that the later user must bear the costs of relocating the earlier user's facilities. Essentially the same contention was answered adversely to Edison's position in the Southern California Gas Company case where we held that a franchise exercised by a city in its governmental capacity is not subordinate to a prior franchise granted to a public utility. Southern California Gas Co. v. Los Angeles, supra, 50 Cal.2d 713, 329 P.2d 289.

[9] Edison contends that the express terms of the Franchise Act of 1937 [1] define its obligation to relocate its facilities at its own expense and that as to franchises granted pursuant to that act any other similar obligations are excluded by clear implication. We rejected a similar contention based on the maxim *expressio unius exclusio alterius est* in the Southern California Gas Company case, and although there are some differences between the franchise provisions involved, the rule of strict construction of public grants in the public interest (Knoxville Water Company v. Knoxville, 200 U.S. 22, 33–34, 26 S.Ct. 224, 50 L.Ed. 353; City of Sacramento v. Pacific Gas & Electric Co., 173 Cal. 787, 791, 161 P. 978; County of L. A. v. Southern Cal. Tel. Co., 32 Cal.2d 378, 384, 196 P.2d 773; Civ.Code, § 1069) compels the same conclusion here. As in that case most of the provisions relied on as excluding any implied obligations may reasonably be interpreted as no more than partial expressions of common-law rights and obligations inserted out of an abundance of caution or by way of example only. It is true that section 6297 of the Public Utilities Code may go beyond a restatement of the common-law rule by requiring the utility to remove rather than merely relocate its facilities to make way for public travel, but if it does so, a point we need not decide, it supplies an additional reason why the maxim *expressio unius* does not apply. Had the statute referred only to removal it might cast doubt on the right to relocate instead when relocation would be sufficient to subserve the public interest. There was thus a special reason for mentioning relocation for the specified purposes in section 6297, and it may not therefore be inferred that relocation was included to exclude by implication obligations to relocate for other purposes. City of Lexington ex rel. Menefee v. Commercial Bank, 130 Mo.App. 687, 108 S.W. 1095, 1096. In short, here as in the Los Angeles Gas Company case, the enumeration of what were considered to be the most important of the utilities' obligations cannot reasonably be interpreted as an "express direction of the Legislature" passing the utilities' other common-law obligations over to the taxpayer. Transit Commission v. Long Island R. Co., 253 N.Y. 345, 171 N.E. 565, 568; New York Tunnel Authority v. Consolidated Edison Co., 295 N.Y. 467, 68 N.E.2d 445, 448–449; Town of St. Helena v. San Francisco etc. Ry., 24 Cal.App. 71, 78, 140 P. 600; County Court v. White, 79 W.Va. 475, 91 S.E. 350, 352, L.R.A.1917D, 660; Peoples Gas Light & Coke Co. v. City of Chicago, 413 Ill. 457, 109 N.E.2d 777, 787; Nicholas Di Menna & Sons v. City of New York, Sup., 114 N.Y.S.2d 347, 350.

No contention is made that the provisions of any of the franchises granted to

1. "The grantee of a franchise under this chapter shall construct, install, and maintain all pipes, conduits, poles, wires, and appurtenances in accordance and in conformity with all of the ordinances and rules adopted by the legislative body of the municipality in the exercise of its police powers and not in conflict with the paramount authority of the State, and, as to state highways, subject to the laws relating to the location and maintenance of such facilities therein." Pub. Util.Code, § 6294.

"The grantee shall remove or relocate without expense to the municipality any facilities installed, used, and maintained under the franchise if and when made necessary by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the constructure of any subway or viaduct, by the municipality." Pub.Util.Code, § 6297.

Edison other than pursuant to the 1937 Act are more favorable to its position than those considered above, and accordingly it is unnecessary to consider such other franchises separately.

The judgment is reversed with directions to the trial court to enter judgment for the District declaring its rights in accord with the views herein expressed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

McCOMB, J., dissents.

CARTER, Justice.

I dissent.

The majority opinion in the case at bar is another link in the chain of confusion which exists in the opinions of this court which involve the exercise of the police power and the exercise of the power of eminent domain. I pointed out in my concurring opinion in Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289, that cases in which the right of eminent domain was involved are cited as authority in cases involving the exercise of the police power and police power cases are cited in support of cases involving the eminent domain power.

I am unable to understand on just what theory the majority relies in the case under consideration. It appears that it *must* be the police power given to the flood control district by the majority of this court which is the basis for its holding that the Edison Company must relocate its facilities at its own expense.

It has *long* been a rule of law in this state that political subdivisions such as drainage districts, irrigation districts, and the like, are entities of limited powers—those whch have been expressly granted them by the Legislature. Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 392, 393, 67 P. 496, 1034; City of Madera v. Black, 181 Cal. 306, 310–312, 184 P. 397; Leeman v. Perris Irrigation Dist., 140 Cal. 540, 543, 74 P. 24; Bottoms v. Madera Irr. Dist., 74 Cal.App. 681, 694, 695, 242 P. 100; Harden v. Superior Court, 44 Cal.2d 630, 642, 284 P.2d 9. The only qualification to this rule is that certain powers strictly necessary to carry out those expressly granted by the Legislature are implied.

The Los Angeles County Flood Control District was created by the Legislature in 1915 (Stats.1915, ch. 755, pp. 1502–1512, §§ 1–23 inclusive). The act is now found in Deering's Water Code as Act 4463, sections 1–23 inclusive, pages 325–354.

Section 2 sets forth the objectives of the act as providing for the control and conservation of the flood, storm and other waste waters of the district "and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district, or to save or conserve in any manner, all or any of such waters, and to protect from damage from such flood or storm waters, the harbors, waterways, public highways and property in said district." The same section then provides: "Said Los Angeles County Flood Control District is hereby declared to be a body corporate and politic, *and as such shall have power:*

"1. To have perpetual succession.

"2. To sue and be sued * * *

"3. To adopt a seal * * *

"4. To take by grant, purchase, gift, devise or lease * * * real or personal property of every kind within or without the district necessary to the full exercise of its power.

"5. To acquire or contract to acquire lands, rights of way, easements, privileges and property of every kind, and construct, maintain and operate any and all works or improvements * * *

"6. *To have and exercise the right of eminent domain, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act,* whether such property be already devoted to the same use by any district or other public corporation or agency or otherwise, and may condemn any existing works or improvements

in said district now used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in said district from damage from such flood or storm waters." (Emphasis added.)

Subsection 7 provides for the incurment of debt and the issuance of bonds; subsection 7a provides for the borrowing of federal funds; subsection 7b provides for the sale of bonds to the county; subsection 8 provides for the collection of taxes; subsection 9 provides for the making of contracts; subsection 10 provides for the granting of easements; subsection 11 provides for the disposal of rubbish; subsection 12 provides for the payment of bond premiums; subsection 13 provides for the disposal of property. The subsections to section 2 as just set forth provide *all* the powers granted to the district by the Legislature. *It is apparent that the district is not granted the right to exercise the state's police power.*

Article I, section 14, of the California Constitution provides, in part, that "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *." This refers to the right of eminent domain.

In 1953, section 16 of Act 4463 was amended to provide for certain powers in the board of supervisors in the exercise of the district's right of eminent domain. The amendment provides, in part, as follows: "[*P*]*rovided, however, that nothing in this act contained shall be deemed to authorize said district in exercising any of its powers to take, damage or destroy any property or to require the removal, relocation, alteration or destruction of any bridge, railroad, wireline, pipeline, facility or other structure unless just compensation therefor be first made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California.*" (Emphasis added.)

In my opinion, the Legislature of this state could not have more clearly expressed its meaning: That the relocation of any facility was an exercise by the district of its power of eminent domain and that compensation should be made therefor as provided in the California Constitution, article I, section 14.

The reasoning found in the majority opinion on the meaning and effect of the 1953 amendment heretofore set forth, while extremely ambiguous and a masterpiece of confusion, *apparently* means that since the Constitution of California does not spell out in words of one syllable that relocations of various types of facilities are to be compensated in money, the Legislature did not really mean what it said—that it intended just compensation to be made for such relocations. It is first argued in the majority opinion that if the amendment only required the district to abide by its constitutional obligations, the amendment was unnecessary; and then that it was "dubious" that the Legislature intended by implication to negative "others" (*probably* constitutional obligations) that "might also exist." Then the following unclear language appears: "Had the Legislature in 1953 clearly not wanted the District to pay relocation expenses, it could have expressed this intent also more clearly than by merely reaffirming the District's constitutional obligations. Nevertheless, the fact remains that the plain language of the 1953 amendment provides for payment only to the 'extent required' by the constitutional provisions, and if it is anything more than an admonition to obey the constitutions, it constitutes legislative recognition that the District is not obligated to pay for utility relocations unless constitutional provisions so require." *When the Legislature clearly states that compensation is to be made for relocations how is it possible for the majority to assume that the Legislature clearly did not want the district to pay for such relocations?* The entire section (16) deals with the district's right of eminent domain and the supervisors' duties and powers in connection therewith. The Constitutions provide that private property shall not be taken or damaged without just compensation being made therefor. There is no reason whatsoever

for the nebulous reasoning and negative thinking set forth in the majority opinion.

If we assume that the theory on which the conclusion reached by the majority is that the district is exercising the police power of the state, a complete answer is that the district has no police power. In the majority opinion is the following statement: "Section 2 of the Los Angeles County Flood Control Act expressly authorizes the district to 'construct, maintain and operate,' the drains here involved. West's Water Code—Appendix, § 28–2. In doing so it is exercising the police power of the state. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 392, 153 P.2d 950; O'Hara v. Los Angeles County Flood etc. Dist., 19 Cal.2d 61, 64, 119 P.2d 23." In constructing, maintaining and operating the drains here involved the district was exercising a power expressly granted to it by the Legislature of this state. It is true that the grant of the power was given by the state as an exercise of the *state's* police power but that is not to say that in the delegation of the powers *specifically* enumerated in the act creating the district the Legislature also granted to the district the state's police power in other respects. In the House case this court reversed a judgment of dismissal entered after the trial court had sustained a demurrer to the plaintiff's complaint for damages to her property occasioned by the district's negligence in planning, construction and maintenance of certain flood control channel work. We noted that the plaintiff "rests her right of recovery upon article I, section 14, of the state Constitution, which provides that private property shall not be taken or damaged for public use without just compensation to the owner. *The trial court erred in failing to sustain the constitutional basis of the plaintiff's claim under the distinguishable concept of her pleading.*" House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 386, 153 P.2d 950, 951 (emphasis added). While the court spoke of the police power the case was not decided upon the theory that the flood control district was exercising the police power of the state. It was said: "While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation. [Citations.] In fact, on the point of a governmental agency's liability for damages arising in connection with its undertaking construction work, the prevailing opinion in the Archer case [Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1] supra, does not purport to dispute the settled principle that public necessity limits the right to exact uncompensated submission from the property owner if his property be either damaged, taken or destroyed. Rather it is expressly stated there in the prevailing opinion (19 Cal.2d 23–24, 119 P.2d [1] at page 4): 'The state or its subdivisions may take or damage private property without compensation if such action is *essential* to safeguard public health, safety or morals. [Citing authorities.] In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. [Citing authorities.]' (Italics added.) Thus there is recognized the incontestable proposition that the exercise of the police power, though an essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property." 25 Cal. 2d at pages 388, 389, 153 P.2d at page 952. The House case, with its reliance upon the Archer case, demonstrates again the confusion which exists in the cases. The House case involved an action against the *flood control district.* The Archer case involved an action against the *city of Los Angeles.* Article XI, section 11, of the California Constitution provides that "Any *county, city, town,* or *township* may make

and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." This is known as the constitutional police power provision. It does not provide that any flood control, or sanitary, or mosquito abatement district may exercise the police power of the state. O'Hara v. Los Angeles County Flood Control etc. Dist., 19 Cal.2d 61, 119 P.2d 23, 24, also relied upon by the majority for its statement that the district was exercising the "police power" of the state was decided upon the theory that a lower riparian owner has no redress for injury to his land caused by improvements in the stream when there has been no diversion of water out of its natural channel. The following statement is found in the majority opinion in the O'Hara case: "Compensation for private property taken or damaged for a public use must be made under article I, section 14, only when the taking or damaging of property is not so essential to the public health, safety, and morals as to be justified under the 'police power,' and the injury is one which would give rise to a cause of action on the part of the owner if it were inflicted by a private person. Archer v. City of Los Angeles [19 Cal.2d 19, 119 P.2d 1], this day decided." Again, it will be noted, that while the *flood control district* was involved, the Archer case, which involved the *city,* was cited as authority. While the city of Los Angeles may, by constitutional authority, exercise both the police power and the power of eminent domain, a flood control district has *only the authority and powers specifically delegated to it by the Legislature.* In this particular instance the flood control district of Los Angeles County may exercise *only* the power of eminent domain and, by reason of the 1953 amendment to the act as heretofore set forth, the required relocation of certain enumerated facilities by the district is considered by the Legislature to be an exercise of its power of eminent domain and the owner of the facility must be compensated for such relocation. It is only where the state, *or one of its political subdivisions having the right to exercise the police power,* is involved that the so-called "twilight zone" comes into play and the heretofore quoted language from the Archer case is pertinent. In the case at bar, as in the House and O'Hara cases, a political subdivision, the Los Angeles Flood Control District, is involved and it is emphatically pointed out that the Los Angeles Flood Control District has no right to exercise the police power of the state inasmuch as the Legislature has not seen fit to so authorize it in the act which created it and the amendments thereto.

The 1953 amendment to the act was not an "unnecessary" legislative act as intimated in the majority opinion. The purpose thereof was to make certain that a required relocation of certain facilities by the district was part of its eminent domain power. While the language therein specifically requiring compensation to be paid therefor might be considered unnecessary in view of the constitutional requirement that just compensation be paid for the taking of private property, under the reasoning of the majority it was obviously necessary—even if, under the holding here, quite futile.

I recently prepared a concurring opinion upholding the right of the city of Los Angeles to require a utility company to relocate its facilities without compensation to make way for a sewer line which the city was installing in a public street or road (Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289). In said opinion I stated that under the authorities the city was performing a governmental function and was exercising the police power granted to it by the Constitution of this state. It should be perfectly clear from that opinion that the rule announced in the majority opinion there cannot be relied upon in support of the position of the plaintiff here, as neither the Constitution nor the statutes of this state purport to give the plaintiff any of the power exercised by the city in that case.

In my opinion the judgment of the trial court in favor of defendant and cross-complainant, Southern California Edison Company, should be affirmed.

SCHAUER, Justice (dissenting).

I am in accord with the principles of law discussed by Mr. Justice CARTER and concur in his conclusion that the judgment of the trial court in favor of Southern California Edison Company should be affirmed.

Rehearing denied; CARTER, SCHAUER and McCOMB, JJ., dissenting.

51 Cal.2d 346

STOCKTON THEATRES, INC. (a corporation), Appellant,

v.

Emil PALERMO et al., Respondents.

Sac. 6829.

Supreme Court of California,

In Bank.

Dec. 19, 1958.

Rehearing Denied Jan. 14, 1959.

Action for restitution. From an order of the Superior Court, San Joaquin County, George F. Buck, J., refusing to allow as costs on appeal, the amount of premium on a bond to preserve attachment pending the appeal, the plaintiff appeals. The Supreme Court, Carter, J., held that the evidence established that the bond was necessary so as to entitle the successful plaintiff to costs on appeal of the amount of premium on the bond.

Order reversed with directions.

Schauer, Shenk, and McComb, JJ., dissented.

Opinion, 323 P.2d 1039, vacated.

1. Costs ⇐251

The statute providing that the cost of attachment bond shall be included as costs allowed to a party entitled to costs unless the court determined that the bond "was" unnecessary, manifests the intention that the necessity for the bond be measured as of the time of perfecting the appeal. West's Ann.Code Civ.Proc. §§ 946, 1035.

2. Costs ⇐264

Evidence of property owned by judgment debtor in California established that it was necessary for the corporate creditor to file a bond to preserve attachment pending the appeal and hence the refusal to allow as costs on appeal the amount of premium on the bond was error. West's Ann.Code Civ.Proc. §§ 946, 1035.

3. Costs ⇐251

In action for restitution, that plaintiff filed its notice of appeal 41 days after giving and receiving notice of entry of judgment did not render ineffective, bond given by plaintiff in order to preserve attachment pending an appeal so as to preclude recovery of premium on the bond as costs on successful prosecution of the appeal. West's Ann.Code Civ.Proc. §§ 946, 1035.

Freed & Freed and Eli Freed, San Francisco, for appellant.

Smith & Zeller and Charles A. Zeller, Stockton, for respondents.

CARTER, Justice.

This is an appeal by plaintiff from an order refusing to allow as costs on appeal the amount of the premium on a bond to preserve attachments pending appeal.

This is part of a long line of litigation which, it will be recalled, began when Emil Palermo, the owner and lessor of the Star Theater in Stockton, brought an action for declaratory relief against the lessee, Stockton Theatres, Inc., in an endeavor to have the lease declared void because the stockholders of the lessee were Japanese nationals. This court reversed the trial court (Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 195 P.2d 1) holding that the lease was valid and that under it, Stockton Theatres was entitled to possession of the

theater as tenant thereof. Stockton Theatres then brought an action for restitution, and after trial, in which plaintiff was held entitled to recover from Palermo the sum of $13,658.75, both parties appealed. Plaintiff prevailed on its appeal and the judgment of the lower court was modified to provide that Stockton Theatres recover the sum of $45,992.12 and that it was entitled to costs on appeal (Stockton Theatres, Inc., v. Palermo, 121 Cal.App.2d 616, 264 P.2d 74).

On the appeal in the restitution case, Stockton Theatres argued that it was entitled to a total amount of $130,000. The bond premium necessary for a sufficient bond to preserve its attachment during the pendency of the appeal amounted to a total sum of $6,980.49. When the remittitur came down, Stockton Theatres filed its memorandum of costs and disbursements on appeal; Palermo objected to the inclusion of the bond premium as an item of costs. The trial court granted Palermo's motion to tax costs on appeal as to this item on the ground that section 1035 of the Code of Civil Procedure did not apply at the appellate stage (Stockton Theatres, Inc., v. Palermo, 47 Cal.2d 469, 304 P.2d 7).[1]

Section 1035 of the Code of Civil Procedure provides: "Whenever in this code or by other provision of law costs are allowed to a party to an action or other proceeding, such costs shall include the premium on any surety bond which was procured by the party entitled to recover costs in connection with the action or proceeding *unless the court determines that the bond was unnecessary.*" (Emphasis added.) We reversed and the "trial court [was] directed to determine the necessity for the bond required to preserve the attachment pending appeal, and, if it is determined that such bond was necessary, allow the amount of the premium paid therefor as an item of the costs on appeal to which plaintiff is entitled. The amount so allowed to be a lien upon any property of Palermo covered by the attachment heretofore levied." 47 Cal.2d 469, 478, 479, 304 P.2d 12.

Thereafter, the trial court, after taking evidence, determined that a bond was unnecessary "for the preservation of the attachment on appeal and the amounts of premium thereon is not a proper item of costs on appeal. * * *" Plaintiff then prosecuted this appeal.

Inasmuch as section 946 of the Code of Civil Procedure specifically states that "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him * * *" it appears that the trial court could not have meant that such bond was unnecessary "for the preservation of the attachment on appeal * * *" but intended to say that the bond was unnecessary because of defendant Palermo's financial standing.

The record at the last hearing shows that Palermo testified that on the day (August 10 or 11, 1948) Stockton Theatres filed its complaint in restitution he withdrew $27,000 from one bank account and took the money to Reno, Nevada, where he placed it in a safety deposit box; that he also withdrew over $10,000 from another bank account and took the money to Nevada; that the money was placed in the Reno safety deposit box for "protection"; that he opened two bank accounts in Stockton in his brother's name; that his brother was mentally incompetent; that his own name was on the accounts as "agent" and that he was the only one entitled to make withdrawals therefrom; that his brother had nothing whatsoever to do with the accounts; that he told his brother he was depositing in his name "to protect my interest so that I couldn't get any attachments slapped to me. * * *" In answer to the question "Why do you keep the bank accounts in

1. The above brief résumé of this litigation is taken from our opinion in 47 Cal.2d 469, 304 P.2d 7. A more complete statement will be found in our opinion in Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 195 P.2d 1.

the Bank of America in your brother's name?" Palermo replied: "Protection. I never know when I am going to be attached." When asked by whom he might be attached, he replied: "Well by anybody." The record shows that Mr. Palermo was extremely vague as to what happened to the money he had placed in the Reno safety deposit box; that he didn't "believe" he had ever deposited it in a California bank; that he used some of it to pay the judgments against him; that he had to borrow $20,000 from a bank to pay the judgments; that he had to put up stocks of his as collateral; that the judgment was paid by check drawn on the brother's account which he signed as "agent." The record shows, through the testimony of an officer of the bank, that the savings account was opened by Palermo in his brother's name with an initial deposit of $15,000; that the highest balance was $15,378; that the checking account in the brother's name was opened in 1950 with an initial deposit of $1,000; that the March, 1954 balance in the checking account was $3,329.11.

With respect to the real property owned by him, Palermo testified that the Star Theater was built in approximately 1930; that he inherited it from his father in 1941; that it was appraised for inheritance tax purposes at $33,000; that in 1951 the theater had a value of $110,000; that he based his valuation on the building on "what the monthly rent" would be; that the monthly rent from the whole building would run "over a thousand dollars"; that his reason for placing this valuation on the theater was that it had a seating capacity of 530; that he placed a rental valuation of $1.75 per month per seat and multiplied by the number of seats; that his reason for using the $1.75 per seat figure as a reasonable rental was that "I believe a couple years back I read it in the Box Office Magazine. They determined it that way. It is a theater magazine, I receive it. We always gave—I receive two different magazines. And there was a writeup in there." When asked if that was the only basis for his opinion that the reasonable rental value per seat was $1.75, he replied, "Yes, that is." Palermo also testified that the theater building included a candy store for which he received $100 per month rent, and a bar for which he received $80 a month rent; and that although his estimate of the reasonable rental value of the theater would amount to $927.50 per month (530 x $1.75), he had received between $300 and $360 per month rent from Stockton Theatres, Inc.

Palermo testified that the theater business, as distinguished from the real property, had a value of $60,000 in 1951; that he had no basis for this valuation; that someone (he was not sure who) had made him an offer to buy it at that time for that amount; that "The business itself has no value whatsoever unless there is a lease so that the person who buys the business can actually occupy the place of business and operate it as a motion picture theater; that to *him* it had a "very large value, that business does"; that at the time he left Stockton in 1948, after the filing of the restitution action, all the equipment, seats and furnishings of the Star Theater were in the name of Ray Rowen; that he had an arrangement with Rowen for buying it back; that he paid Rowen "about" $25 a month rental for the seats, equipment and furnishings.

Concerning the home owned by him, Palermo testified that in 1951 it was worth $10,000; that he sold it in 1955 for that amount; that he didn't know whether it had increased in value or not.

[1, 2] It will be recalled that in 1948 when Stockton Theatres brought the action for restitution it claimed it was entitled to the sum of $130,000 from Palermo. It appealed from the judgment of the trial court still contending it was entitled to that sum. Section 946 of the Code of Civil Procedure provides that an appeal does not continue in force an attachment unless the appellant procures a bond in double the amount claimed by him (see our opin-

ion, Stockton Theatres, Inc., v. Palermo, 47 Cal.2d 469, 472, 473, 304 P.2d 7). Section 1035 of the Code of Civil Procedure provides that the cost of such a bond shall be included as a cost allowed to a party entitled to costs "unless the court determines that the bond *was* unnecessary." (Emphasis added.) It will be noted that the Legislature used the word "was," thereby declaring its intention that the necessity for the bond be measured as of the time of perfecting the appeal. Judgment was entered in the restitution action on April 27, 1951; Stockton Theatres filed its notice of appeal on June 7, 1951. The District Court of Appeal opinion in which the judgment was modified so as to increase it by the sum of $32,333.14 was rendered on November 30, 1953. Although Palermo testified that in 1951 the money had been removed from the Nevada safety deposit box and "returned to the State of California" no bank account owned or controlled by him reflects it, and it will be recalled that he testified that he did not "believe" he had ever deposited the money in a California bank. It will also be recalled that he continued to carry money in accounts in his incompetent brother's name so as to avoid attachments. It will also be recalled that at no time pertinent to this inquiry did either of these accounts contain sufficient sums to protect plaintiff had it recovered the sum claimed to be due it. The record further shows that Palermo owned, during this time, only the one-story brick building, and a home with an estimated value of $10,000. In view of his admissions that he removed his money to Nevada to "protect" it, that he carried other money in his brother's name to avoid attachments from *any* source, that he had sold all the theater equipment, furnishings, et cetera, to another person, it appears to us as a matter of law that the bond procured by plaintiff was necessary within the meaning of section 1035 of the Code of Civil Procedure.

[3] Palermo earnestly argues that because plaintiff filed its notice of appeal 41 days after both giving and receiving notice of entry of judgment in the restitution case the bond was ineffective as a matter of law by reason of the provisions of section 946 of the Code of Civil Procedure. That section, in addition to providing that an appeal does not preserve an attachment unless a bond is procured by the appellant as heretofore noted, provides "* * * and unless, *within five days* after written notice of the entry of the order appealed from, such appeal be perfected." This same argument was made by Palermo to the District Court of Appeal in Stockton Theaters v. Palermo, 109 Cal.App.2d 616, 617, 241 P.2d 54, where he sought to have terminated and discharged plaintiff's attachments on the ground that plaintiff's appeal was not filed within the time permitted by section 946 of the Code of Civil Procedure. The court there denied Palermo's motion to vacate the attachments. Although the District Court of Appeal erroneously construed the effect of section 946 (see Stockton Theatres, Inc., v. Palermo, 47 Cal.2d 469, 474, 304 P.2d 7, 10), we held that portion of its opinion was dictum and not the law of the case. We said "In the instant case the court presupposed a situation for the purpose of illustrating its theory of how the statute should be construed. The illustration was clearly erroneous *and it is obvious that the decision was not predicated upon the court's construction of the statute.* Hence, we are not bound to follow the District Court's erroneous interpretation of the scope of section 946 of the Code of Civil Procedure under the doctrine of the law of the case." (Emphasis added.) We also said "*If*, as previously set forth, the District Court believed that the lien of attachment had 'merged with the judgment [and] said section [946] has no applicability,' it would appear that defendants' motion to discharge the attachment should have been granted rather than denied." There is no merit to Palermo's argument in this respect since the holding of the District Court of Appeal has long since become final.

Having concluded as a matter of law that the record shows that a bond was

necessary to preserve the attachment within the meaning of section 1035 of the Code of Civil Procedure, the order is reversed with directions to the trial court to allow the premiums on said bond as a cost on appeal.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

In Stockton Theatres, Inc., v. Palermo (1956), 47 Cal.2d 469, 477 [10], 304 P.2d 7, we declared that "Having concluded that section 1035 of the Code of Civil Procedure permits as an item of costs on appeal the premium on a bond where one is required by law (Code Civ.Proc., § 946) in order to preserve an attachment, the cause must be reversed and remanded for a *determination by the trial court* as to *whether* or not a *bond* was *necessary* in the case under consideration." (Italics added.) The order taxing costs was reversed and the trial court "directed to *determine the necessity for the bond required* to preserve the attachment pending appeal, and, *if it is determined that such bond was necessary,* allow the amount of the premium paid therefor as an item of the costs on appeal to which plaintiff is entitled." (at pages 478–479 of 47 Cal.2d, at page 12 of 304 P.2d; italics added.)

Following a hearing, including the taking of evidence, the trial court "Determined that under the law and evidence it was unnecessary to file the corporate surety bond herein for the preservation of the attachment on appeal and the amount of premium thereon is not a proper item of costs on appeal." I believe that the trial court's determination, made pursuant to our express direction, is supported by the record and that we should uphold it.

This was an action brought by plaintiff for restitution of the theatre, in which plaintiff recovered judgment in the trial court for $13,658.75. An abstract of that judgment against defendant was recorded in the office of the County Recorder of the county (San Joaquin) in which the theatre (which defendant owns) is located. Both parties appealed from the judgment, with plaintiff claiming it was entitled to recover its entire demand of $130,000. It appears that the bond posted by plaintiff to preserve its attachment on appeal was in double the amount (see Code Civ.Proc., § 946) of $116,341.25 ($130,000 claimed by plaintiff, less $13,658.75 covered by the recorded abstract of judgment), and the bond premium of $6,980.49 which plaintiff now seeks to have taxed to defendant as one of the costs on appeal was based on such doubled amount. However, although plaintiff prevailed on the appeal, it prevailed to the extent of an increase *of only* $32,333.44 over its trial court judgment of $13,658.75, and *not to the extent* of the $116,341.25 increase which it had claimed on appeal and on which (doubled) the bond premium was based. (See Stockton Theatres, Inc., v. Palermo (1953), 121 Cal.App.2d 616, 632, 264 P.2d 74.) Thus the sum of $32,333.44 won by plaintiff on the appeal was the only claim with respect to which it was justified in fairness and in law to claim and recover "necessary" costs on appeal. Otherwise there would seem to be no reasonable limit in the amount which might be claimed against a defendant whose property has been attached on a claim however grossly in excess of the actual recovery by plaintiff on appeal. If plaintiff here had recovered only an additional $100 on the appeal, rather than $32,333.44, under the majority opinion it apparently would still be considered "necessary" as a matter of law that plaintiff preserve its attachment by a bond in double the amount of $116,341.25. The majority must consider the entire amount to be necessary as a matter of law because they reverse the trial court's findings on the evidence and remand the cause "with directions to the trial court to allow the [entire amount of] premiums on said bond." Surely a defendant should not be taxed with the premium incident to maintaining such an excessive claim.

In Moss v. Underwriters' Report, Inc., (1938), 12 Cal.2d 266, 274–275 [9–12], 83 P. 2d 503, it was pointed out that the statute (Code Civ.Proc., § 1033) which provides that a successful litigant furnish a memorandum of his costs and "necessary disbursements" in the action "does not contemplate that a defendant must pay all of the successful plaintiff's expenses in connection with the litigation," and that "the right to reimbursement for expenses depends upon the statutory provisions concerning costs and not upon the necessity, in the mind of the litigant, or his counsel, for the outlay." See also Simms v. County of Los Angeles, (1950), 35 Cal.2d 303, 319, 217 P.2d 936. In the present case the necessity, in the mind of plaintiff or his counsel, of maintaining an additional claim on appeal in the amount of $116,341.25 does not warrant taxing defendant as a matter of law with the cost thereof when plaintiff was successful to the extent of only $32,333.44.

Further, from testimony of defendant, which the trial court was free to accept as true, defendant owned during the period here involved unencumbered real property of a value in excess of $100,000 upon which plaintiff's judgment was a lien following recording of the abstract thereof. This evidence is plainly sufficient to support that court's implied finding that plaintiff's security for its total recovery of nearly $46,000 ($13,658.75 original judgment, plus $32,333.44 additional recovery on appeal) was ample, and that court's determination that the surety bond to preserve the attachment on appeal was wholly unnecessary. Section 1035 of the Code of Civil Procedure provides that the premium on the bond is not recoverable as costs if the court "determines that the bond was unnecessary." Pursuant to this court's direction, the trial court upon sufficient evidence has made its determination and I would uphold it and affirm the order appealed from.

SHENK and McCOMB, JJ., concur.

Rehearing denied; SHENK, SCHAUER and McCOMB, JJ., dissenting.

51 Cal.2d 310

Gaston PESCE, Respondent,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL et al., Appellants.

S. F. 19959.

Supreme Court of California,
In Bank.
Dec. 12, 1958.

Rehearing Denied Jan. 7, 1959.

Proceeding to set aside Alcoholic Beverage Control Appeal Board's decision dismissing appeal of petitioner from order and decision of Department of Alcoholic Beverage Control revoking petitioner's on-sale liquor license. The Superior Court, County of Alameda, Charles Wade Snook, J., rendered judgment for petitioner and Department and Board appealed. The Supreme Court, Shenk, J., held that Section 1013 of the Code of Civil Procedure providing that when service is made by depositing in mail if within a given number of days after such service the right is to be exercised or an act is to be done the time for exercising that right or performing that act is extended applies to extend the 40-day period prescribed by statute within which appeal to Alcoholic Beverage Control Appeals Board from decision of Department of Alcoholic Beverage Control, revoking license for sale of alcoholic beverages, may be filed, and hence mailing of notice of appeal on 40th day after party received decision revoking on-sale liquor license, which notice was received by the Board on the 41st day was sufficient to effect the appeal.

Affirmed.

Gibson, C. J., and Traynor, J., dissented.

Opinion, 322 P.2d 995, vacated.

1. Statutes ⇐223.2(1)

The Business and Professions Code and the Code of Civil Procedure are to be read and construed together under well-recognized rule that for purposes of stat-

utory construction the codes are to be regarded as blending into each other and constituting but a single statute. West's Ann.Code Civ.Proc. § 1013; West's Ann. Bus. & Prof.Code, §§ 23081, 25760.

2. Intoxicating Liquors ⇐108(10)

Section 1013 of the Code of Civil Procedure providing that when service is made by depositing in mail if within a given number of days after such service the right is to be exercised or an act is to be done the time for exercising that right or performing that act is extended applies to extend the 40-day period prescribed by statute within which appeal to Alcoholic Beverage Control Appeals Board from decision of Department of Alcoholic Beverage Control, revoking license for sale of alcoholic beverages, may be filed, and hence mailing of notice of appeal on 40th day after party received decision revoking on-sale liquor license, which notice was received by the board on the 41st day was sufficient to effect the appeal; disapproving Anderson v. Dept. of Alcoholic Beverage Control, 324 P.2d 24, 159 Cal.App.2d 413, Van De Veer v. Dept. of Alcoholic, etc., Control, 318 P.2d 686, 155 Cal.App. 2d 817, and Hollywood Circle v. Dept. of Alcoholic Beverage Control, 153 Cal.App.2d 526, 314 P.2d 1009. West's Ann.Code Civ. Proc. § 1013; West's Ann.Bus. & Prof. Code, §§ 23081, 25760.

3. Appeal and Error ⇐2

The policy of the law favors the preservation of right of appeal and the hearing of appeals on their merits and hence the sections of the code relating to the subject should be liberally construed with a view of promoting such purpose.

Edmund G. Brown, Atty. Gen., Charles A. Barrett and Wiley W. Manuel, Deputy Attys. Gen., for appellants.

Theodore Golden, Robert N. Stefan and J. Bruce Fratis, Oakland, for respondent.

SHENK, Justice.

This is an appeal from a judgment of the Superior Court, Alameda County, ordering a writ of mandate directing the Alcoholic Beverage Control Appeals Board to set aside its order dismissing the petitioner's appeal from a decision of the department.

The question presented is whether section 1013 of the Code of Civil Procedure applies to extend the forty day period prescribed by section 23081 of the Business and Professions Code for taking an appeal from a decision of the department.

The facts are undisputed. On July 25, 1956, the department rendered a decision recommending that the petitioner's on-sale license be revoked. A copy of the decision, addressed to the petitioner, was deposited by the department in the United States mail at Sacramento on July 26, 1956. The petitioner received it in Oakland on July 27, 1956. On September 4, 1956, he mailed a notice of appeal to the principal office of the board at Sacramento. This notice was received by the board on September 5, 1956. It thus appears that the notice of appeal was received by the board at Sacramento on the forty-first day after the copy of the decision was mailed to the petitioner. The board dismissed the appeal on the ground that it was not taken within the time prescribed by section 23081 of the Business and Professions Code. That section provides: "Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved * * * may appeal to the board * * *. The appeal shall be in writing * * *. A copy of the appeal shall be mailed by the appellant to each party who appeared * * * including the department which shall thereafter be treated * * * as a party * * *."

It is the board's position that the time for taking an appeal from a decision of the department is limited by section 23081 to forty days and that to be effective the notice of appeal must be filed with the board within that period. The petitioner contends that the period prescribed by section 23081 is extended by the provisions of section 1013 of the Code of Civil Pro-

cedure, and as extended, his notice was filed within the period provided by law.

Section 1013 provides: "In case of service by mail, the notice or other paper must be deposited in the United States post office * * * in a sealed envelope, with postage paid, addressed to the person on whom it is to be served * * *. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full 100 miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all." Section 25760 of the Business and Professions Code states: "Notice of any act of the department required by this division to be given * * * may be made personally or by mail. If made by mail, service shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure. In case of service by mail, the service is complete at the time of deposit in the United States Post Office."

[1] Both section 1013 and section 25760 provide that the service is complete at the time of deposit in the United States post office. It is this service which is referred to in section 1013 where it is stated "* * * but if, within a given number of days after such service * * *," a right is to be exercised, or an act is to be done, the time for exercising that right or performing that act is extended. Sections 23081 and 25760 contain nothing which would preclude the application of section 1013 in its entirety to the service of the board's decision and to the extension of the period in which an appeal can be taken from such decision. The Business and Professions Code and the Code of Civil Procedure are to be read and construed together under the "well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute." In re Porterfield, 28 Cal.2d 91, 100, 168 P.2d 706, 712, 167 A.L.R. 675; see also, Armenta v. Churchill, 42 Cal.2d 448, 455, 267 P.2d 303; Gillespie v. City of Los Angeles, 36 Cal.2d 553, 558, 225 P.2d 522; In re Estate of Risse, 156 Cal. App.2d 412, 421, 319 P.2d 789; Ryder v. City of Los Altos, 125 Cal.App.2d 209, 211, 270 P.2d 532. Applying this rule both the petitioner and the department are authorized to make service in the manner provided by section 1013.

Section 1013 was held inapplicable to section 23081 in Van De Veer v. Dept. of Alcoholic, etc., Control, 155 Cal.App.2d 817, 318 P.2d 686, and Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control, 153 Cal.App.2d 523, 314 P.2d 1007, 1010. In the Hollywood Circle case, the court held section 1013 inapplicable on the ground that "The Appeals Board is a constitutional governmental body. Bus. & Prof.Code, § 23075. There appears to be no intent by the people in enacting the current liquor control laws in their Constitution, nor by the legislature in implementing them, to extend in any manner the time for filing a notice of appeal specified in section 23081 of the Business and Professions Code." Courts too, are constitutional governmental bodies subject to strict time limits for hearing appeals. See In re Estate of Hanley, 23 Cal.2d 120, 122, 142 P.2d 423, 149 A.L.R. 1250. This, however, furnishes no ground for refusing to apply section 1013 to proceedings before those bodies. Any implications to the contrary in Anderson v. Dept. of Alcoholic Bev. Control, 159 Cal.App.2d 413, 324 P.2d 24; Van De Veer v. Dept. of Alcoholic, etc., Control, supra, 155 Cal.App.2d 817, 318 P.2d 686, and Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control, supra, 153 Cal.App.2d 523, 314 P.2d 1007, are disapproved.

[2, 3] Sections 23081 and 25760 of the Business and Professions Code reasonably permit a construction which would include the application of section 1013 of the Code of Civil Procedure in its entirety to the

filing of a notice of appeal from a decision of the Department of Alcoholic Beverage Control. That construction is consistent with the policy of the law which favors the preservation of the right of appeal and the hearing of appeals on their merits. See People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868; Manning v. Gavin, 14 Cal.2d 44, 46, 92 P.2d 795; Haskins v. Crumley, 152 Cal.App.2d 64, 66, 312 P.2d 276; Wilbur v. Cull, 127 Cal.App.2d 655, 657, 274 P.2d 424. As stated in Wilbur v. Cull, supra, 127 Cal.App.2d at page 657, 274 P.2d at page 425, quoting from Anderson v. Standard Lumber Co., 60 Cal.App. 445, 448, 213 P. 65, "'Of course, the disposition of the courts is to hear appeals upon their merits and the sections of the code relating to the subject should be liberally construed with a view of promoting such purpose.'"

The judgment is affirmed.

CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

GIBSON, C. J., and TRAYNOR, J., dissent.

Rehearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

51 Cal.2d 885

Manuel SILVA et al., Respondents,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL et al., Appellants.

S. F. 20056.

Supreme Court of California,
In Bank.
Dec. 12, 1958.

Rehearing Denied Jan. 7, 1959.

Proceeding on application by alcoholic beverage licensees for a writ of mandate directing Alcoholic Beverage Control Appeals Board to hear licensees' appeals from revocation of the licenses. The Superior Court, County of Alameda, Cecil Mosbacher, J., entered judgment in favor of licensees and respondents appealed. The Supreme Court, Shenk, J., held that notices of appeal filed with Department of Alcoholic Beverage Control on the 41st day after mailing of notices of decision of revocation of licenses were timely, since section of Code of Civil Procedure pertaining to manner in which service by mail should be made extends by period of one day the time for filing of such appeal.

Affirmed.

Gibson, C. J., and Traynor, J., dissented.

Opinion, 328 P.2d 803, vacated.

Intoxicating Liquors ⇐108(10)

Notices of appeal filed with Department of Alcoholic Beverage Control on the 41st day after mailing of notices of decision of revocation of licenses were timely, since section of Code of Civil Procedure pertaining to manner in which service by mail should be made extends by period of one day the time for filing of such appeal. West's Ann.Bus. & Prof.Code, §§ 23081, 25601, 25658; West's Ann.Code Civ.Proc. § 1013.

Edmund G. Brown, Atty. Gen., and Wiley W. Manuel, Deputy Atty. Gen., for appellants.

Golden & Stefan, Theodore Golden, Robert N. Stefan and J. Bruce Fratis, Oakland, for respondents.

SHENK, Justice.

This is an appeal from a judgment of the Superior Court, Alameda County, ordering a writ of mandate directing the respondent board to set aside an order dismissing appeals from decisions of the department and to consider an application for relief from an alleged clerical or inadvertent error in the preparation of a notice of appeal from decisions of the department.

A similar question was involved in Pesce v. Department of Alcoholic Beverage Control, Cal., 333 P.2d 15.

On October 18, 1956, the department rendered two separately numbered decisions in file 42022. In the first, numbered 9560, the petitioners' wine and beer license was ordered revoked for violation of section 25601 of the Alcoholic Beverage Control Act, Business and Professions Code, § 25601. In the second, numbered 1166, the license was suspended for fifteen days for violation of section 25658 of the Alcoholic Beverage Control Act, Business and Professions Code, § 25658. The decisions were mailed to the licensees on October 18, 1956, and received by them at their place of business on October 19, 1956. On November 28, 1956, the forty-first day after notice of the department's decisions was mailed to the licensees, the licensees delivered a notice of appeal to the board. The notice stated that an appeal was taken from the decision of the department in the proceeding numbered "file no. 4202, reg. no. 1166." It thus appears that the notice of appeal incorrectly designated the file number and referred only to the proceeding in which the petitioners' license was suspended for fifteen days. On January 16, 1957, the licensees filed a "Correction and Clarification of Notice of Appeal." They alleged that their failure to properly identify the file number and to include in the notice of appeal the number of the proceeding in which their license was revoked was the result of typographical error and inadvertence.

The superior court ordered the board to set aside its order dismissing the appeals in both proceedings; to hear and determine the suspension order in number 1166 on its merits; to hear and determine the application for relief from the alleged inadvertence in omitting number 9560 from the caption of the notice of appeal, and to hear that appeal on the merits if such relief be granted.

The dismissal was based on the ground that the notice of appeal was not filed within the forty day period prescribed by section 23081 of the Business and Professions Code. The licensees contend that the period prescribed by that section for taking an appeal from a decision of the department is subject to the provisions of section 1013 of the Code of Civil Procedure for the reason that the notice of the department's decision was served upon them by mail, and as extended, the notice of appeal was timely. In Pesce v. Department of Alcoholic Beverage Control, supra, it was held that those sections should be read together. Under such a construction the notice herein was given within the time provided by law.

The judgment is affirmed.

CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

GIBSON, C. J., and TRAYNOR, J., dissent.

Rehearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

51 Cal.2d 355

The PEOPLE of the State of California, Respondent,

v.

Robert WILLIAMS, Appellant.

Cr. 6275.

Supreme Court of California,
In Bank.
Dec. 19, 1958.

Rehearing Denied Jan. 14, 1959.

Prosecution for selling of narcotics. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered judgment of conviction and defendant appealed. The Supreme Court, Gibson, C. J., held that where police officer, the only witness for prosecution, testified that he made first purchase of narcotics from defendant through services of an informer and made the second purchase on basis of the first one but without informer's presence, refusal of court to compel disclosure of informer's identity resulted in a miscarriage of justice.

Judgment and order denying new trial reversed.

Opinion, 323 P.2d 824, vacated.

1. Witnesses ⇐216

Although government is generally privileged to withhold identity of informers, privilege must give way when it comes into conflict with fundamental principle that a person accused of a crime is entitled to a full and fair opportunity to defend himself.

2. Witnesses ⇐216

Privilege of government to withhold identity of an informer may not be invoked in criminal case in which identity of informer is material to defense and nondisclosure would result in denying defendant a fair trial.

3. Criminal Law ⇐1186(4)
Witnesses ⇐216

Where police officer who was the only witness for prosecution in trial of defendant on charge of selling narcotics testified that the first purchase of narcotics he made from defendant was in the company of an informer who introduced officer to defendant but the second purchase of narcotics was made alone and on the basis of the first purchase, informer was a material witness on issue of guilt with respect to first sale and refusal to compel disclosure of informer's identity resulted in a miscarriage of justice. West's Ann.Health & Safety Code, § 11500; West's Ann.Const. art. 6, § 4½.

Ellery E. Cuff, Public Defender, and Paul G. Breckenridge, Jr., Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Albert Bianchi, Deputy Attys. Gen., for respondent.

GIBSON, Chief Justice.

Defendant was convicted on two counts of selling narcotics in violation of section 11500 of the Health and Safety Code, and he appeals, contending that the trial court erred in failing to strike the testimony of a police officer who refused to disclose the identity of an informer.

Officer Renty was the only witness for the prosecution, and he testified as follows with regard to two transactions which occurred about three months before defendant's indictment and arrest: On February 4, 1957, Renty was standing on East Fifth Street in Los Angeles with an informer who had been used by the police on other occasions. The informer called to defendant, addressing him as "Red," and, when defendant walked over to them, the informer told him that Renty "had the money," which meant, in narcotics parlance, that Renty wanted to buy narcotics. Defendant said that he "could do us some good," and, while the informer waited outside, Renty and defendant entered a nearby cafe, where Renty handed defendant a ten-dollar bill. Defendant gave him some narcotics and a one-dollar bill. On February 7, 1957, Renty was again in the area when he saw defendant and said that he had nine dollars. They entered the same cafe, and defendant sold Renty more narcotics. Renty had not known defendant prior to February 4, and, in consummating the second transaction, he was relying on the first one.

On cross-examination Renty refused to disclose the identity of the informer. Defendant testified to the effect that the officer was mistaken in identifying him as the one who had made the sales, and he moved to strike Renty's testimony as to both counts on the ground that the informer was a material witness whose identity was necessary to a fair presentation of the defense. The motions were denied.

[1] It has long been recognized that, although the government is generally privileged to withhold the identity of informers, the privilege must give way when it comes into conflict with the fundamental principle that a person accused of crime is entitled to a full and fair opportunity to defend himself. Regina v. Richardson

(Eng.), 3 F. & F. 693; see Marks v. Beyfus (Eng.), 25 Q.B.D. 494, 498. While the language employed in describing the restriction on the privilege is not always the same, it does not vary in any substantial respect. Thus, Wigmore states that disclosure may be compelled if it "appears necessary in order to avoid the risk of false testimony or to secure useful testimony" (8 Wigmore on Evidence (3d Ed. 1940) § 2374, p. 756), and the United States Supreme Court in its latest opinion on the question declares that a limitation arises from the fundamental requirements of fairness where disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." Roviaro v. United States, 353 U.S. 53, 60–61, 77 S.Ct. 623, 628, 1 L.Ed.2d 639.

[2] What is important is not the precise phraseology used but the firmly established principle that the privilege may not be invoked in a criminal case in which the identity of the informer is material to the defense and nondisclosure would result in denying the defendant a fair trial. Roviaro v. United States, supra, 353 U.S. 53, 60–62, 77 S.Ct. 623, 1 L.Ed.2d 639; Portomene v. United States, 5 Cir., 221 F. 2d 582, 584; Sorrentino v. United States, 9 Cir., 163 F.2d 627, 628–629; Wilson v. United States, 3 Cir., 59 F.2d 390, 391 et seq.; United States v. Blich, D.C., 45 F. 2d 627, 629; United States v. Keown, D.C., 19 F.Supp. 639; People v. Alvarez, 154 Cal.App.2d 694, 696, 316 P.2d 1006, et seq.; People v. Castiel, 153 Cal.App.2d 653, 656–659, 315 P.2d 79; People v. Lawrence, 149 Cal.App.2d 435, 450–452, 308 P.2d 821; Crosby v. State, 90 Ga.App. 63, 82 S.E.2d 38, 39–40; Hamilton v. State, 149 Miss. 251, 115 So. 427, 428; see Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151; United States v. Conforti, 7 Cir., 200 F.2d 365, 367–369; United States v. Li Fat Tong, 2 Cir., 152 F.2d 650, 652; United States v. Heitner, 2 Cir., 149 F.2d 105, 107; Morgan, Basic Problems of Evidence (1954) p. 119; McCormick on Evidence (1954) § 148, pp. 310–311; 3 Wharton's Criminal Evidence (12th Ed. 1955) § 795, pp. 136–137.

A comparable rule exists with respect to the government's privilege to withhold documents in its possession. For many years courts have compelled the government to produce documents material to the defense in a criminal case. Jencks v. United States, 353 U.S. 657, 670 et seq., 77 S.Ct. 1007, 1 L.Ed.2d 1103; Gordon v. United States, 344 U.S. 414, 419, 73 S.Ct. 369, 97 L.Ed. 447; United States v. Andolschek, 2 Cir., 142 F.2d 503, 506; Powell v. Superior Court, 48 Cal.2d 704, 709, 312 P.2d 698; People v. Moses, 11 Ill.2d 84, 142 N.E.2d 1, 4; State v. Guagliardo, 146 La. 949, 84 So. 216, 219; People v. Davis, 52 Mich. 569, 18 N.W. 362, 363–364; Centoamore v. State, 105 Neb. 452, 181 N.W. 182, 183–184; People v. Schainuck, 286 N.Y. 161, 36 N.E.2d 94, 96; see United States v. Reynolds, 345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727; Parsons v. State, 251 Ala. 467, 38 So.2d 209, 216.

The scope of the limitation upon the privilege of concealing the identity of an informer may be better understood by considering some of the situations in which the problem frequently arises. Disclosure is required where the informer participated in the crime with which the defendant is charged. E. g., Portomene v. United States, supra, 5 Cir., 221 F.2d 582, 584; People v. Lawrence, supra, 149 Cal.App.2d 435, 450–452, 308 P.2d 821. However, the limitation is not confined to such cases, since it is based upon materiality of the informer's identity to the defense. Clearly, for example, an informer who took no part in the crime but was an eyewitness may be in a position to give highly significant testimony. See United States v. Conforti, supra, 7 Cir., 200 F.2d 365, 367–369. Also, where the informer did nothing more than give the police information leading to a search and seizure made without a warrant and alleged to be unlawful, courts have compelled disclosure if the informer's communication was the only justification for the action of the police. Wilson v. United States,

supra, 3 Cir., 59 F.2d 390, 391 et seq.; United States v. Blich, supra, D.C., 45 F.2d 627, 629. In that type of case the identity of the informer is material because, unless he was a person upon whose credibility the police were entitled to rely, the necessary showing of reasonable cause for the search and seizure would not be present. On the other hand, the limitation upon the privilege does not apply, of course, in every criminal case. For example, disclosure has not been required where there was reasonable cause for a search and seizure apart from an informer's communication which led the police to suspect the defendant. Scher v. United States, supra, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151.

Three cases recently decided by this court are in accord with the established principles discussed above. Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39; People v. McShann, 50 Cal.2d 802, 330 P.2d 33; Mitchell v. Superior Court, 50 Cal.2d 827, 330 P.2d 48. Those decisions in no way extend or proscribe either the privilege or the limitation to which it is subject; they hold that disclosure is to be made where, in connection with a claim of illegal search and seizure, there is no showing of reasonable cause, apart from the informer's communication (Priestly v. Superior Court, supra, 50 Cal.2d at page 815 et seq., 330 P.2d 39), or where, in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial (People v. McShann, supra, 50 Cal.2d at page 808, 330 P.2d 33 et seq.; Mitchell v. Superior Court, supra, 50 Cal.2d at page 829, 330 P.2d 48).

[3] In the light of the undisputed evidence in the present case, the informer was clearly a material witness on the issue of guilt with respect to the first sale. He not only saw the seller of the narcotics, whom he knew prior to that occasion, but also was instrumental in bringing about the transaction. As a witness at the trial he might have testified that defendant was not the seller of the narcotics, and such testimony would have been especially important to the defense in view of the fact that the officer was the sole witness for the prosecution and that, so far as appears from the record, he saw the culprit for only a few minutes, three months prior to defendant's indictment and arrest. Under the circumstances, disclosure of the identity of the informer was necessary to a fair trial of count one.

Although the informer did not witness the second transaction, it was consummated in reliance upon the prior one, and the theory of the prosecution, as sought to be established by the officer's testimony, was that the same person, allegedly defendant, committed the two offenses. If the informer had contradicted the officer's identification of defendant as to the first sale, this would have been highly material evidence to show that the officer was also mistaken in connecting defendant with the second transaction.

The failure to compel disclosure of the informer's identity resulted in a miscarriage of justice with respect to both counts. See Cal.Const. art. VI, § 4½.

The judgment and the order denying a new trial are reversed.

CARTER, TRAYNOR, and SCHAUER, JJ., concur.

SPENCE, Justice.

I concur in the reversal with respect to both counts, but I adhere to the views expressed in my concurring and dissenting opinion in People v. McShann, 50 Cal.2d 802, 330 P.2d 33.

There is a clear distinction between the present case and the McShann case. Here defendant was not arrested until three months after the alleged offenses had been committed. Officer Renty testified that defendant was the person who had made both sales. Defendant denied any participation in either sale. In other words, the defense was based upon the claim that Officer Renty had been mistaken in identifying defendant as the person who had made the two sales. Under these circumstances, the majority properly conclude that testimony

of the informer as to the identity of the person involved could have been of material benefit to the defense.

In the McShann case, however, defendant was arrested at the time of the second offense, namely possession, while he actually had narcotics on his person. No question of identity was involved. Following the guiding principles declared in Roviaro v. United States, 353 U.S. 53, at page 62, 77 S.Ct. 623 at page 628, 1 L.Ed.2d 639, as to the conditions which require the disclosure of the name of the informer, and "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense", I am of the opinion that the balance is in favor of the "individual's right" here but that the balance was in favor of the "public interest" in the McShann case insofar as the second count of possession was concerned.

SHENK and McCOMB, JJ., concur.

51 Cal.2d 294

August J. BUMB, Respondent,
v.
Minnie M. BENNETT et al., Appellants.
L. A. 24884.

Supreme Court of California,
In Bank.
Dec. 12, 1958.

Rehearing Denied Jan. 7, 1959.

Action involving rights arising from a general assignment for benefit of partnership creditors. From a judgment of the Superior Court, Los Angeles County, David Coleman, J., the defendants appealed. The Supreme Court, Spence, J., held that the assignment was not void because not complying with the statutory provisions respecting assignments for benefit of creditors but was valid as common-law assignment; that the recording was not necessary; that defendants had no standing to raise objections to enforcement of a condition in the assignment where they were not injured thereby; that the assignment sufficiently described the realty assigned and that the assignment was not invalid as authorizing the assignee to pay the individual partners' tax liabilities nor because of an alteration by the assignee for the purpose of allegedly increasing his compensation.

Judgment affirmed.

Vacating opinion, 326 P.2d 566.

1. Assignments for Benefit of Creditors ⇐22

An assignment of personalty for benefit of creditors may be valid as a common-law assignment although it is not made in conformity with the statutes. West's Ann. Civ.Code, §§ 3449–3473.

2. Assignments for Benefit of Creditors ⇐22

An assignment of partnership property to assignee for benefit of creditors was not necessarily invalid because it did not comply with the statutes relating to statutory assignments for creditors, since the statute merely renders invalid certain transfers not accompanied by an immediate change of possession, and since there are other code provisions giving recognition to common-law assignments for benefit of creditors. West's Ann.Civ.Code, § 3440(e); West's Ann.Code Civ.Proc. § 1204.

3. Assignments for Benefit of Creditors ⇐22

Common-law assignments for creditors whether of real or personal property are valid because they existed at common law, and hence common-law assignments of both personalty and realty are permitted by law and neither is invalid because they do not conform to the Civil Code provisions relating to statutory assignments for benefit of creditors. West's Ann.Civ.Code, §§ 3449–3473.

4. Assignments for Benefit of Creditors ⇐170

An assignment of partnership property to an assignee for benefit of creditors was not invalid because not recorded where the assignment was valid as a common-law assignment. West's Ann.Civ.Code, §§ 3449–3473.

5. Fraudulent Conveyances ⇐154(1)

A transfer is not invalid because of the failure to record it as a conveyance of real property, since an unrecorded deed or assignment is sufficient to pass title against a subsequent attaching creditor. West's Ann. Civ.Code, § 1215.

6. Assignments for Benefit of Creditors ⇐31

An assignment of partnership property to assignee for benefit of partnership creditors was not an assignment for benefit of creditors generally, where beneficiaries were limited to a particular class of creditors and to such other creditors as assented to its terms. West's Ann.Civ.Code, § 1215.

7. Assignments for Benefit of Creditors ⇐31

An assignment of partnership property to assignee for benefit of partnership creditors would not be invalid because limited to a particular class of creditors and to such others as assented to its terms since preferences are not illegal; Kaye v. Jacobs, 122 Cal.App. 421, 430, 10 P.2d 186 disapproved in part. West's Ann.Civ.Code, § 3432.

8. Assignments for Benefit of Creditors ⇐31

An assignment of partnership property to assignee for benefit of partnership creditors was not invalid as against defendants who were not injured by enforcement of the requirement that secured creditors must render their security or forfeit their right to participate in the estate. West's Ann. Civ.Code, §§ 3449–3473.

9. Assignments for Benefit of Creditors ⇐47

Creditors who consented to assignment of partnership property to assignee for benefit of partnership creditors had no standing to object to the assignment. West's Ann. Civ.Code, §§ 3449–3473.

10. Partnership ⇐151

As respects authority of partner to assign for benefit of creditors, evidence supported finding that property assigned to assignee for benefit of partnership creditors was an asset of the partnership. West's Ann.Corp.Code, § 15008.

11. Partnership ⇐151

Where partnership property was used at the firm's place of business and held in the names of the individual partners as tenants in common, it could not be assigned for benefit of creditors by one partner without the express authorization of his copartner. West's Ann.Corp.Code, §§ 15009, 15010.

12. Partnership ⇐151

Absent evidence that the copartner had abandoned the business, the partnership property could not be assigned for the benefit of creditors by one partner without the authorization of the other. West's Ann. Corp.Code, § 15009.

13. Evidence ⇐267

Where witness was testifying to the fact that a statement was made, the testimony was not hearsay.

14. Assignments for Benefit of Creditors ⇐52

There is no requirement that assent to assignment of partnership property for benefit of creditors be reduced to writing.

15. Frauds, Statute of ⇐143(2)

Where the assignment of partnership property for benefit of creditors might be voidable by the nonsigning partner but he had never objected, judgment creditors could not invoke the statute of frauds to avoid the assignment. West's Ann.Civ. Code §§ 1091, 1624, 1971, 2309; West's Ann. Code Civ.Proc. § 1973.

16. Assignments for Benefit of Creditors ⇐58

Where deed of assignment of partnership property for benefit of creditors transferred all the property of the assignor of every kind and nature both real, personal or mixed and any interest or equity therein not exempt from execution but did not specifically describe any real property, the phrase "all of the property of the assignor" was sufficient to describe the property to be conveyed.

See publication Words and Phrases, for other judicial constructions and definitions of "All Of The Property Of The Assignor".

17. Internal Revenue ⇐1717
Partnership ⇐181

Federal income tax obligations of individual partners are not liens on a partner-

ship property nor are they entitled to priority of payment from that property.

18. Assignments for Benefit of Creditors ⇐90

Assignment of partnership property for creditors was not invalid because authorizing the assignee to pay the net proceeds to creditors after deducting moneys which assignee could pay to discharge any lien on property and an indebtedness under the law entitled to priority of payment including personal income taxes of the partners, since the assignment should not be construed as conferring authority of the assignee to pay individual partners' tax liabilities from partnership assets before applying the proceeds to discharge the partnership obligations where its language was consistent with a different and valid interpretation.

19. Alteration of Instruments ⇐2

It is not every material alteration of a written instrument which will invalidate it.

20. Alteration of Instruments ⇐11(2)
Assignments for Benefit of Creditors ⇐184

An assignee for benefit of creditors holds a bare legal title in trust for the beneficiary, and hence his alteration of the assignment interest in a manner neither sanctioned by nor advantageous to the beneficiaries but solely to increase his own compensation should not deprive creditors of their rights under the assignment.

21. Alteration of Instruments ⇐11(2)

Alteration of assignment for benefit of creditors of a partnership by the assignee by striking out the word "net" in respect to his compensation did not render the assignment void where the alteration was neither sanctioned by nor advantageous to the parties beneficially interested. West's Ann. Civ.Code, §§ 3449–3473.

William Katz, Los Angeles, for appellant.

Harold A. Slane, Harold Slane, Jr., and Sidney J. Unickel, Los Angeles, for respondent.

Glen Behymer, Los Angeles, James M. Conners, San Francisco, Cyril W. McClean, Oakland, Brown & Brown, Howard B. Brown, Craig, Weller & Laugharn, Frank C. Weller, Hubert F. Laugharn, Thomas S. Tobin, William E. Bartley, Andrew F. Leoni, Joseph S. Potts, Jr., Gendel & Raskoff, Bernard Shapiro, J. Rolf de Wied, Herbert Colden, Los Angeles, and Kenneth G. McGilvray, Sacramento, as amici curiae on behalf of respondent.

SPENCE, Justice.

Defendants Minnie M. Bennett, Victoria E. Bloch and Leonard Bloch appeal from a judgment quieting title to a parcel of real property in plaintiff as assignee for the benefit of creditors of B. F. Wells & Son, a copartnership, and enjoining defendants from claiming any interest therein.

From and after December 30, 1955, the record owners of the property in dispute were "Bert F. Wells and Edward L. Wells, father and son, as Tenants in Common, doing business as B. F. Wells & Son." On May 25, 1956, B. F. Wells & Son, by Edward L. Wells, executed an assignment of all the partnership property to plaintiff as assignee for the benefit of the partnership creditors. The assignment was accepted by plaintiff at approximately 9:00 A.M. on May 29, 1956. On that same day, at 12:17 P.M., defendant Bennett, as the representative of certain unsecured creditors of B. F. Wells & Son, levied an attachment upon the real property here involved and, after judgment in her favor, assigned her rights to defendant Victoria E. Bloch, who thereafter purchased the property at execution sale. Defendant Leonard Bloch is the husband of defendant Victoria E. Bloch.

The trial court entered judgment for plaintiff based on findings that the realty was partnership property, that the partnership liabilities were greatly in excess of its assets, and that the assignment was valid and prior to the attachment. There can be no question but that the judgment was proper if the assignment was valid. Brain-

ard v. Fitzgerald, 3 Cal.2d 157, 163, 44 P.2d 336. Defendants contend that it was not.

[1] Defendants first argue that the assignment is void because it did not comply with the code provisions relating to statutory assignments for the benefit of creditors. Civil Code, §§ 3449–3473. Defendants concede that an assignment of personal property for the benefit of creditors may be valid as a common-law assignment although it is not made in conformity with those sections. Brainard v. Fitzgerald, supra, 3 Cal. 2d 157, 44 P.2d 336. But they insist that common-law assignments of personalty are valid only because of legislative recognition of such assignments in section 3440, subdivision (e), of the Civil Code. Since that section has no application to transfers of realty, they conclude that assignments of real property are invalid unless the statutory provisions are observed.

[2] There is no merit in this contention. Section 3440 does not purport to validate any transfer of a debtor's property; it merely renders invalid certain transfers which are not accompanied by an immediate change of possession. And, contrary to defendants' contention, there are other provisions in our codes which give recognition to common-law assignments for the benefit of creditors. Thus section 1204 of the Code of Civil Procedure provides for preferred labor claim liens against "any property" transferred by "any assignment, * * * whether formal or informal, * * * made for the benefit of creditors * * *."

[3] However, we need not further labor the question of legislative "recognition," for the validity of common-law assignments—whether of real or personal property—does not depend on such tenuous ground. They are valid because they existed at common law (See Billings v. Billings, 2 Cal. 107) and because the only presently effective statutory provisions (Civ.Code, §§ 3449–3473) which could be construed as invalidating them do not "affect the power of a person, although insolvent, * * * to transfer property * * *, in good faith to a particular creditor, or creditors, or to some other person or persons in trust for such particular creditor or creditors for the purpose of paying or securing the whole or part of a debt owing to such creditor or creditors * * *." (Civ.Code, § 3451; Brainard v. Fitzgerald, supra, 3 Cal.2d 157, 160–161, 44 P.2d 336; Jarvis v. Webber, 196 Cal. 86, 98, 236 P. 138.) It follows that common-law assignments of both personalty and realty are permitted by our laws, and that neither are invalid because they do not conform to the provisions of the Civil Code relating to statutory assignments for the benefit of creditors.

[4, 5] Defendants next contend that the assignment is void because it was not recorded. The assignment was not invalid as against defendants by reason of the sections requiring assignments for the benefit of creditors to be recorded (Civ.Code, §§ 3458, 3459, 3463–3466) since those sections do not apply to common-law assignments. Brainard v. Fitzgerald, supra, 3 Cal.2d 157, 161, 44 P.2d 336; see also Jarvis v. Webber, supra, 196 Cal. 86, 98, 236 P. 138; First Nat. Bank of Stockton v. Pomona Tile Mfg. Co., 82 Cal.App.2d 592, 608, 186 P.2d 693. Nor is the transfer invalid because of the failure to record it as a conveyance (Civ.Code, § 1215; Moore v. Schneider, 196 Cal. 380, 389, 238 P. 81) of real property, since an unrecorded deed or assignment is sufficient to pass title against a subsequent attaching creditor. Watkins v. Wilhoit, 104 Cal. 395, 398–399, 38 P. 53; Fares v. Morrison, 54 Cal.App.2d 773, 776, 129 P.2d 735.

Defendants also assail the assignment because it was not made for the benefit of creditors generally. The deed of assignment provided that "before secured creditors shall be paid hereunder they shall first be required to surrender to said Assignee the security so holden by them and accept the provisions of this agreement."

[6, 7] Since the beneficiaries of the assignment were limited to a particular class of creditors and to such other creditors as assented to its terms, it was not an assignment for the benefit of creditors generally. Jarvis v. Webber, supra, 196 Cal.

86, 98–99, 236 P. 138. But that fact, standing alone, does not render the transfer invalid, for "preferences are not illegal under our law." Brainard v. Fitzgerald, supra, 3 Cal.2d 157, 163, 44 P.2d 336, 339. An insolvent debtor may lawfully pay one or more of his creditors to the exclusion of others by a direct transfer. Civ.Code, § 3432. We can see no reason why he may not do the same thing by way of a transfer in trust where there is no basis for contending that the transfer is in fraud of creditors. See Brainard v. Fitzgerald, supra, 3 Cal.2d 157, 162, 44 P.2d 336; Jarvis v. Webber, supra, 196 Cal. 86, 98–99, 236 P. 138. It is true that Sabichi v. Chase, 108 Cal. 81, 41 P. 29, and Rapp v. Whittier, 113 Cal. 429, 45 P. 703, contain apparent holdings to the effect that preferential assignments are invalid. Those cases, however, are no longer in point. They were based on section 3457 of the Civil Code—a section subsequently made inapplicable to common-law assignments. (Stats.1905, ch. 466, § 1, p. 622; now Civ.Code, § 3451.) To the extent that Kaye v. Jacobs, 122 Cal. App. 421, 430, 10 P.2d 186, purports to follow the Sabichi case, it is disapproved.

[8, 9] Additionally, defendants maintain that the requirement that secured creditors must surrender their security or forfeit their right to participate in the estate is so unreasonable as to render the assignment void. But even assuming that this condition might render the assignment invalid as against a nonconsenting secured creditor, defendants have no standing to raise this objection since they could not be injured by enforcement of the condition. (Burrill, Voluntary Assignments for the Benefit of Creditors (1894), § 452, p. 600.) No other creditors are in a position to object since they have consented to the assignment. See Peterson v. Ball, 211 Cal. 461, 468, 296 P. 291, 74 A.L.R. 187; Garn v. Thorwaldson, 40 Cal.App. 62, 66, 180 P. 9; Stone-Ordean Wells Co. v. Anderson, 66 Mont. 64, 212 P. 853.

[10] Defendants further claim that the assignment is invalid because it was neither signed by B. F. Wells nor authorized by him in the manner prescribed by law. Record title to the property was in the name of the individual partners as tenants in common. However, the uncontradicted evidence showed that the property was purchased with partnership funds, that it constituted the place of business of the partnership, and that in every way it was treated as partnership property by the record owners. The trial court's finding that the property was an asset of the partnership was, therefore, amply supported. (Corporations Code, § 15008; see also Vineland Homes, Inc., v. Barish, 138 Cal.App.2d 747, 755–758, 292 P.2d 941; Rishwain v. Smith, 77 Cal.App.2d 524, 534, 175 P.2d 555; Parmelee v. Brainard, 62 Cal.App.2d 182, 184, 144 P.2d 381.)

[11, 12] As partnership property used as the firm's place of business and held in the names of the individual partners as tenants in common, it could not be conveyed by one partner without the express authorization of his co-partner. (Corp. Code, §§ 15009, 15010; Petrikis v. Hanges, 111 Cal.App.2d 734, 738–739, 245 P.2d 39.) And, absent evidence that the co-partner had abandoned the business, it could not be assigned for the benefit of creditors by one partner without the authorization of the other. (Corp.Code, § 15009; see also Richlin v. Union Bank & Trust Co., 197 Cal. 296, 304, 240 P. 782.)

[13] The assignment was executed in the name of the partnership by Edward L. Wells. It is not contended that Bert F. Wells had abandoned the business, but, over defendants' objection, Edward was permitted to testify that he had discussed the assignment with his partner, and that the latter had said, "Go ahead." Defendants contend that this testimony was inadmissible hearsay. Since the witness was testifying to the fact that the statement was made, the testimony was not hearsay. (6 Wigmore, Evidence (3d ed. 1940), § 1766, p. 177.) And unless the authorization was required to be in writing, it sufficiently expressed the assent of the non-signing partner.

[14, 15] As a matter of agency or partnership law, there is no requirement that the assent be reduced to writing. Hooper v. Baillie, 118 N.Y. 413, 23 N.E. 569; Crane, Partnership (2d ed. 1952), p. 267. But defendants maintain that the assignment operated as a conveyance of the property in dispute and therefore was required to be "subscribed by the party * * * assigning * * * the same, or by his lawful agent thereunto authorized by writing." (Code Civ.Proc. § 1971; see also Civ.Code, §§ 1091, 1624, 2309; Code Civ.Proc. § 1973.) While the assignment might be voidable by the non-signing partner, he has never objected and defendants, as judgment creditors, cannot invoke the statute of frauds to avoid the assignment. Wood Estate Co. v. Chanslor, 209 Cal. 241, 250–251, 286 P. 1001; Mitchell v. Locurto, 79 Cal.App.2d 507, 512–513, 179 P.2d 848; 6 C.J.S. Assignments for Benefit of Creditors § 374, p. 1419.

[16] Defendants next argue that the assignment insufficiently described the real estate assigned. "[A] description of the property by general terms, as is so generally the case in assignments, is no more void for uncertainty than it is in its less frequent use in deeds." (4 American Law of Property (1952), p. 781.) The deed of assignment purported to transfer "all of the property of the Assignor of every kind and nature and wheresoever situated, both real and personal or mixed, and any interest or equity therein not exempt from execution * * *." The assignment did not specifically describe any real property, but the phrase "all of the property of the Assignor" sufficiently described the property to be conveyed. Brusseau v. Hill, 201 Cal. 225, 230–231, 256 P. 419, 55 A.L.R. 157; Pettigrew v. Dobbelaar, 63 Cal. 396, 397.

Defendants further maintain that the assignment is invalid because it provided that the assignee was to pay the net proceeds to the creditors "after deducting all monies which said Assignee shall at his option pay to discharge any lien on any of said property and any indebtedness which under the law is entitled to priority of payment, including any and all personal income taxes which may be due from E. L. W[ells] and B. F. W[ells] and after paying all charges and expenses" of administration.

[17, 18] Admittedly, this provision could be read as directing the assignee to pay the individual partners' tax liabilities from the partnership assets before applying any of the proceeds to discharge the partnership obligations. But the assignment should not be construed as conferring this authority where its language is consistent with a different and valid interpretation. (Burrill, Voluntary Assignments for the Benefit of Creditors (1894), § 285, p. 382; Bump, Fraudulent Conveyances (2d ed. 1876), pp. 358–359.) The challenged clause can be read as authorizing the assignee to prefer only such income tax obligations as may be a lien on the partnership property or which, under the law, are entitled to priority of payment. The income tax obligations of the individual partners are not liens on the partnership property, as distinguished from the partners' shares in any surplus (United States v. Worley, 5 Cir., 213 F.2d 509; Adler v. Nicholas, 10 Cir., 166 F.2d 674) nor are they entitled to priority of payment from that property. United States v. Kaufman, 267 U.S. 408, 45 S.Ct. 322, 69 L.Ed. 685. Therefore, the assignee was not authorized to prefer or pay them, and the assignment is not void as reserving a benefit to the individual members of the firm.

Finally, defendants maintain that the assignment is void because the assignee drew three lines through the word "net" in the sentence providing that he was entitled to "ten per cent (10%) of all net funds coming into his possession pursuant to this agreement." The assignee admitted drawing the lines, but insisted that he did not strike the word. He explained that he initially thought that the insertion of the word "net" was "obviously * * * wrong," that he drew the lines through it, but after consulting with attorneys representing the creditors and the assignor, he "accepted the assignment on the basis that

it was 10 per cent of all net funds and so signed it."

[19] The cancellation of the word "net" effected an alteration of the instrument. Since it purported to change the rights of the parties, it was material. Consolidated Loan Co. v. Harman, 150 Cal.App.2d 488, 491–492, 310 P.2d 450. However, not every material alteration of a written instrument will invalidate it. Thus an alteration by a stranger to the instrument or an agent acting beyond the scope of his authority is a mere spoliation and does not affect the right of the parties to enforce the instrument as it was originally written. Walsh v. Hunt, 120 Cal. 46, 53, 52 P. 115, 39 L.R.A. 697. It has also been said that "a material alteration of a deed by a trustee who holds the legal title for others, who are entitled to the enjoyment of the beneficial interest, does not invalidate the deed, for the trustee is not a party within a rule that a material alteration by a party to a deed, with a view to increase the benefit which he may take under it, renders it void." (8 Thompson, Real Property (perm. ed. 1940), § 4235, p. 16; see also 3 C.J.S. Alteration of Instruments § 53 p. 971.)

[20, 21] We are of the opinion that this latter rule correctly states the law and is controlling here. The assignee for the benefit of creditors, like a trustee, holds a bare legal title in trust for the beneficiaries. Accordingly, his alteration of the instrument in a manner neither sanctioned by, nor advantageous to, the parties beneficially interested, but solely for the purpose of increasing his own compensation, should not deprive the partnership creditors of their rights under the assignment. We have concluded, therefore, that the assignment was not rendered void by the alteration, and that plaintiff was entitled to quiet his title as assignee for the benefit of creditors.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

166 Cal.App.2d 314

Kathleen Ann GOFF, a minor, by and through her Guardian ad litem, Charles T. Goff; Charles T. Goff, Jr., a minor, by and through his Guardian ad litem, Charles T. Goff; Bette Jo Goff, a minor, by and through her Guardian ad litem, Charles T. Goff; and Charles T. Goff, Plaintiffs and Respondents,

v.

DOCTORS GENERAL HOSPITAL OF SAN JOSE, a corporation doing business as Buchanan Hospital, et al., Defendants,

Doctors General Hospital of San Jose, a corporation doing business as Buchanan Hospital; Buchanan Hospital; Elma Kiese; and L. Lee, Appellants.

Civ. 9408.

District Court of Appeal, Third District, California.

Dec. 17, 1958.

Action against hospital, nurses and attending physician for wrongful death of mother who died of a hemorrhage from laceration of the cervix to relieve constrictive band of muscle during childbirth. From an order of the Superior Court, San Joaquin County, George F. Buck, J., granting plaintiffs' motion for a new trial as to the hospital and nurses, the hospital and nurses appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to support finding that nurses, who attended mother, and who knew that she was bleeding excessively, were negligent in failing to report to their superior circumstances of mother's peril so that prompt and adequate measures could be taken to safeguard her life, and court did not abuse its discretion in granting a motion for new trial on ground that evidence was insufficient to sustain verdict in favor of hospital and nurses.

Order affirmed.

1. New Trial ⇐70

In action against hospital, nurses and attending physician for wrongful death of mother who died of a hemorrhage from laceration of the cervix to relieve constric-

tive band of muscle during childbirth, evidence was sufficient to support finding that nurses, who attended mother, and who knew that she was bleeding excessively, were negligent in failing to report to their superior circumstances of mother's peril so that prompt and adequate measures could be taken to safeguard her life, and court did not abuse its discretion in granting a motion for new trial on ground that evidence was insufficient to sustain verdict in favor of hospital and nurses.

2. Appeal and Error ⇐854(6), 933(1), 977(3)

Granting of motion for new trial rests within discretion of trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears, and all presumptions are in favor of the order, and it will be affirmed if it is sustainable on any ground.

3. New Trial ⇐71

Trial court, in considering a motion for new trial, is not bound by a conflict in the evidence.

4. Hospitals ⇐7

Extent and character of care that a hospital owes to its patients depends on circumstances of each particular case.

5. Hospitals ⇐7

A private hospital owes its patients duty of protection, and must exercise such reasonable care toward a patient as his known condition may require.

6. Hospitals ⇐7

Measure of duty of a hospital toward a patient is to exercise that degree of care, skill and diligence used by hospitals generally in that community and required by the express or implied contract of the undertaking, and a hospital is liable for want of ordinary care, whether from incompetency of a nurse or failure in duty by a fully qualified nurse.

7. Evidence ⇐538

In action against attending physician, hospital and nurses for wrongful death of mother following delivery of child, physician, who practiced in two hospitals in city located in same county 14 miles away, was qualified to testify as to standard of care of doctors and nurses in the locality and as to standard of care prevailing in hospitals of the same type and he was competent to testify as to negligence of nurses and attending physician.

8. Hospitals ⇐8

In action against hospital, attending physician and nurses for wrongful death of mother following delivery of child, whether negligence of nurses was a proximate cause of death was one of fact.

9. Hospitals ⇐8

In action against hospital, attending physician and nurses for wrongful death of mother who died of a hemorrhage from laceration of cervix several hours after delivery of child, evidence was sufficient to sustain finding that nurses, who attended mother and who were aware of excessive bleeding, were negligent and that such negligence was a contributing cause of death.

Zeff, Halley & Price, Modesto, for appellants.

Hancock & Lundgren, Modesto, for respondents.

SCHOTTKY, Justice.

[1] This is an appeal from an order granting a motion for a new trial as to defendants Doctors General Hospital of San Jose, doing business as Buchanan Hospital, Elma Kiese, and Mary Lynne Lee, sued as L. Lee, in an action brought to recover for the wrongful death of Bette Jo Goff, the wife of plaintiff Charles T. Goff, and the mother of plaintiffs Charles T. Goff, Jr., Kathleen Ann Goff and Bette Jo Goff. Defendant Vernon Ashley has not appealed from the judgment entered against him.

On October 26, 1955, Bette Jo Goff was admitted to Buchanan Hospital at the request of her physician, Vernon Ashley, for the purpose of having a child. Under instructions of her physician, Mrs. Goff was administered pituitrin, a drug used to induce labor. About 7:00 p. m. Mrs. Goff

was taken to the delivery room where her child was born. Prior to the birth of the child Dr. Ashley made an incision just to the left of the 12:00 o'clock position of the cervix to relieve the constrictive band of muscle. This incision was not sutured, but pelvic packs were inserted to control the bleeding. Mrs. Goff was then returned to her room. Nurse Lee, who assisted during the birth of the child, told the doctor on three different occasions, the last about 9:30 p. m., that, in her opinion, the patient was bleeding too much. She testified that Dr. Ashley told her that the condition, as described, was normal. She also testified that Dr. Ashley instructed her on a testing method by which the rate of loss of blood could be measured. The nurse was instructed to time the period it took for the perineal pads to become soaked. At 9:45 she checked the patient and some blood was found on the pads, though they were in fair condition; at 10:15 the nurse checked the pads again and found that they were approaching the saturation point; at 10:30 the pads were found to be soaked with blood and the nurse changed them. During this period the nurse did not take the blood pressure, temperature, pulse or respiration of the decedent. She did not call the physician because, in her opinion, he would not have come anyhow. She also testified that she did not call him because the timing test had not been completed. The doctor's order sheet stated that he was to be called if the post partum flow was greater than normal. At 10:15 she thought an emergency existed. At 10:30 she thought the patient's condition was pretty serious. At 11:00 p. m. Miss Lee was relieved by Mrs. Kiese. She was advised by Miss Lee that Mrs. Goff was bleeding too much, and that Miss Lee was horrified by Dr. Ashley's treatment of the patient. About 11:10 Mrs. Kiese observed Mrs. Goff. The patient appeared to be going into shock. The nurse could not locate the patient's pulse, and she was cold and clammy. She called Dr. Ashley about 11:15, and he arrived at the hospital about 11:25. Mrs. Goff was taken to the delivery room where oxygen and adrenalin were administered. There was an attempt to give the patient a blood transfusion, but the doctor was unable to find a vein in which to insert a needle. Mrs. Goff died of a hemorrhage from a laceration of the cervix.

Dr. John F. Blinn, Jr., a physician and surgeon, with offices in Stockton, was found by the court to be qualified to testify as to the standard of care of doctors and nurses in the locality. Dr. Blinn testified that defendant Ashley's treatment of Mrs. Goff was not one which is ordinarily employed by physicians in good standing in the locality. The incision was not proper in technique and should have been sutured. He also did not meet the standard by not observing the laceration, and when he could not find the vein he should have cut down.

Dr. Blinn further testified that defendant Lee's care was not commensurate with the skill ordinarily used by nurses in good standing in the locality in that she should have observed the blood pressure, temperature, pulse and respiration of Mrs. Goff, and that such observations would have indicated Mrs. Goff's perilous condition; that she should not have acted on her own opinion of the doctor's attitude and qualification, but should have called him and should have notified her supervisor.

Dr. Blinn also testified that time was of the essence and that if proper medical care had been summoned sooner the chances of saving Mrs. Goff's life would have been greater.

The motion for a new trial was granted upon the ground of insufficiency of the evidence to sustain the verdict in favor of appellants. Appellants contend that there is no substantial evidence to support a verdict contrary to the one that the jury rendered, and that, therefore, the order granting the motion for a new trial was erroneous.

[2, 3] The rules applicable to an appeal from an order of the trial court granting a motion for a new trial on the ground of the insufficiency of the evidence are well settled and are succinctly expressed in the case of Ballard v. Pacific Greyhound Lines, 28

Cal.2d 357, at page 358, 170 P.2d 465, at page 467, as follows:

"* * * [T]he granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690; Malloway v. Hughes, 125 Cal.App. 573, 580, 13 P.2d 1062."

In the light of these well-settled rules, we have concluded that the order granting a new trial in the instant case must be affirmed.

[4–6] Any liability of the appellant hospital must necessarily be predicated on the doctrine of respondeat superior so we must determine whether there is any evidence in the record which would support a finding that either of the nurses was negligent, since Dr. Ashley was not an employee of the hospital. "The extent and character of the care that a hospital owes its patients depends on the circumstances of each particular case. A private hospital owes its patients the duty of protection, and must exercise such reasonable care toward a patient as his known condition may require. The measure of duty of a hospital is to exercise that degree of care, skill and diligence used by hospitals generally in that community, and required by the express or implied contract of the undertaking. A hospital is liable for want of ordinary care, whether from incompetency of a nurse or failure in duty by a fully qualified nurse * * *." (Wood v. Samaritan Institution, 26 Cal.2d 847, 851, 161 P.2d 556.) Appellant Lee knew that Mrs. Goff was bleeding. She did not take her pulse, blood pressure, temperature or respiration. She did not call Dr. Ashley even at 10:30 p. m. when she was aware that the bleeding was more than normal post partum flow, despite the fact that the doctor's order sheet stated he was to be called if there was more than the normal post partum flow.

Dr. Blinn testified that proper nursing care required that the nurses who were employees of the hospital should have reported the facts and circumstances to a superior in the hospital, with the end in view that prompt and adequate measures be taken to safeguard the life of Mrs. Goff. The following quotation from the memorandum opinion of the trial judge in granting the motion for a new trial is fully supported by the record:

"The evidence is clear that the two nurses realized the nature of the medical care that the doctor was administering to Mrs. Goff. The nurses knew that Mrs. Goff was in deadly peril and the nurses knew the cause and origin of that peril and they knew who was to blame for that peril. The first nurse told the second nurse that she was 'horrified.' It is elementary that the knowledge received during the course of their employment as nurses is in legal effect binding upon their employer, the defendant Hospital.

* * * * * *

"It is apparent from the evidence with particular reference to the time of 9:00 P.M., and 10:30 P.M., and 11:00 P.M., that both nurses in the exercise of ordinary care could have taken action that would have guarded the safety of Mrs. Goff and that this nonfeasance contributed as a proximate cause to her death.

"Both nurses had enough time to have reported the facts and circumstances of Mrs. Goff's peril to a superior in the hospital corporation with the purpose that prompt and adequate measures be taken to safeguard the life of Mrs. Goff. In view of the testimony of Dr. Blinn there was enough time for those measures to have been effective."

We are satisfied that the evidence was sufficient to support a finding that the appellant nurses, Lee and Kiese, were negligent and that the trial court did not abuse its discretion in granting the motion for a new trial on the ground of the insufficiency of the evidence.

[7] Appellants contend that Dr. Blinn's testimony should not have been received because he was not qualified to testify as to the standard of care prevailing in the hospitals of the same type or similar to the appellant hospital or as to the duties and functions of nurses employed therein. Dr. Blinn practices in Stockton, which is 14 miles from Lodi. He is on the staff of two hospitals in Stockton, as well as being a member of the staff of the infirmary of the College of Pacific. The staff of a hospital determines the policies that are to be followed by the hospital and the course of conduct to be followed by the hospital personnel. This latter includes the duties of nurses in post partum care. Dr. Blinn could not testify to the actual standard of care in Lodi. He did practice in a city 14 miles away. Both cities are in the same county, and medical men practicing in the two cities belong to the same county medical association. Certainly, as to the negligence of Dr. Ashley, Dr. Blinn's testimony would be competent. See Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3, 8 A.L.R. 2d 757.) We are convinced also that Dr. Blinn would be competent to testify as to the negligence of the nurses. Surely, a qualified doctor would know what was standard procedure for nurses to follow. Hospitals are required to be licensed by the State of California and must conform to certain standards. Nurses who perform the duties assigned to appellant nurses in the instant case are required to be licensed registered nurses and are expected to practice their profession with due concern for the welfare of the patient. We are satisfied that Dr. Blinn, who is on the staff of two hospitals in the neighboring city of Stockton, was fully competent to testify as to the negligence of the appellant nurses.

[8, 9] Appellants also contend that if either of the appellant nurses was negligent her negligence was not a proximate cause of the death of Mrs. Goff. However, the question whether or not the negligence of the nurses was a proximate cause is one of fact. Conceding that Dr. Ashley was negligent, still if nurse Lee had called the doctor at 10:30 p. m., when she was aware the condition of the patient was critical, who can say that the same result would have occurred. The patient may not have been in shock. The doctor may have been able to insert a needle for a blood transfusion. The longer the delay, the more critical the condition of the patient became. Time was a most important factor. In the instant case a finding that the negligence of the nurse was a contributing cause of the death is supported by the record.

No other points raised require discussion.

The order granting a new trial is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

166 Cal.App.2d 593

Helen Trent POWER, as trustee of the estate of Mary Delome Trent, Deceased, Plaintiff and Respondent,

v.

Evelyn Trent JONES, individually and as executrix of the estate of L. C. Trent, Deceased, Defendant and Appellant.

Civ. 9382.

District Court of Appeal, Third District, California.

Dec. 29, 1958.

Hearing Denied Feb. 25, 1959.

Action to quiet title to real property. From a judgment of the Superior Court, Placer County, Leland J. Propp, J., the defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that title to the property was properly quieted in the plaintiff.

Judgment affirmed.

1. Trusts ⇐137

A trustee accepting a trust is estopped from contesting the title of the creator of the trust to the property conveyed to the trustee and from setting up a claim to the trust estate as against the beneficiary under the trust or denying title or estate of the person for whose benefit the trust was created or for whom he holds it.

2. Trusts ⇐137

If a trustee desires to set up a title to trust property in himself, he should refuse to accept the trust.

3. Trusts ⇐248

In action to quiet title to realty where decedent during her lifetime and after her death her successors had been in uninterrupted possession of the property for more than 20 years and defendant's possession as coexecutrix and cotrustee was at no time during that period as an individual but solely in her legal capacity and the plaintiff was in possession of the property first as executrix and later as trustee of the estate, title was properly quieted in the plaintiff.

4. Trusts ⇐248

In action to quiet title to realty where decedent acquired color of title to the parcels by decree quieting her title in 1926 and although the action did not name defendant's decedent as a party defendant he had the constructive notice of the plaintiff decedent's hostile claim and he voiced no objection thereto, title was properly quieted in plaintiff as trustee of the decedent's estate.

Robert A. Zarick, Leonard P. Burke, Sacramento, for appellant.

Mas Yonemura, Oakland, for respondent.

WARNE, Justice pro tem.

This is an appeal from a decree and judgment quieting title to real property.

Mary Delome Trent, the mother of the appellant and the respondent herein, died testate in 1931. By her will she left all of her estate to her husband for life and after his death to her daughters Helen Trent Power and Evelyn Trent, now Evelyn Trent Jones, in trust, to be held until there were but two survivors of the testator's eight children. The two daughters were named as executrices of the estate and duly qualified as such.

The decedent was married to L. C. Trent, and during their lifetime and marriage they acquired the property in question in the name of L. C. Trent. It apparently was purchased out of community funds. However, in 1926, decedent acquired color of title to the property in her own name in a quiet title suit. Her husband was not a party to that action either as plaintiff or defendant.

During the course of administration of the estate of Mary Delome Trent, deceased, appellant and respondent as executrices thereof reported all of Parcel II and an undivided one-half interest in and to Parcel III, including a right of way or easement appurtenant to Parcel III, in the inventory and appraisement filed in said

estate proceedings as property belonging to the estate of Mary Delome Trent; and thereafter, on October 24, 1932, the property was, by decree of distribution, distributed to L. C. Trent, the decedent's surviving spouse, for life, with the remainder at his death to Helen Trent Power and Evelyn Trent, as trustees, for the uses and purposes stated in decedent's last will and testament.

In June of 1932, L. C. Trent conveyed Parcel III to one Sophia Rosenberg, and on the same day Sophia Rosenberg, by deed, conveyed said parcel to L. C. Trent and Evelyn Trent, as joint tenants.

L. C. Trent died testate in March, 1935, and on April 8, 1935, a decree establishing the fact of his death and terminating the joint tenancy was entered, investing title to Parcel III in Evelyn.

Immediately after the death of their father, the two daughters, Helen and Evelyn, began their duties as trustees of the testamentary trust created by their mother's will; and in that capacity they collected the rents of the cottages on Parcel II, paid all the taxes, and, in general, cared for and managed the property. However, in 1955, Evelyn was removed as a trustee by order of court because of a conflict of interest created by her claim as executrix under her father's will that the real property involved herein belonged to the estate of her father. Under the terms of her father's will, she was his sole beneficiary and as such any real property which he owned at the time of his death vested in her. Although her father's will was in her possession at all times after his death, she did not file it for probate until 1954. In her petition for letters testamentary she listed Parcel II as part of the assets belonging to her father's estate.

Parcel II was improved during the lifetime of Mary Delome Trent. She constructed three rental cottages on said parcel and had another under construction at the time of her death. The cottage under construction was completed out of the income and assets of her estate during probate. All of the rental units mentioned herein were assumed to be on Parcel II, but in 1951 it was learned that one of the units encroached on Parcel III. The cottages on Parcel II were occupied by tenants of Mary Delome Trent's trust estate. All income from Parcels II and III were collected and reported as income of the testamentary trust; and all real property taxes and expenses and maintenance of said property were paid out of funds of said estate, with the exception that as to income from the cottage on the boundary between Parcel II and Parcel III an allocation was made in 1951 between appellant and respondent, since respondent conceded that an undivided one-half interest to Parcel III belonged to appellant individually.

Except for the conveyance to Sophia Rosenberg in 1932 of Parcel III, and the reconveyance of the joint tenancy deed from her, it does not appear that L. C. Trent made any claim to the real property involved herein following the death of his wife. There is no evidence that he disapproved of his wife's will. Nor did appellant Evelyn claim that said property belonged to her father or his estate until she filed his will for probate 23 years after the death of her mother.

After Evelyn filed her father's will for probate and listed the property mentioned as part of his estate, Helen, as trustee of her mother's testamentary trust, then brought this action to quiet title to Parcel II and to a one-half interest in Parcel III and to the right of way appurtenant to said Parcel III. The trial court found that "plaintiff and her predecessors in interest had been in the actual, exclusive and adverse possession of the whole of said real property and of each and every parcel thereof continuously for twenty years prior to the filing of the complaint, and claiming during all of said period title to the whole of said parcels of real property in fee; that during a period of more than twenty years continuously next preceding the filing of this complaint plaintiff has, as co-executrix, co-trustee and individual trustee of the estate of Mary Delome Trent, paid all of the taxes of every kind levied

or assessed against, or any part thereof, and which were payable during the said period of twenty years continuously next preceding the filing of the complaint, save and except that since 1951, defendant has paid one-half of the taxes" on the parcel in which it is considered she owned a one-half interest. The trial court further found that the asserted claim of appellant, individually and as executrix of the estate of L. C. Trent, deceased, of an interest in and to the property in question was without any right whatever, and that said appellant has not, nor has ever had, any estate, right, title, or interest whatever in said land or premises, or any part thereof, save and except as to the undivided one-half interest in the parcel which we have described as No. III herein. Judgment was entered accordingly and this appeal followed.

[1–3] Appellant first contends that as to Parcel II she was never out of possession or ousted for the statutory period required to establish title by adverse possession. The facts, as heretofore stated, show that Mary Delome Trent, during her lifetime, and after her death her successors, as co-executrices of her estate and as co-trustees of her testamentary trust, have been in the uninterrupted possession of the property involved in this action for more than twenty years. Appellant's possession as a co-executrix and co-trustee was at no time during that period of years as an individual, but solely in her legal capacity. Respondent likewise was in the possession of the property in question, first as an executrix and later as a trustee of said estate. Appellant's claim that she, personally, was never out of possession as the one in whom the property would have vested upon the death of her father cannot under the circumstances be maintained. A trustee, accepting a trust, is estopped from contesting the title of the creator of the trust to the property conveyed to the trustee and from setting up a claim to the trust estate, as against the beneficiary under the trust, or denying the title or estate of the person for whose benefit the trust was created or for whom he holds it. In re Eustace' Estate, 198 Wash. 142, 87 P.2d 305, 307; 90 C.J.S. Trusts § 181, p. 71. If a trustee desires to set up a title to the trust property in himself, he should refuse to accept the trust. (1 Perry on Trusts and Trustees, 7th ed. 721, sec. 433.)

[4] Finally, with respect to Parcel III and the right of way appurtenant thereto, appellant contends that there can be no adverse possession as between co-tenants. Mary Delome Trent in her lifetime acquired color of title to these parcels by decree quieting her title in 1926, and although the quiet title action did not name L. C. Trent as a party defendant, the recording of the decree quieting title gave constructive notice of her hostile claim. In addition to the constructive notice given by said quiet title decree, the inference may be drawn that L. C. Trent had actual notice of Mary Delome Trent's claim to the whole of said parcels and voiced no objection thereto. Further, the decree quieting title in Mary Delome Trent was an independent source of title which formed the basis of including Parcels II and III, and the right of way appurtenant to Parcel III, in the decree of distribution in the Mary Delome Trent estate; and by the time that L. C. Trent died in 1935, the statutes of limitations had already run against him and those claiming under him.

The judgment is affirmed.

VAN DYKE, P. J.,, and SCHOTTKY, J., concur.

166 Cal.App.2d 501

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Phillip Errol FLYNN, Defendant and Appellant.

Cr. 6296.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1958.

As Modified Jan. 12, 1959.

Hearing Denied Feb. 18, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Otto J. Emme, J., for furnishing marijuana to a minor, and he appealed. The District Court of Appeal, White, P. J., held that an expert may base his opinion either on facts personally observed or on hypothesis that finds support in evidence.

Affirmed.

1. Criminal Law ⇐481, 1153(2)

It is primarily for trial court, in exercise of sound discretion, to determine competency and qualifications of an expert witness to give his opinion, and no specified limitations are imposed upon trial court in determining such qualifications; and its ruling will not be disturbed upon appeal unless manifest abuse of that discretion is made clearly to appear.

2. Criminal Law ⇐478(1)

On record presented, in prosecution for furnishing marijuana to a minor, it was not an abuse of discretion to find police officer qualified as an expert and to receive his response to a hypothetical question based upon testimony of minor. West's Ann.Health & Safety Code, § 11714.

3. Criminal Law ⇐486

An expert may base his opinion either on facts personally observed or on hypothesis that finds support in evidence.

4. Criminal Law ⇐452(1)

In prosecution for furnishing marijuana to a minor, trial court did not err in permitting minor to give her opinion, based on knowledge gained by prior use, that what she smoked in defendant's apartment was marijuana. West's Ann.Health & Safety Code, § 11714.

5. Witnesses ⇐262

Recalling for further cross-examination a witness who has been excused by all parties is a matter committed to sound discretion of trial court.

6. Criminal Law ⇐1170½(1)
Witnesses ⇐332

In prosecution for furnishing marijuana to a minor, it was not an abuse of discretion to refuse to permit minor to be recalled for further cross-examination aimed at showing bias and implication of a promise of immunity; and, in any event, defendant could not have been prejudiced by trial court's ruling in view of fact that subject had theretofore been explored.

7. Criminal Law ⇐507(1)

Minor in question could not be considered an accomplice of defendant charged with furnishing marijuana to her. West's Ann.Health & Safety Code, § 11714; West's Ann.Pen.Code, § 1111.

J. Thomas Russell, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of a violation of Section 11714 of the Health and Safety Code in that he did on or about August 19, 1957, furnish marijuana to Kathleen Briggs, a minor. Defendant was also charged with a prior conviction of the crime of Rape. He pleaded not guilty to the charge and denied the prior conviction, which was dismissed because the prior conviction was reduced to a misdemeanor by the imposition of a county jail sentence therein. Trial by jury resulted in a conviction of the crime charged in the information. Defendant's motion for a new trial was denied and he was sentenced to state prison.

From the judgment of conviction and the order denying his motion for a new trial, defendant prosecutes this appeal.

As to the factual background of this prosecution the record reveals that Kathleen Briggs testified she was seventeen years of age. On August 19, 1957, she accepted the invitation of one Mickey Russell "to get high on marijuana". Russell, whom the witness had known for some time, said he knew where they "can get some", and escorted her to the defendant's apartment, where they arrived about 2:30 a. m. The witness had met defendant only once before some weeks prior. Defendant was entertaining another young lady with whom the witness was acquainted. Defendant led the witness and her escort into his bedroom where he got into bed. After a brief conversation, "Mickey (Russell) said to Flynn (defendant) that he wanted to get high" and asked defendant if he had any "pot" (marijuana). Defendant replied, "It's under the dresser". Thereupon, "Mickey walked over to the dresser and reached underneath the dresser and brought a package out". According to the witness, the package was "a brown paper bag", which contained "a brownish-green leafy substance * * * stems like from a plant and * * * seeds". Mickey handed the bag to defendant who removed some white cigarette papers from it and glued two of them together. Defendant "took some of the material out of the bag" and used the papers to roll a cigarette, the ends of which were "tucked in". All four of those present in the room smoked the cigarette, each taking one or two puffs, inhaling, and then passing it to another. While they were smoking "a couple of the seeds popped". Defendant rolled three or four cigarettes and the parties smoked two. The witness gave the following description as to how defendant made a "cocktail" out of the first butt or "roach": "He took the tobacco out of one end of a regular size cigarette and put the roach inside of the cigarette and rolled the end back up and lit the cigarette and smoked it."

The cigarette had an odor like "burning weed or leaves burning". The witness became "high", "thirsty", "hungry"; her mouth got "dry"; she "felt relaxed".

The witness further testified she had commenced smoking marijuana about June of 1957 and prior to the occasion here in question, she had smoked approximately twenty or twenty-five such cigarettes. Over the objection of defendant on the ground of the incompetency of Miss Briggs to testify on the subject of marijuana, she was permitted to testify that on the aforesaid previous occasions, the cigarettes were rolled in the same fashion as on the morning with which we are here concerned, that she had heard "that pop noise"; had smelled the same odor of "burning leaves", and had experienced the same sensations of getting "high", dryness of mouth, thirst, hunger and relaxation. That she would generally start to feel "high" in three to six minutes and the effects would last from an hour to an hour and a half depending on how much she smoked. She experienced a feeling of depression as she was "coming down from the marijuana".

After about an hour and a half to two hours the witness and Russell left defendant's apartment.

On cross-examination Miss Briggs testified that she was arrested on August 29 by Officer Allen; that she had not been prosecuted; that no promise of any kind had been made to her by any member of the police department in consideration of her testifying; that she had made twelve to thirteen visits to the juvenile bureau of narcotics on each of which she had seen Officer Allen and "about every officer that is down at Georgia Street in the Narcotics Division"; that she had given three statements to police officers, that no promise of immunity had been made by any officer in consideration of her testifying in any other case.

Edwin O. Hall testified that he had been a police officer of the City of Los Angeles continuously from 1941 to the time of the

trial, except for approximately three years of military service. Since January of 1949 he had been assigned exclusively to the narcotics division. During his first year and a half in that division he had been "Day Watch Commander" assigning cases and interviewing all persons involved in narcotic matters. He had spent two and one-half years as head of the "Addict Squad" which investigated users of narcotics and filed use or addiction reports. With respect to his experience with and knowledge of marijuana, he testified:

> "My training in the effects, appearance, and so forth, of marijuana has been field training by veteran narcotic officers, by reading various governmental publications and pamphlets, and some other publications. I have discussed it with some medical authorities, and then field investigations."

He had also taught and lectured at various colleges and junior colleges throughout the local area and had instructed at the Los Angeles Police Academy. He had lectured to the graduating interns at the College of Osteopathy at General Hospital and had been on a forum, attended by many prominent psychiatrists from throughout the United States, including Dr. Victor Vogell, whom Officer Hall considered to be the foremost authority on narcotics in the United States. Officer Hall had assisted in the writing of a pamphlet entitled "Youth and Narcotics" which was published by the Los Angeles Police Department. He had observed more than one hundred individuals actually smoking marijuana and had discussed with certain of them the effects therefrom. He had testified in connection with similar matters in approximately 300 other cases.

Officer Hall testified that in the jargon of the marijuana user, the term "pot" means marijuana; that the color of the marijuana depends on the age and manner of drying of the plant, in the earlier stages the leaves are green, and in the latter it becomes a dark brown; that usually two overlapping cigarette papers are used to roll a marijuana cigarette in order to get "a tighter wrap"; that the ends of a marijuana cigarette are usually "tucked in"; that the marijuana smoker takes "a long, slow drag on the cigarette and holds it within the lungs as long as possible" to get the "maximum effect"; that the odor of a burning marijuana cigarette is similar to that of burning leaves or grass; and that the term "cocktail" signifies a tobacco cigarette containing the marijuana roach in one end. Hall testified that the effects of smoking marijuana were dryness of the throat and mouth, hunger, "light-headedness or, as they say, high", abnormal behavior, thirst, then "(a)s he comes down" a feeling of depression. The intensiveness and duration of these sensations depend upon the tolerance of the smoker and the quantity smoked.

In response to a hypothetical question based upon the testimony of Miss Briggs, Hall expressed the opinion, over the objection of defendant on the ground of Hall's "lack of experience", that the "person did receive and smoke marijuana".

On cross-examination, Officer Hall testified in effect that when he entered the narcotics division there was no course offered anywhere on narcotics, therefore a school was started by the police department to train police officers in this field. He eventually "took over" the school which now furnishes men "to teach in the various universities on all phases of narcotics". Defendant's counsel subsequently asked Officer Hall: "Q. You are dean emeritus then of (that school)", to which Hall replied: "A. I like to think so, sir."

On re-direct examination Hall stated that there was no local physician and surgeon known to the police department who had sufficient experience with marijuana, as distinguished from opiates, to testify as an expert on marijuana addiction.

Sworn as a witness for the defense, Doctor M. A. Seymon testified that he was a physician and surgeon licensed to practice in this state. The witness testified: "I am a specialist in the treatment of alcohol-

ics and drug addicts". Dr. Seymon was shown the hypothetical question theretofore propounded to the witness, Officer Hall, and when asked if he had an opinion on said question, replied, "My opinion is that this doesn't prove anything at all". Having read the symptoms referred to in the aforesaid question, the witness was asked to approximate from how many other substances those symptoms might emanate or result. He replied, "From many other drugs which have an effect on the sympathetic nervous system". When asked to approximate the number of drugs, if possible, he stated that "it could be ten or twelve drugs that could do the thing, at least".

"Q. Doctor, there is no specific for the test of smoking marihuana, is there? A. No, there is none.

"Q. Just from judging, observing the conduct of a person? A. No, there is not."

On cross-examination, the witness testified as follows:

"Q. By Mr. Amstutz (deputy district attorney): Doctor, you are familiar, are you, with some of the better known, or shall we say, commonly accepted symptoms in relation to people who have smoked marijuana? A. Yes, sir.

"Mr. Russell (counsel for defendant): That is objected to, if the court please, on the ground that it is not proper cross-examination.

"The Court: Objection is overruled.

"Q. By Mr. Amstutz: Among those symptoms, Doctor, have you ever heard the expression that those who might have smoked it felt high or lightheaded? A. Yes, sir.

"Mr. Russell: May my objection continue throughout this line of questioning, if the court please?

"The Court: Yes, you may have a running objection to this line of questioning.

"Q. By Mr. Amstutz: Have you also seen listed among those, Doctor, the fact that the mouth may or does become dry? A. Yes, sir.

"Q. Or that there is a feeling of hunger? A. Yes, sir.

"Q. Or that sound or sight might be distorted, or distance? A. Yes, sir.

"Q. Doctor, do you know of any other weedy, if I may use that expression, substance and/or any narcotic which can be smoked or is smoked as a cigarette which would give some or all or any of the symptoms I just referred to? A. No."

Suzanne Russell, called as a witness on behalf of defendant, stated she was 17 years of age and that she had known Kathleen Briggs for about eight months. Questioned as to whether she knew of her general reputation in this community for truth, honesty and integrity, the reply was that she did. Upon being asked what was that reputation, she replied, "Very bad."

Sworn as a witness in his own behalf, defendant testified only to the fact that he had never been convicted of a felony.

As his first ground for reversal of the judgment and order herein appellant urges that the court erred in permitting a lay witness, Officer Hall, to answer a hypothetical question based upon the testimony given by Kathleen Briggs, 17 years of age. In support of this contention, appellant argues that Officer Hall "was not a graduate in any of the sciences and had no personal knowledge of or contact with any aspect of the subject matter of the question, there being no physical substance as an exhibit in evidence and never having seen or observed the witness concerned until weeks later." The gist of appellant's argument seems to be that Officer Hall was not qualified as an expert on marijuana and, though it be conceded he was, nevertheless he could not give an opinion based upon a hypothetical question.

Certain elementary principles relating to the qualifications and the opinion testimony

of the expert witness are treated with unusual clarity in the case of Manney v. Housing Authority, 79 Cal.App.2d 453, 459, 460, 180 P.2d 69, 73, wherein the court, speaking through Mr. Justice Dooling, had this to say:

"The growth of the rule excluding opinion evidence and the development of the two well recognized exceptions to the rule are learnedly traced by Dean Wigmore on Evidence, 3d Ed., pp. 1 to 29. The two instances in which the opinions of witnesses are permitted in evidence are: 1. *The opinions of experts are admitted in matters which are not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may enable him to form an opinion, where men of common experience would not be able to do so.* (Citations.) 2. The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. (Citations.)

"For a nonexpert to be competent to give an opinion under the second exception he must be testifying about facts that he has personally observed; *but the expert in any case proper for the reception of expert testimony may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses put to him in the form of hypothetical questions.*" (Emphasis added.)

[1] Appellant concedes that it is primarily for the trial court, in the exercise of a sound discretion, to determine the competency and qualifications of an expert witness to give his opinion, and that its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is made clearly to appear (Huffman v. Lindquist, 37 Cal.2d 465, 476, 234 P.2d 34, 29 A.L.R.2d 485). And to that may be added that no specified limitations are imposed upon the trial court in determining such qualifications (People v. Horowitz, 70 Cal.App.2d 675, 689, 161 P.2d 833). In the case just cited it it is further stated, at page 689 of 70 Cal. App.2d, at page 841 of 161 P.2d, "If the witness exhibits an unusual skill and knowledge gained from study and experience not possessed by the man on the street he is competent to give an opinion".

[2, 3] With the foregoing rules in mind, we are satisfied from the testimony given by Officer Hall and hereinbefore narrated, that he had a thorough knowledge of marijuana "* * * gained through experience in interviewing addicts and study, not possessed by the average man. He thus qualified as an expert and as such his opinion was properly received" (People v. Nunn, 46 Cal.2d 460, 466, 467, 296 P.2d 813, 817).

Appellant's argument that an expert cannot give an opinion based upon a hypothetical question is equally devoid of merit. He relies upon the headnote statement contained in People v. Johnson, 153 Cal.App.2d 564, 314 P.2d 751, that "An expert's opinion must be based on his own personal observations". However, a reading of that case discloses that no hypothetical question was involved.

The court therein simply held that in order for the expert witness properly to testify as to the effects of a test for addiction, known as the Nalline Test, it was necessary for the witness to have "personal knowledge of the practical results and effectiveness of the test" (People v. Johnson, supra, 153 Cal.App.2d at page 569, 314 P.2d at page 754). That the court did not hold that expert testimony based upon a hypothetical question was barred is further evidenced by the fact that in support of the necessity of personal observation under the facts of that case, the court cited only the case of George v. Bekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037, and wherein is found, at page 844, of 33 Cal.2d, at page 1038 of 205 P.2d, the following succinct statement of the general rule: "Ordinarily an expert must base his opinion either on facts personally ob-

served or on hypotheses that find support in the evidence". We perceive no error in the ruling of the court that Officer Hall was qualified as an expert on marijuana and was therefore entitled to give an opinion based upon the hypothetical question here under consideration.

Appellant's further contention that the hypothetical question propounded to Officer Hall "did not include all of the salient factors adduced by the evidence * * *", cannot be sustained. We have read the record and suffice it to say that, in the light thereof, the hypothetical question embraced all the elements of the testimony of the witness Kathleen Briggs, upon which it was based.

[4] It is next contended that the court erred in permitting the witness Kathleen Briggs to "give her opinion that what she smoked in the defendant's apartment was marijuana". No extended discussion is required on this assignment of error because the same contention was advanced in the case of People v. Winston, 46 Cal.2d 151, 293 P.2d 40, and rejected. In that case two minor girls were permitted to testify that the cigarettes they smoked were marijuana, based on their knowledge of it from previous use. The ruling was sustained, the court holding that the weight of such testimony was for the jury. In the cited case, the court's summary of the minor girls' testimony as to their previous use of marijuana cigarettes, manner of smoking them and the effects therefrom, indicates a striking similarity to the testimony given by Kathleen Briggs in the instant case.

"Both girls testified that they had frequently smoked marijuana; they described the appearance of a marijuana cigarette, having tucked in ends; they related the custom of smoking such a cigarette in chain fashion in a group, each person taking one or two puffs and inhaling, then passing it to another; and they told of their 'high' feeling after about 15 minutes, their feeling of freedom from their cares, lasting about three to four hours, then their feeling of 'coming down,' that is, their feeling of depression, at which time they became hungry * * *." People v. Winston, supra, 46 Cal.2d at page 156, 293 P.2d at page 43.

Since the challenged testimony in the case now engaging our attention was substantially the same as that given by the minor girls in the Winston case, supra, it is obvious that the trial court herein did not err in ruling that the same was admissible. See also People v. Candalaria, 121 Cal.App. 2d 686, 689, 264 P.2d 71; People v. Drake, 151 Cal.App.2d 28, 44, 310 P.2d 997.

The next claim of error asserted by appellant is the refusal of the court to permit the witness Kathleen Briggs to be recalled for further cross-examination on the ground that his counsel had just discovered during the preceding noon recess that Miss Briggs had recently testified "* * * in four other cases, all involving minors and charging the same offense as herein, save one, with the same investigating officers in command". Appellant's counsel stated to the court that he wished to further cross-examine Miss Briggs "* * * for the sole purpose of showing her bias, her prejudice in this matter, and the implication and the deduction that can be drawn therefrom as to the promise of immunity * * *". The motion was denied.

[5] It is conceded by appellant that the recalling of a witness who has been excused by all parties, for further cross-examination is a matter committed to the sound discretion of the court (People v. Moan, 65 Cal. 532, 536, 4 P. 545; Litt v. Litt, 75 Cal. App.2d 242, 244, 170 P.2d 684; People v. Miller, 56 Cal.App. 472, 476, 477, 206 P. 89; 27 Cal.Jur. Witnesses, sec. 86, p. 111.)

[6] We are persuaded that in the case at bar, the trial court did not abuse its discretion in denying appellant's motion. During the extensive and intensive cross-examination of Miss Briggs by appellant's counsel when she was on the witness stand, we find the following:

"Q. (By Mr. Russell, appellant's counsel): I will ask you the question. What were your reasons for going down there (police headquarters) the

12 or 13 times? That is what I feel I have a right to know. A. I would meet Mr. Allen and Mr. Hathaway (police officers) in the mornings at the station to come down to the courthouse to go to court.

"Q. Not just on the Flynn case alone? A. No, sir.

"Q. On how many other cases, that is what I'm trying to find out. We will get at it that way.

"Mr. Amstutz: That is objected to as being immaterial, how many other cases, if the court please?

"The Court: Objection is sustained.

"Q. By Mr. Russell: I am going to assume that you testified in other cases by the process of subtraction, knowing how many times you have been in court on the Flynn case, which is three times, yesterday and today, and at the preliminary examination.

"Were you made any promises by Officer Allen or Officer Hathaway, or anyone else, when you went to court with them on these occasions on these other cases as to the fact that they would not prosecute, file any claim against you, or cause you not to be prosecuted if you testified as you did already, or would testify against Mr. Flynn? A. No, sir.

"Q. Did you expect it? A. No, sir, I did not.

"Q. Do you still expect to be arrested? A. No, I don't.

"Q. Why not? A. Because I haven't done anything to be arrested for, that is why."

From the foregoing it is manifest that appellant's counsel had obtained from the witness information that she had previously been to court with Officer Allen to testify "in many other cases". As to whether any promises of immunity or leniency had been offered for her testimony in such cases, Miss Briggs consistently denied any such promised reward, and with equal vigor asserted that she did not "expect to be arrested" because she had not "done anything to be arrested for". It appears to us that counsel had at considerable length explored the general subject of Miss Briggs' state of mind, not only in connection with the three cases to which he referred, but also as to all "other cases", and that further cross-examination along this line would necessarily be cumulative and repititious of matters already inquired into.

We are further persuaded that though it be assumed that the trial court might well have permitted the recall of Kathleen Briggs for further cross-examination nevertheless, appellant was not prejudiced by the adverse ruling on his motion. On her original cross-examination, the witness frankly admitted her prior use of marijuana, her many interviews with the police officers and her constant, complete and voluntary cooperation with and assistance to them in this and the "other cases" above referred to. From this testimony the jury could well have inferred that the testimony of the witness was subject to the distinct possibility, if not probability, that it was given in the hope of obtaining leniency. Thus, "(p)ractically everything that defendant was trying to develop through cross-examination along this line (was) * * * before the jury except an express agreement for leniency, but (Kathleen Briggs) specifically denied that any such promise had been made to (her)". People v. Winston, supra, 46 Cal.2d at pages 157, 158, 293 P.2d at page 44.

[7] Appellant's next assignment of error is the failure of the trial court to give an instruction in the language of Section 11714 of the Health and Safety Code. He urges that the court should have "* * * read (to the jury) the charging part of the Section (11714) commonly referred to and known as the 'transportation' section * * *" rather than giving "* * * only the second half of Section 11714". In support of his claim appellant argues that "One of the defenses urged by counsel for the defendant was that the witness, Kathleen Briggs, the minor, was a principal in the commission of the instant offense. Said defense was rendered a nullity by the failure of the court to read the charging

part of the Section commonly referred to and known as the 'transportation' section. If the witness Briggs were an accomplice in the crime as alleged, the lack of corroboration of her testimony, as required by Section 1111 of the Penal Code, requires the court to give the further requested instruction offered by the defense: 'A court is advised to acquit the defendant on the charge set forth in the Information, etc. * * *'". We are satisfied no error was committed by the court in refusing to read to the jury Section 11714 of the Health and Safety Code in its entirety, and particularly in refusing to read that portion thereof referred to by appellant as the "transportation section". The reason advanced by appellant why the instruction should have been given, that is, that therefrom the jury might have considered Miss Briggs an accomplice, finds no support in the law. In People v. De Paula, 43 Cal.2d 643, 647, 276 P.2d 600, 603, it was expressly held that "Since the minor involved is the victim and the offense denounced by section 11714 of the Health and Safety Code is the harmful act to that victim with the resulting harm to society in general, it necessarily follows that in a prosecution under that section the minor involved cannot be held a principal in the sense of being subject to prosecution for the same identical offense, within the meaning of section 1111 of the Penal Code".

We have painstakingly read the reporter's transcript in this case containing some 350 pages; have carefully considered the assignments of error and have read appellant's briefs in connection therewith, from all of which we conclude that none of the rulings complained of militated against the substantial rights of appellant. He had a fair and impartial trial; in fact, the learned trial judge displayed to the defense unusual consideration and patience. The verdict of the jury was based on clear and convincing proof.

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 563

Harry BISCHOFF, Plaintiff and Appellant,

v.

NEWBY'S TIRE SERVICE, W. Mike Newby, Fred Lowery, et al., Defendants and Respondents.

No. 17685.

District Court of Appeal, First District, Division 1, California.

Dec. 24, 1958.

Action for injuries sustained by plaintiff when head of hammer one of defendants was using while making a tire change for plaintiff flew off and hit plaintiff, who was standing eight or nine feet away, in the face. From adverse judgment of the Superior Court, Santa Clara County, Harold Holden, J., the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that it was prejudicial error not to give plaintiff's requested instructions on res ipsa loquitur.

Judgment reversed.

1. Appeal and Error ⇐1067
Negligence ⇐138(2)

In action for injuries sustained by plaintiff when head of hammer one of defendants was using while making a tire change for plaintiff flew off and hit plaintiff, who was standing eight or nine feet away, in the face, it was prejudicial error not to give plaintiff's requested instructions on res ipsa loquitur.

2. Negligence ⇐121(2)

Doctrine of res ipsa loquitur comes into play when accident is of a kind which ordinarily does not occur in absence of someone's negligence, and it is caused by an agency or instrumentality within exclusive control of defendant, and when it is not due to any voluntary action or contribution on part of plaintiff.

3. Negligence ⇐138(2)

In action for injuries sustained by plaintiff when head of hammer which one of defendants was using while making a tire change for plaintiff flew off and hit

plaintiff in the face, requested instruction by plaintiff that accident was of such a character that it spoke for itself and that defendants could not be held blameless except under a showing either of satisfactory explanation of accident or of such care in all possible respects as necessarily to lead to conclusion that accident could not have happened from want of care, was not objectionable on ground that instruction put ultimate burden of proof on defendants contrary to correct rule that res ipsa loquitur doctrine only shifts burden of going forward with the evidence.

4. Negligence ⇐138(2)

In action for injuries sustained by plaintiff when head of hammer which one of defendants was using while changing a tire for plaintiff flew off and hit plaintiff in the face, requested instruction that it was only necessary for plaintiff, in order to establish a prima facie case, to prove fact of accident and injuries caused thereby, and that having done that he could rest, for inference then arose that accident occurred through negligence of defendants, and burden of explaining that defendants were not negligent was then cast upon them, and that to overcome inference of negligence defendants must show that accident was not caused by their negligence, was not improper.

Boccardo, Blum, Lull, Niland & Teerlink, San Jose, Edward J. Niland, San Jose, of counsel, for appellant.

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, of counsel, for respondents.

FRED B. WOOD, Justice.

[1] Plaintiff drove his car to defendants' tire shop, removed one of the wheels and took it and a spare tire into the shop for a tire change. Defendant Fred Lowery removed the old tire and was installing the spare when the head of the hammer he was using flew off and hit plaintiff in the face. Verdict and judgment were for defendants.

Plaintiff's principal claim upon this appeal is the failure of the trial court to give his requested instructions on res ipsa loquitur. Our examination of the record convinces us there was sufficient evidentiary basis for the giving of instructions on that subject and that it was prejudicial error to give none.[1]

There is no dispute that the head of the hammer did fly off. There is a dispute about plaintiff's position at the time. Plaintiff testified he was standing about eight or nine feet away, and that no one had told him to stand further back or go somewhere else. Lowery testified that plaintiff "was knelt down, squatting" about three or four feet away, and had been told he had better move. Plaintiff testified that he requested tire irons be used in mounting the tire because sometimes a hammer will injure the bead. Lowery testified that no such request was made, and that a hammer such as was used would not damage the bead while a tire iron might. There was also some dispute as to the exact type of hammer that was used. Defendant produced a mallet with one rubber end and one metal end. Plaintiff testified that the hammer head which which struck him had one blunt rubber end and a steel claw on the other end. Plaintiff did not know which portion of the hammer struck his face.

1. In their brief, defendants claimed there was no basis for application of the doctrine of res ipsa loquitur.

During the oral argument, they conceded there was such a basis but claimed that plaintiff was not prejudiced by the failure to instruct on that subject because, they asserted, the inference of negligence upon their part was overcome by their testimony.

The fallacy of that argument is that, under the circumstances of this case, it was for the jury, under adequate instructions, to consider all of the evidence and determine whether the inference had in fact been overcome; not for a court to determine that question as a matter of law.

Lowery testified that if the handle of a hammer dries out, or if the steel wedge that is put in for the purpose of tightening the head on the hammer comes out, the head becomes loose. Usually a person can tell by the feel of the hammer while he is using it whether the head has become loosened. However, this particular time he did not detect the loosening, or else he would have fixed it immediately. Prior to plaintiff's accident, Lowery had never had an experience where he had no advance warning of the head becoming loosened.

Defendant Newby, who had had several years' experience as a service station attendant testified that this was the first time he could remember a hammer head flying off in his place of business and that it was almost impossible for a tight head to fly off.

[2] Here is evidence of the existence of the three factors which bring the doctrine of res ipsa loquitur into play: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must have been caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Barrera v. De La Torre, 48 Cal.2d 166, 169, 308 P.2d 724, 726, citing Seneris v. Haas, 45 Cal. 2d 811, 823, 291 P.2d 915, 53 A.L.R.2d 124; Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258, and Prosser on Torts, 2d ed. 1955, p. 201.

Defendants contend that the last two conditions are not met in this case because "no harm would have befallen plaintiff had he merely exercised his own wits and knowledge as a craftsman and stood to either side of the line of downward swing of the hammer he was watching." The only case they cite is Weddle v. Heath, 211 Cal. 445, 295 P. 832, where a judgment in favor of plaintiff was reversed. That was a case of an electric motor and a pump connected by a moving belt with which plaintiff made contact, to his injury; machinery that was under his charge, and which he had set in motion. That is quite different from a tool that breaks, flies apart and hits a bystander. In the Weddle case the accident was due to plaintiff's voluntary act in going too close to the moving parts. Here, the position plaintiff took as a bystander had no causative connection with the separation of the hammer head from its handle, whatever bearing it may have had upon the issue of contributory negligence.

Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 444–445, 247 P.2d 344, 348, explains what is meant by the third condition in res ipsa cases: "Some cases have stated that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. [Citing cases.] This is allied to the condition of control by the defendant and has also been employed as a means of showing that the defendant, rather than the plaintiff, had control and was responsible for the injury. See Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436. It should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof, and its purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident. As recently held by the Supreme Court of Oregon in a well reasoned opinion, a plaintiff may properly rely upon res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. Gow v. Multnomah Hotel, 191 Or. 45, 224 P.2d 552, 555, 560, 228 P.2d 791." In the Gow case, plaintiff was injured when a counter stool on which he was sitting broke. The court cited numerous cases where res ipsa loquitur was held applicable even though contributory negligence was an issue in the case.

In Stanford v. Richmond Chase Co., 43 Cal.2d 287, 272 P.2d 764, the plaintiff was a driver of a tractor with two trailers. Defendants were loading the trailers with boxes by using two fork lifts. Plaintiff

was unconscious when he was found and could not explain the manner of his injury. From the physical evidence, it was "apparent that there are only two possible explanations for the cause of plaintiff's injuries: either he was struck by a fork lift or he fell from some portion of his truck." 43 Cal.2d at page 292, 272 P.2d at page 766. Plaintiff's testimony was that before he lost consciousness he did not climb on any part of the truck. The defendants' evidence concerning the course taken by the fork lifts would tend to show that plaintiff could not have been struck while standing between the trailers. The court held that a res ipsa instruction was properly given, stating at page 292 of 43 Cal.2d, at page 766 of 272 P.2d: "The requirement of the doctrine of res ipsa loquitur that the plaintiff must show that he did not contribute to the accident * * * is satisfied by the evidence that plaintiff was standing between the two trailers when he was struck, since the jury could properly conclude that a reasonable man, under the same circumstances, would expect that the space would be a safe one within which to stand."

Here, too, a reasonable man could conclude that standing eight or nine feet away from a person using a hammer would be a safe place to stand and that plaintiff's actions did not contribute to the accident in the sense that this condition is meant in res ipsa cases.

As to the other conditions, if plaintiff's position is not considered a "cause" of the accident, it is clear that the accident was caused by an instrumentality within the exclusive control of the defendant. There is no suggestion in the evidence that there was anything unusual or defective about the tire that could have caused the hammer head to fly off. And there was testimony of defendants themselves indicating that the accident does not usually occur in the absence of negligence. Defendant Lowery testified that although it is not unusual for hammer heads to loosen, usually a person can tell by the feel of the hammer during its use that it is loosening. Defendant Newby testified that it was almost impossible for a tight head to fly off. The conclusion could be drawn from Lowery's testimony that he did not feel the head loosening, that this was a very peculiar hammer which loosened and flew apart within the space of a single stroke. However, the inference that he was not paying close enough attention to his work seems the more probable one. From the evidence a jury reasonably could infer that an accident such as here took place probably would not have occurred in the absence of negligence. We conclude it was a case appropriate for the giving of an instruction on res ipsa loquitur.

[3] *Defendants further contend that plaintiff's requested instructions incorrectly stated the law, as an additional reason why their refusal was proper.* Their arguments consist of bare assertions without citation of a single case.

Plaintiff's first instruction [2] on this subject is a statement of the general principles governing the defendant's showing in a res ipsa case substantially as expressed in Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12, which quoted from the Supreme Court's opinion rendered upon its denial of a hearing in Bourguignon v. Peninsular R. Co., 40 Cal.App. 689, 694–695, 181 P. 669. See also Fry v. Sheedy, 143

2. "You are instructed that the accident in this case is of such a character that it speaks for itself. Under such circumstances, the defendants will not be held blameless except under a showing either (1) of a satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident, in which cause no element of negligence on the part of the defendants inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendants might have prevented."

Cal.App.2d 615, 619, 300 P.2d 242; and James v. American Buslines, 111 Cal.App. 2d 273, 276, 244 P.2d 503.

Defendants argue that the instruction puts the ultimate burden of proof on the defendants, contrary to the correct rule that the res ipsa doctrine only shifts the burden of going forward with the evidence. In the Dierman case, supra, the statement used in this instruction was quoted from the Bourguignon case to support the following propositions: "This is not to say that a defendant in a res ipsa loquitur case has the burden of proving himself free from negligence. It is not to say that a defendant must in every such case produce evidence of the actual cause of the accident. It is not to say that the question of the sufficiency of a defendant's explanation—or, if he cannot explain, the sufficiency of his evidence of due care and of impossibility of explanation—is not ordinarily for the jury." At page 295 of 31 Cal.2d, at page 14 of 188 P.2d. It would appear that to the Supreme Court the statement has the very meaning which defendants criticize it for not having.

[4] The second proposed instruction[3] is criticized for not taking into account plaintiff's possible contributory negligence. This instruction merely states that an inference of defendant's negligence arises. The jury was fully instructed on contributory negligence. To combine the instructions would only create confusion.

In addition, defendants say that the last sentence of the first paragraph of this instruction requires the inference to be "overcome" by the defendants and thus would cast upon them the burden of proving by a preponderance of evidence they were not negligent; also, that it is inconsistent with the remainder of the instruction and would, therefore, create confusion.

The word "overcome" does not necessarily have such a meaning. As said in Odden v. County Foresters etc. Board, 108 Cal.App.2d 48, 50, 238 P.2d 23, 24, a presumption "is overcome if sufficient evidence is introduced to balance the presumption." Here, such a meaning is clear in view of the context in which the word appears. It is explained, not contradicted, by the sentences which follow it in this instruction. Moreover, the court adequately instructed on the burden of proof. There was no need to deal with that subject in this instruction. See Gigliotti v. Nunes, 45 Cal.2d 85, 95, 286 P.2d 809.

The third proposed instruction is also objected to on the ground that it states nothing about plaintiff's possible contributory negligence, an argument not well taken for reasons already indicated.

The fourth proposed instruction is BAJI No. 206-B.[4] The form of this instruction was approved in Hinds v. Wheadon, 67 Cal.App.2d 456, 466, 154 P.2d 720; Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App. 2d 232, 239, 242, 240 P.2d 672; Meyers v.

3. "It is only necessary for the plaintiff, in order to establish a prima facie case, to prove the fact of the accident and the injuries caused thereby. Having done this, he may rest, for the inference then arises that the accident occurred through the negligence of the defendants, and the burden of explaining that defendants were not negligent is then cast upon them. In order to overcome this inference of negligence, the defendants must show that the accident was not caused by their negligence or was a result of an inevitable casualty, or of some cause which human care and foresight could not prevent.

"The rule of res ipsa loquitur is not merely a rule of evidence shifting the burden of going forward with proof, for the inference of negligence under the rule does not disappear when met with substantial credible evidence of due care. It remains in the case throughout, to be given consideration by the jury in your weighing of the whole case.

"I instruct you that such an inference of negligence is in itself sufficient to satisfy the burden placed upon plaintiff to prove his case by a preponderance of the evidence."

4. The instruction is referred to in defendant's brief as "garbled," but the only apparent change is the substitution of "reasonable care and diligence" for "ordinary care and diligence."

G. W. Thomas Drayage, etc., Co., 108 Cal. App.2d 529, 532–533, 239 P.2d 118; and Silva v. Pacific Greyhound Lines, 119 Cal. App.2d 284, 287, 259 P.2d 743. Defendant's only complaint about it is that it "would have excluded from consideration the existence of the final operative cause of the plaintiff's injury," his position when hit. The distance plaintiff stood from Lowery during the substitution of tires (as to which there was a conflict of testimony) had no causative connection with the flight of the hammer head from its handle, whatever bearing it may have had on the issue of contributory negligence.

In view of these conclusions, it is unnecessary to consider other points discussed by the parties upon this appeal.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

165 Cal.App.2d 765

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frederick Arnold LOAR, Defendant and Appellant (two cases).

Cr. 6270, 6349.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1958.

Defendant was convicted under two counts of the crime of forcible rape, and from a judgment of the Superior Court of Los Angeles County and from an order denying a motion for new trial, Stanley Mosk, J., the defendant appeals. The District Court of Appeal, White, P. J., held that the evidence sustained the conviction and that a motion for new trial for newly discovered evidence was properly denied.

Affirmed.

1. Criminal Law ⇐1023(13)

In rape prosecution, although no judgment or probation order had been made or entered, defendant was entitled to file notice of appeal from an order denying his motion for a new trial. West's Ann.Pen. Code, §§ 261, subd. 3, 1237, subd. 1.

2. Criminal Law ⇐1134(4)

On appeal from an order denying a motion for new trial on ground of insufficiency of evidence to sustain a conviction, the appellate tribunal will determine only whether on the face of the evidence sufficient facts are shown to warrant the implied findings of the trial court.

3. Rape ⇐51(7)

Evidence sustained conviction for forcible rape as against claim that defendant was not sufficiently identified as perpetrator of the offenses. West's Ann.Pen.Code, § 261, subd. 3.

4. Criminal Law ⇐566

Identification of a defendant in a criminal case may be sufficient though the person making it cannot remember the face of the defendant.

5. Criminal Law ⇐260(11)

Trial judge is the sole judge of the facts and the weight to be given the testimony, and although an appellate court may feel that identification evidence is not too strong, it cannot interfere where the evidence is legally sufficient.

6. Criminal Law ⇐351(1)

Where a person suspected of and charged with crime resorts to deception and falsehood, such is a circumstance tending to show consciousness of guilt.

7. Criminal Law ⇐938(1)

Newly discovered evidence, to warrant a new trial, must be such as would render a different result reasonably probable on a new trial and must be such as could not with reasonable diligence have been discovered and produced at the trial.

8. Criminal Law ⇐938(1), 1156(3)

Motion for new trial for newly discovered evidence is addressed to the sound discretion of the trial court and its action

will not be disturbed except for a clear abuse of discretion.

9. Criminal Law ⇐938(1)

On motion for new trial for newly discovered evidence, a showing must be made by the defendant that the evidence and not merely its materiality is newly discovered, the evidence must not be cumulative only and the facts must be shown by the best evidence of which the case admits.

10. Criminal Law ⇐938(1)

Claim of newly discovered evidence as basis for new trial is looked upon with distrust and with disfavor.

11. Criminal Law ⇐938(1)

In rape prosecution, denying new trial for newly discovered evidence was not an abuse of discretion where there was lack of diligence in procuring the evidence, it was not such as would render a different result reasonably probable upon a new trial and where much of the evidence submitted would be inadmissible as evidence even if a new trial were granted. West's Ann. Pen.Code, § 261, subd. 3.

12. Criminal Law ⇐938(4)

In rape prosecution, newly discovered evidence of the prosecuting witness which is so closely related to evidence given by the witness that it might have been obtained on cross-examination is not ground for new trial. West's Ann.Pen.Code, § 261, subd. 3.

Daniel Paul Rikalo, Encino, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Arthur C. de Goede, Deputy Attys. Gen., for respondent.

WHITE, Presiding Justice.

We are here confronted with two appeals taken in one action, and which by stipulation have been consolidated for hearing and decision upon a single set of briefs.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in two counts with the crime of forcible rape (Penal Code, Section 261, subd. 3). In the first count the act was alleged to have been accomplished on or about October 31, 1957, with and upon Barbara Jean Wilson. The second count alleged the act was accomplished with and upon Geraldine Butterbaugh on or about December 9, 1957.

Defendant pleaded not guilty to both counts. He personally and all counsel waived trial by jury. By stipulation the cause was submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing with each side reserving the right to further introduce evidence and defendant reserving the right to cross-examine the witnesses for the People.

At the conclusion of the trial, the court found defendant guilty as charged on each of the two counts. His motion for a new trial was denied.

Under Section 5504 of the Welfare and Institutions Code, the court appointed three doctors to examine the appellant as to being a sexual psychopath.

[1] Although no judgment or probation order had been made or entered, defendant, as he was entitled to do, filed notice of appeal from the order denying his motion for a new trial (Thurmond v. Superior Court, 49 Cal.2d 17, 21, 314 P.2d 6). The appeal in 2nd Criminal 6270 is prosecuted pursuant to the aforesaid notice.

Subsequently, defendant was found not to be a sexual psychopath. Proceedings were suspended and probation was granted for five years with the first year to be spent in the county jail. Appellant filed a notice of appeal from the "judgment of conviction" (Penal Code, Section 1237, subd. 1). The appeal in 2nd Criminal 6349 is prosecuted pursuant to the last mentioned notice.

As to the factual background surrounding this prosecution, the record reveals the following:

Count I

Barbara Jean Wilson, a junior high school student, was home alone in her bathroom at about 9:30 on the night of

October 31, 1957, when she noticed the lights "flickered on and off". She remained in the bathroom for about thirty minutes, when the back door opened and "the lights were off". Miss Wilson then went to the service porch and "yelled * * * Whoever is in the back yard get out and leave me alone" or "leave the house alone". Thereupon, "* * * this figure jumped in at me." The witness testified that the intruder was "six feet, or five foot-eleven, or something like that", that he was wearing "levis, and he had a leather jacket, dark-colored jacket, a motorcycle jacket * * * he had a white hood over his head". Shown a black leather jacket with a buckle on it, which was taken from defendant at the time of his arrest, the witness testified, "It looks like the type of jacket that the person had on". The prosecutrix testified that the man "grabbed me by the throat and told me not to scream or he would kill me". The assailant then forced her into the living room where he commanded her to take off her clothing which she did. She then struggled with him but he overpowered her and forcibly accomplished an act of sexual intercourse upon the complainant notwithstanding her resistance. An automobile drove up in front of the house and the victim told her attacker her "parents were coming", whereupon he "ran off".

With regard to identification of the man who attacked her, the following occurred:

"Q. Now, during the time the person was in the house, he talked to you several times, is that true? A. Yes.

"Q. Did you go to a police lineup later on? A. Yes.

"Q. In the police lineup did they have a person in the lineup—the persons in the lineup talk? A. Yes.

"Q. Did you pick someone in the lineup as having a voice like this person who was in your home? A. I didn't personally pick him out, but after he was picked out, I recognized him.

"Mr. Spencer (attorney for defendant): I will object to that as not responsive.

"The Court: Objection sustained.

"Q. By Mr. Shea (Deputy District Attorney): Did you recognize one of the voices as being the voice of this person which was in your house on that date? A. Yes, I did.

"Q. Did you get to see who that person was in the lineup? A. Yes, sir.

"Q. Is that person in the courtroom today? A. Yes.

"Q. Would you point him out? A. Sitting over there.

"Q. The man seated at the end of the table? A. Yes.

"The Court: The record will indicate that the witness has pointed to the defendant."

On cross-examination, the prosecutrix was interrogated as follows:

"Q. By Mr. Spencer: Let's get down to this police lineup. How many persons did you see in the lineup? A. I believe there was five or six.

"Q. Outside of the man seated at my left, there was only one other man in that group who was his approximate height, in the group, wasn't there? A. I couldn't be sure of that.

"Q. Do you remember two or three persons in the group that were obviously shorter than the man you saw? A. Yes.

"Q. Now, when they had these different individuals speak, you couldn't identify the defendant's voice as the voice you heard at your home on this particular occasion, could you? A. Yes, it is.

"Q. It was only after someone else, either the police or some other person told you that the defendant was the man in the room that night, that you now say he was, isn't that true? A. Yes."

On recross-examination the following occurred:

"Q. At least someone other than the police identified the defendant, is that right? Before that time you did not identify him? A. Yes.

"Q. Although you were asked if you could recognize him? A. Yes."

On redirect examination, the following testimony was given:

"Q. Was the voice you heard of the defendant, was that the same voice you heard at your house? A. Yes.

"Q. No one told you that was the same voice, did they? A. After he had been identified and he said some of the sentences, to me it was the same voice, it sounded like the same voice.

"The Court: What do you mean identified?

"The Witness: After the other person identified him as being the person in her house.

"Q. By Mr. Shea: That was some other girl? A. Yes.

"Q. Your identification is not entirely by a voice but it is more by the voice, is that correct? A. Yes.

"Q. Although his body shape is similar to the person who was in your house, is that correct? A. Yes."

Count II

Geraldine Butterbaugh was at home asleep about 2:30 a. m. on December 9, 1957. She was awakened by a loud crash of falling glass. As she started down the hallway she heard another crash. In answer to a question as to what she did, the prosecutrix stated, "I arose, I didn't try to turn on the light. My little boy called out and I went in to his bed and I saw that everything was all right there and I went back to my bedroom. I heard the second crash and I started down the hallway and was met by this hooded man with a flashlight. I screamed and he grabbed me around the throat. My back was against his chest. He tried to choke me. I realized he meant business. I didn't struggle and he said, 'I won't hurt you.'" Defendant forced her through the house and into the spare bedroom where he said he was going to rape her. At the command of defendant, the victim removed her clothes and he did likewise. Defendant said to the witness, "If you make a noise I'll kill you." Defendant thereupon accomplished his act of sexual intercourse upon her. Mrs. Butterbaugh was employed as office manager at the Golden State Dairies, where defendant was also employed.

Regarding her identification of defendant, the prosecutrix testified that she uses the telephone very frequently in her work. That she went to police headquarters where she was confronted by defendant after his arrest. That she listened to defendant's voice on two occasions. At the trial, the following occurred:

"Q. Did you recognize one of these persons' voices as that of the person who was in the room with you? A. Yes, I did."

The witness then identified defendant as the man she saw at the police station.

"Q. By Mr. Shea: Now, at the time the man was in your house did you pay particular attention to his voice? A. I certainly did.

"Q. Why did you do that? A. I felt that all I could identify was the voice.

"Q. You could not see him in the dark? A. I could not see him.

"Q. You say you work on the telephone? A. Yes, I do.

"Q. And it is very essential that you know voices? A. It certainly is.

"Q. Do you make a study of voices? A. I do.

"Q. Did the person in the room make any statements to you as to the possibility of becoming pregnant? A. Yes, he told me he could not hurt me—

"Mr. Spencer: I object to that as immaterial.

"The Court: Objection overruled.

"The Witness: Shall I answer?

"Mr. Shea: Yes.

"The Witness: He told me, "I can't hurt you, I am sterile.'"

On cross-examination the following transpired:

"Q. (By Mr. Spencer, attorney for defendant): You are basing this identifica-

tion solely on the voice, is that right? A. Yes, sir."

Defendant was arrested about 3:30 on the morning of December 22, 1957, when he was observed crossing a street wearing a hood over his head. In his possession was found a flashlight and a diaper.

Sworn as a witness in his own behalf, defendant testified that at his work, because of refrigeration, he wears a hooded sweater. With reference to the night of October 31, 1957 (Count I) defendant testified he was at home that evening; that at approximately 10 p. m. he left his home and went to work where he remained until 7:00 the following morning. With regard to the night of December 9, 1957 (Count II) defendant testified he did not work but remained at home. He remembered the night in question because his son was afflicted with the measles. That his mother-in-law was at his home that night. With reference to his arrest, defendant testified that he was ill that day, but because of pressing financial obligations he decided rather than absent himself from work, he would "go up early and get my work done, and then Fritz would let me get off early". That he went to work about 9:00 p. m. and left his employment about 3:00 a. m. That he was dressed "the way I usually dress". He was on his way to a drug store, "to pick up a newspaper". Defendant admitted he had a flashlight when apprehended which he had secured at the plant where he works because "my mother-in-law had asked me to check some batteries and I was taking it home to check these batteries". Defendant explained his possession of the gloves by stating he uses them in his work when handling dry ice. As to the diaper found in his possession, defendant explained that, "It was in my pant leg when I left for work"; that it was used at home for his baby son. That after discovering it he placed the diaper in his pocket. In explanation of his failure to have any means of identification upon him when arrested, defendant testified, "* * * I never carry identification sir, when going to work there on account of the box freezes and the dampness gets into and runs your ID cards". Defendant denied either of the offenses charged against him.

Defendant's wife testified that he did not leave home for work on the night of October 31, 1957 (Count I) until approximately 10:00 p. m.; that she recalled the night because it was Halloween. (The victim in Count I was assaulted about 10:00 p. m. on that night.) The testimony of Mrs. Loar was corroborated by that of her mother, Maria Aloisio.

Ronnie David Gardner, an eleven-year-old boy who was acquainted with defendant and his wife, testified that on October 31, 1957 (Halloween night) he called at the Loar home shortly after 8:00 p. m. and that defendant, his wife, and the latter's mother were all there.

There was testimony by Reinhold Lauster and Carl Vreeken, Jr., fellow employees of defendant at Golden State Dairies, that a "lot of men" wear hoods during their work at the dairy plant.

We shall first give consideration to appellant's contention that the court erred and abused its discretion in denying his motion for a new trial on the ground of insufficiency of the evidence to sustain his conviction.

[2–4] On appeal from such an order, the appellate tribunal, in reviewing sufficiency of the evidence, will determine only whether on the face of the evidence insufficient facts are shown to warrant the implied findings of the trial court (People v. Jones, 36 Cal.2d 373, 375, 224 P.2d 353). As was said in People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778: "* * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below". Applying this rule to the case now engaging our attention, appellant's claim as to the insufficiency of the evidence cannot be sustained. Appellant earnestly insists that while the evidence may point the finger of suspicion at him, and might even indicate he had an opportunity to commit the of-

fenses charged against him, it lacks that substantiality required to prove him guilty beyond a reasonable doubt. With this we cannot agree. As to Count I the victim identified appellant as her assailant at a police lineup. While it is true she was not sure the first time she heard his voice, she did recognize appellant's voice at a subsequent time. That Miss Wilson had ample opportunity to study the voice of her attacker is evidenced by the fact that he talked to her several times. She also testified that the "body shape" of appellant was similar to that of her assailant. True, it was impossible for the prosecutrix to identify the man who assaulted her by his face, since the lights were off during the time they were together, but as was said in People v. Coley, 61 Cal.App.2d 810, 814, 143 P.2d 755, 757, quoting from People v. Wilson, 76 Cal.App. 688, 700, 245 P. 781, " 'It is not necessary that any of the witnesses called to identify the accused should have seen his face. "Identification," says the court in State v. Mason, 152 Minn. 306, 189 N.W. 452, "may be sufficient, though the person making it cannot remember the face. Identification based upon other peculiarities may be reasonably sure." There the Minnesota Supreme Court held that the identification may be sufficient though the witnesses say that they could not identify the accused from his face, the crime having been committed in the dark, but that they can identify him from his size, his general appearance, his talk, and his walk.'

"See, also People v. Glab, 15 Cal.App.2d 120, 59 P.2d 195; People v. Bealey, 81 Cal.App. 648, 254 P. 628."

[5] And in Connell v. Clark, 88 Cal. App.2d 941, 947, 200 P.2d 26, 29, we find the following: "It is universally recognized that the voice as well as the physical appearance of a person, is a means by which identification is made possible, there being no more similarity in the voices of different people than there is in their physical appearance. * * * Therefore testimony relating to the identity of the voice is competent, its probative value being a question of fact for the jury." It is well established in our law that the jury, or in this case the trial judge, is the sole judge of the facts and of the weight to be given to testimony, and though an appellate court may feel that the identification evidence is not too strong, yet it cannot interfere with or invade the province of the duly constituted arbiter of the facts, where the evidence is legally sufficient. Furthermore, there are other facts and circumstances shown in evidence tending to strengthen the identification of appellant as the man who assaulted the victims named in both counts of the information. The man who attacked Miss Wilson (Count I) wore a dark leather motorcycle-type jacket with a buckle and ornamental pieces of metal. A jacket owned by appellant was similar to this jacket and had a similar finish. Miss Wilson's assailant wore pants with a zipper, which were possibly levis. Appellant owns a pair of blue denims which have a zipper. Miss Wilson's assailant had a hood over his head. Appellant owns a sweat shirt with a hood and was wearing it when he was arrested.

When appellant broke into the Butterbaugh (Count II) and Molinar residences he wore a hood. (As to the Molinar residence, it might here be noted that at the preliminary examination, in addition to the two counts of the information, with which we are here concerned, appellant was also charged with attempted rape allegedly committed against one Catherine D. Molinar on October 14, 1957, but this count of the complaint was dismissed at the preliminary examination. However, her testimony is contained in the transcript of such examination and was used at the trial and on the motion for a new trial on the issue of identification of appellant.) Miss Wilson's assailant wore gloves. Appellant had a pair of gloves in his pocket when arrested and the man who attacked Mrs. Butterbaugh (Count II) wore gloves. Before Miss Wilson (Count I) was attacked, and while she was still alone in the house, the electric lights flickered on and off. Before breaking into the Molinar and Butterbaugh residences, the intruder had turned the

lights off. Miss Wilson's assailant grabbed her by the throat, threatening to kill her if she made an outcry. The same procedure was utilized when the assault was made upon Mrs. Butterbaugh.

Appellant contends that Miss Wilson (Count I) was assaulted shortly after 9:00 p. m. on October 31, 1957, and that the evidence shows that he was at home between 8:00 p. m. and 10:00 p. m. on that night. However, as pointed out by respondent, "Of course, it was not incumbent on the trial court to believe the testimony on appellant's time of departure for work. However, even if it was accepted, appellant still had opportunity to make the alleged attack, for Miss Wilson's testimony indicates that her assailant entered the house about 10:00 p. m. Her lights flickered on and off at about 9:30 p. m. She stayed in the bathroom for about thirty minutes then went to the back porch on hearing the back door open. Her assailant jumped in at her, and was in the house ten to fifteen minutes. Her assailant left about two or three minutes after attacking her."

As to Count II, the victim Geraldine Butterbaugh identified appellant as her assailant at a police lineup by recognizing his voice. Mrs. Butterbaugh works on the telephone and studies voices because it is essential that she know them. She paid particular attention to her assailant's voice because she could not see him and felt that was the only way she could identify him. She never did get to see his face but had plenty of opportunity to hear his voice. Assailant was in the house about forty minutes.

The assailant took off all his clothes except his shoes before he attacked Mrs. Butterbaugh—some of his clothes were of the type that would come off and go on over the head. The sweat shirt in evidence which appellant owned is of this pull-over type. Mrs. Butterbaugh's assailant had a flashlight. Appellant had a flashlight when he was arrested. The reason appellant gave for having the flashlight, which he did not own, was that, at his mother-in-law's request, he wanted to test some batteries which she had at home, even though there was no flashlight at home for which the batteries might be used.

There is testimony of the defendant, his wife and his mother-in-law that he was home on the night of December 9, 1957. However, as pointed out in respondent's brief, "Since Mrs. Butterbaugh was criminally attacked on the morning of December 9, at 2:30 a. m., this testimony does not establish an alibi. Even assuming that the testimony was meant to refer to the night of December 8, the court did not have to accept it. The mother-in-law's testimony clearly indicates that she felt appellant always went to work about 10:00 p. m.—she testified appellant went to work about 10:00 p. m. on a day on which appellant did not have to go to work at all.

"When arrested at about 3:00 a. m. on December 22, 1957, appellant was walking in a direction away from his home. He had no identification. He was away from his work during his regular working hours."

[6] The trial court was not compelled to accept appellant's explanation of his unusual conduct in wearing the hood over his head when arrested nor of his possession of the diaper, flashlight and gloves. When a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and concealment, tends to show a consciousness of guilt, and thereby strengthen any inference of guilt arising from other established facts. All of the attacks occurred within walking distance of appellant's home, and when apprehended he carried no driver's license or other means of identification.

We are satisfied that appellant's contention that the evidence and the reasonable inferences to be drawn therefrom are insufficient to justify the trial court's finding of guilt, is not supported by the record or the law and therefore, the court below did not abuse its discretion in denying appellant's motion for a new trial on the ground of insufficiency of the evidence.

[7–9] It is next urged by appellant that the court erred and further abused its dis-

cretion in denying him a new trial on the ground of newly discovered evidence. With commendable candor, appellant's counsel concedes that newly discovered evidence to warrant a new trial must be such as would render a different result reasonably probable on a new trial (People v. Radz, 119 Cal.App. 435, 437, 6 P.2d 527); that the evidence must be such as could not, with reasonable diligence, have been discovered and produced at the trial; that such a motion is addressed to the sound discretion of the trial court, and its action will not be disturbed except for a clear abuse of discretion (People v. McGarry, 42 Cal.2d 429, 432, 267 P.2d 254). To the foregoing should be added that a showing must be made by appellant that the evidence, and not merely its materiality, be newly discovered; that the evidence be not cumulative only, and that all the aforesaid facts be shown by the best evidence of which the case admits (People v. McGarry, supra, 42 Cal.2d at page 433, 267 P.2d at page 256).

[10] It is now well established that the claim of newly discovered evidence is universally looked upon with distrust and disfavor (People v Greenwood, 47 Cal.2d 819, 821, 306 P.2d 427). The reason for this rule is thus stated in People v. Byrne, 160 Cal. 217, 225, 116 P. 521, 525: "Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence. People v. Freeman, 92 Cal. [359] 366, 28 P. 261. It is recognized, however, that despite the exercise of such effort, cases will sometimes occur where, after trial, new evidence most material to the issue and which would probably have produced a different result, is discovered. For such cases, the remedy of motion for a new trial on the ground of newly discovered evidence has been given."

[11] In the light of the foregoing rules it cannot be said that the trial court abused its discretion in the case here under consideration.

In support of his motion for a new trial, appellant filed several affidavits. One was that of Barbara Jean Wilson, the victim in Count I of the information, in which she stated:

"With regard to identifying the suspect, my father took me to the police station on a Sunday. I don't remember the date. The police had 5 or 6 men in the lineup and we were in a room, the Molinar girl, her mother and I. Out of the five or six men three of them were too small and skinny. Two of them were large, one was real tall. All of the men talked but I was able to discount the words of the ones that didn't look like the man. After they all spoke, the police asked me to identify the one that committed the act and I told them that I couldn't. The Molinar girl's mother said that that could be him and she pointed or indicated Fred Loar. Her daughter agreed with this I. D. and they had the men talk again and I told the police that the man that Mrs. Molinar pointed out could be him. I did not make a positive identification. Only at one time during the lineup did the fellow that I said could be the one, sound like it may be the same voice; and only one time in court his voice sounded like it could be the same. The rest of the time it didn't." The substance of the foregoing is that Miss Wilson only identified appellant as her assailant after someone else (the mother of Catherine D. Molinar) had identified him as the person who had broken into the identifier's home on another occasion. This was also the substance of the affidavit of Miss Wilson's father, who also stated: "I saw the men in the lineup and there were no other men there with the same physical description as Fred Loar (appellant)." However, the facts stated in these affidavits were known to appellant at the preliminary examination, as is indicated by the transcript of that proceeding which was submitted to the trial court, and quotations from which we have herein narrated in summarizing the factual background surrounding this prosecution.

In another affidavit by Paul F. Eddy, a private investigator, the deponent states: "That in the course of his investigation he learned that one William Esterline, of 19136 Kittridge Street, Reseda, California, telephone number DIckens 2–5280, had approached the Defendant on February 8, 1958, the day before Defendant's hearing in Department 14 of the Superior Court of the County of Los Angeles in re the instant matter, and asked the Defendant if he, the Defendant, had found or seen his, Esterline's hooded sweater which Esterline stated he had lost some five months previously; that the Defendant responded that he had not seen or found such hooded sweater". This can hardly be classed as newly discovered evidence since the affidavit itself shows that the day before appellant's trial, Mr. Esterline inquired of the appellant whether the latter had found or seen the sweater which Esterline had lost some five months previously. There remains the further fact that appellant had subpoenaed Mr. Esterline as a witness which would seem to indicate that any evidence the latter might be able to give was known to appellant at the time of trial.

There is some evidence contained in the affidavits which might be characterized as newly discovered evidence since it was unknown to appellant at the time of trial, nevertheless, the court did not abuse its discretion in denying a new trial, if such evidence would have been known to appellant had he made a reasonable effort to procure it before and at the trial (People v. Byrne, supra, 160 Cal. at page 226, 116 P. at page 525).

[12] As noted in respondent's brief, "The statements allegedly made by Mrs. Butterbaugh (victim in Count II), as related in the affidavits of (private investigator) Paul F. Eddy could all have been ascertained before the trial—at least there is no showing that Butterbaugh was unavailable. Appellant contends that he used reasonable diligence to uncover said evidence in that Butterbaugh was cross-examined at the preliminary hearing and did not reveal at that time that she had already been informed by the police whom she would be asked to identify and that she was of the opinion that appellant was a 'liar' and had a 'bad reputation'. But newly discovered evidence of the prosecuting witness which is so closely related to evidence given by said witness that it might have been obtained on a cross-examination is not ground for a new trial. (People v. Phelan, 123 Cal. 551, 568, 56 P. 424.)

"In the present case, circumstances of identification is certainly closely related to identification. It would also seem that the time to show bias of the prosecution witness (Butterbaugh allegedly was of the opinion that appellant was a "liar" and had a "bad reputation") would be on cross-examination and not after the appellant was found guilty. It should be noted that appellant had the opportunity to cross-examine Mrs. Butterbaugh (and Miss Wilson) twice—once at the preliminary hearing and once at the trial—and that appellant waived his right to cross-examine at the latter time as to all the prosecution witnesses."

The purported newly discovered evidence in the affidavit of Rosanne Okin with regard to a man who followed her and Miss Wilson (victim in Count I) on the night of the assault upon the latter, as they were on their way home from a Halloween party and that this man was not the appellant, would not in our opinion be such as to render a different result reasonably probable on a new trial, and there is no showing that deponent was unavailable to appellant before the trial.

As to the foregoing affidavit of William Esterline, it should be noted that at the trial it was stipulated that if the witness was called and sworn at the trial, he would testify to the disappearance of his "hooded shirt", as set forth in Mr. Esterline's affidavit, and such evidence was stricken on the ground it was immaterial. We are impressed that the trial court was justified in concluding that had due diligence been used, the evidence set forth in the supporting affidavits could have been produced at the trial.

We are further satisfied that appellant has not met the burden imposed upon him to show that the newly discovered evidence submitted by him on his motion for a new trial is such as to render a different result reasonably probable on a new trial. The affidavits indicate that Mrs. Butterbaugh (the victim in Count II), was advised by the police that the subject under arrest, and whom she was requested to identify, worked at the dairy where she was employed. That, "When I went down the list I knew he, Frederick Loar, was built trim. I eliminated the short, tall and old ones and I decided that he, Fred Loar, must be the one." That when asked by deponent Eddy, "You told us a few moments ago that you didn't know Loar (appellant). Just how were you able to pick his name out from all of the rest?" Mrs. Butterbaugh answered, "I knew he was a liar and I know what his reputation is around here." Such evidence might tend to impeach Mrs. Butterbaugh's unequivocal identification of appellant at the trial as her assailant, as would her opinion of appellant as being a liar and having a bad reputation in that it would tend to show bias, but in the light of the many other incriminating facts and circumstances heretofore adverted to, as well as the positive identification of appellant by Miss Wilson (the victim in Count I), we are unable to say that the foregoing evidence would render a different result reasonably probable on a retrial.

What we have just said is also applicable to the affidavit of Rosanne Okin which rejects appellant as the attacker of Miss Wilson (Count I). Miss Okin was the person heretofore referred to who was in the company of Miss Wilson (Count I) just prior to the attack upon the latter and who states that a man followed them who resembled appellant and was attired in a manner similar to that of the assailant of Miss Wilson. In her affidavit, Miss Okin states that after viewing appellant she is of the opinion he was not the man who followed them. Miss Okin bases her statement on the fact that the man she observed following her and Miss Wilson wore lighter clothing and had lighter hair than that of appellant, and that he had a more rounded nose. While this testimony cannot be characterized as inherently improbable, it must be remembered that Miss Okin made her observation at night at a cross-intersection with only an overhead street light to aid her. Miss Okin states that her view was a profile view but the person she observed was watching her as she approached the intersection where she made her observation. This evidence that there was some person other than the appellant in the vicinity of the Wilson home about an hour before Miss Wilson was attacked is clearly not of the type which would indicate a different result on a new trial.

We are also here confronted with the omission on the part of appellant to file an affidavit showing that he did not know of the existence of the evidence at the time of trial, that he used due diligence to discover the same, or that it could not have been discovered by the use of due diligence (People v. Farber, 19 Cal.App.2d 189, 192, 64 P.2d 1138). No explanation is given of the reason why the newly proffered evidence could not be discovered during the time that elapsed between the preliminary examination and the trial. Considering the disfavor and suspicion with which this ground of the motion is regarded, we think the affidavits as to diligence should have been more explicit than they were.

Furthermore, much of the evidence submitted would be inadmissible as evidence in behalf of appellant even were a new trial granted him. Considerable of the contents of Paul F. Eddy's affidavits consisted of hearsay evidence.

While a mere reading of the record in this case might well leave one in grave doubt on the question of appellant's guilt, there is certainly enough in the evidence to sustain the conclusion of the trial judge.

An earnest and apparently rather strong showing was made for a new trial on the ground of newly discovered evidence, but in the light of the well-settled rules appli-

cable in the consideration of appeals from orders of trial courts denying such motions, we do not see how it can properly be held that the trial court abused its discretion in denying the motion in the instant case.

For the foregoing reasons, the judgment (order granting probation) (2nd Criminal 6349), and the order denying defendant's motion for a new trial (2nd Criminal 6270), are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

166 Cal.App.2d 232

Mae V. BROWN, Plaintiff and Respondent,

v.

DOUGLAS AIRCRAFT COMPANY, Inc., a corporation, et al., Defendants,

Douglas Aircraft Company, Inc., a corporation, Appellant.

Civ. 23299.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1958.

Hearing Denied Feb. 11, 1959.

Libel action for damages against individual defendants and corporations. From an order of the Superior Court of Los Angeles County, John J. McCarthy, J., plaintiff filed a motion to set aside judgment as to corporate defendant and corporation appealed. The District Court of Appeal, Fourt, J., held that where before corporation was served counsel, who stated that he represented corporation, appeared in court and entered into stipulation with plaintiff's counsel that default would not be taken against corporation on original complaint but that amended complaint might be served upon all defendants including corporation which was to answer within 30 days, and such stipulation was entered and made a part of court order, court had jurisdiction over corporation and default judgment entered upon corporation's motion after plaintiff's failure to file amended complaint was final, and court had no power thereafter to set it aside.

Reversed.

1. Appearance ⇐9(1)

A general appearance is not necessarily a formal, technical step or act.

2. Appearance ⇐2

Where action for libel was brought against corporation and individual defendants, even though corporation had not as yet been served, corporation had a right to appear and defend with respect to demurrers and motions to strike filed by several of the individual defendants.

3. Appearance ⇐19(1)
Judgment ⇐95

Where action for damages was brought against corporation and individual defendants and before corporation was served with summons there was a hearing on demurrers and motions to strike by several of the individual defendants who had been served, and counsel, who stated that he represented corporation, appeared in court and entered into a stipulation with plaintiff's counsel that default would not be taken against corporation on original complaint but that amended complaint might be served upon all the defendants, including corporation which would answer within 30 days, and such stipulation was entered and made a part of court order on that date, court had jurisdiction over corporation, and default judgment entered upon motion of corporation after plaintiff's failure to file an amended complaint was final, and court had no power thereafter to set it aside. West's Ann.Corp.Code, § 6403; West's Ann. Code Civ.Proc. §§ 473, 1014.

4. Appearance ⇐22

Jurisdiction of courts over persons of parties to suit is one of personal privilege

and if party appears and fails to make objection to jurisdiction over his person in limine, objection is waived.

John A. Dundas, Louis Lieber, Jr., Frederick E. MacArthur, Santa Monica, for appellant.

Margolis, McTernan & Branton, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from an order granting a motion to set aside a judgment as to the above named corporate defendant.

An action for damages for libel was brought by the plaintiff against fifteen individual defendants and the Douglas Aircraft Company, the corporate defendant. Several of the individual defendants were served with summons and a copy of the complaint and thereupon such individual defendants demurred to, and moved to strike certain portions of the complaint. The demurrers and the motions to strike came on for hearing on April 11, 1956, and after some two hours of hearing, were continued for further hearing to April 19, 1956. Another of the individual defendants was served after April 11, 1956, and she filed a demurrer and motion to strike on April 19, 1956; a stipulation was then entered into between counsel, and the court ordered "that the demurrer to the complaint and the motion to strike filed herein today by defendant Mary A. Church may be heard at this time together with the demurrer and motion to strike already set for this time." After the matter of the demurrers and motions had been argued for another two hours on the 19th of April, the demurrers were sustained and the plaintiff was given forty-five days within which to amend. The motions to strike were ordered off calendar.

During the hearing on the 19th of April it was stated by counsel for the plaintiff, in effect, that he was about to serve Douglas Aircraft Company, the corporate defendant, who, with the individual defendants L. A. Peifer, Sonia Van Hooser Hazard and Winnie W. Barrett, had not as yet been served, and who, up to that time, had made no appearance in the action. Counsel for the appearing defendants stated that he was the attorney for Douglas Aircraft Company, and further stated in effect that he intended to demur and move to strike in its behalf as and when the summons and complaint were served. Apparently, in order to circumvent another lengthy hearing covering the identical matters which the court was then hearing, it was suggested and stipulated by opposing and appearing counsel in open court as follows:

> "* * * default will not be taken against the corporate defendant on the original complaint herein, but the amended complaint may be served upon counsel for the defendants who have appeared and thereupon the corporate defendant and all defendants who have appeared shall answer or plead to the 1st amended complaint within 30 days following service upon their counsel."

The stipulation was embodied in, and made a part of the court's order of that day wherein it ruled upon the demurrers, the motions to strike and the granting of time to the plaintiff within which to amend, and the granting of time to the corporate defendant within which to answer the amended complaint.

No amended pleading was filed within the forty-five days, namely on or before June 4, 1956. The corporate defendant waited until the 20th day of June, 1956, and then wrote a letter on that date to the plaintiff's attorneys stating, in effect, that the forty-five day period within which the amended complaint was to be filed had expired on June 4, 1956, and that counsel for the plaintiff was notified that he might have to and including Wednesday, June 27, 1956, in which to serve an amended complaint and that if not served on or prior to that date the company would take such steps as might be available to have the action terminated with prejudice to the plaintiff. On June 28, 1956, sixty-nine days after the demurrers were sustained and no amended complaint had been filed, the corporate de-

fendant made an application to the court to dismiss the action with prejudice as to the plaintiff, and a judgment was so rendered and entered, and notice thereof was given to counsel for the plaintiff on June 29, 1956.

On October 17, 1957, one year and almost four months after entry of the judgment of dismissal, the plaintiff moved to set aside the judgment as to the corporate defendant, L. A. Peifer, Sonia Van Hooser Hazard and Winnie W. Barrett. The motion was made pursuant to the provisions of section 473, Code of Civil Procedure. The matter came on to be heard November 20, 1957, and was heard in part on that day and continued to December 11, 1957, when it was further heard, and the court then granted plaintiff's motion to set aside the judgment as to the corporate defendant and the above individually named defendants. This appeal is by the corporate defendant from that order.

The appellant contends that under the circumstances of this case it made a general appearance, that the trial court had jurisdiction over the person of the corporate defendant, and the judgment of dismissal was final and binding as between the plaintiff and the corporate defendant, and further that the court thereafter had no power to set the judgment aside. We agree with the appellant.

This case is unusual and anomalous in that it is the plaintiff, not the defendant, who seeks to demonstrate that the defendant made no appearance in the case. Counsel for the appellant has stated in the brief that he has been unable to find a case parallel to the situation presented here, and our own independent research has not disclosed any such case.

Section 1014, Code of Civil Procedure, read, at the time with which we are concerned, as follows:

> "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail."

[1] A general appearance is not necessarily a formal, technical step or act. Witkin, California Procedure, Vol. I, § 66, p. 336. And, as further stated by Witkin, California Procedure, supra, at page 336:

> "The doctrine of appearance has more than one purpose and becomes relevant in several branches of the law of procedure:
>
> "(1) Its principal application is in the present topic of *jurisdiction of the person.* Appearance is considered herein as a form of consent to personal jurisdiction, dispensing with the requirement of service of process, and curing a defective service or other lack of notice."

[2] The corporate defendant, in this case, through its counsel knew of the pending action. The defendant obviously had a right to appear and defend in the action. In Wheatland v. Maloney, 110 Cal.App. 288, 294 P. 499, the plaintiff voluntarily dismissed a libel action before service or appearance of the defendants, and the defendants sought the statutory award of $100 attorneys' fees. In rejecting plaintiff's contention that they were not entitled, because of the lack of summons or appearance, the court said (110 Cal.App. at pages 290–291, 294 P. at page 500):

> "When a complaint is filed, service of summons is not a necessary prerequisite to the right of the defendant to appear and defend such action. The summons duly served is simply a mandate requiring the appearance of said defendant in said action under penalty of having judgment entered for failure so to do. A defendant, who knows an action was pending against him, could proceed to retain counsel and begin the

preparation of his defense to said pending action. If defendant has a right to appear in an attack upon an alleged cause of action after complaint filed, then he has a right to appear by attorney. Having such a right in a pending action presupposes his right to retain or employ such an attorney."

There is no contention in this case that counsel for the corporate defendant was not authorized to appear for the company.

The plaintiff argues that the corporate defendant made no appearance at all, and that at best all that was done was that the corporate defendant asked for an extension of time within which to answer or to appear. However, it is clear that such is not the situation.

[3] The attorney for the company and the attorney for the plaintiff were physically present in court acting upon the matters which had to do with the very case in question. The court had the particular case, and none other, before it at the time and the attorney for the corporate defendant represented the other defendants in the case. The attorney for the corporate defendant, on its behalf, entered into the stipulation with the attorney for the plaintiff, and the court made the stipulation a part of its order of the day in the particular matter. The attorney for the corporate defendant made no objection to the court's taking jurisdiction over the person of the corporate defendant. Likewise, the plaintiff did not object to the court's taking jurisdiction over the corporate defendant, and her actions later indicate that she assumed that the court did have jurisdiction and that the corporate defendant had appeared in the case. The stipulation, it may be noted, did three things, namely, (1) it provided that no default would be taken against the corporate defendant on the original complaint. As a consequence, if the plaintiff had served the corporate defendant with process and more than ten days had elapsed thereafter, with no further appearance by the corporate defendant, still no default judgment could be secured; (2) it provided that an amended complaint could be served upon counsel for the corporate defendant, and in effect, therefore, that it would not be necessary to serve an officer of the corporation itself which, but for the appearance, would have been required, and (3) it provided that the corporate defendant would have thirty days following service of the amended complaint upon its counsel within which to plead thereto.

As counsel for appellant has pointed out, there is "no judicial litmus paper by which an appeals court can test the question of appearance." We look to the circumstances of the particular case.

In Judson v. Superior Court of Los Angeles County, 21 Cal.2d 11, at page 13, 129 P.2d 361, at page 362, it was said:

" 'Whether an appearance is general or special is determined by the character of the relief sought and not by the intention of the party that it shall or shall not operate as a general or special appearance. The statement of a defendant or party that he is making a special appearance is not necessarily conclusive. The test is—Did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special. In re Clarke, 125 Cal. 388, 58 P. 22. The rule in this regard may be epitomized by saying that if a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a special appearance, but if he raises

any other question, or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then he had made a general appearance. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Zobel v. Zobel, 151 Cal. 98, 90 P. 191.'"

In Davenport v. Superior Court, 183 Cal. 506, at page 511, 191 P. 911, at page 913, it was said:

"An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of obtaining any ruling or order of the court going to the merits of the case, as, for example, a motion to strike out part of the complaint, *or the making of stipulations,* as in the cases above mentioned, *which may reasonably be construed to imply that the court has in that action acquired jurisdiction of the person of the defendant, will be equivalent to an appearance,* although not strictly in accordance with the terms of section 1014." (Emphasis added.)

The plaintiff recognized that an appearance was made by the corporate defendant, for in plaintiff's affidavit made in December, 1956, she stated: "* * * she was informed by her counsel Philip E. Poppler that the defendants Douglas Aircraft Company, Inc., and others had extended by oral stipulation the time within to file an Amended Complaint to and including June 27, 1956." It is readily apparent that if there had been no appearance upon the part of the corporate defendant she did not need any extension of time within which to file her amended pleading. Likewise, when she served her notice of motion to set aside the judgment, she served it upon counsel for the corporate defendant and not upon any officer of the corporation, as designated in section 6403, Corporations Code. Under section 473, Code of Civil Procedure, a court may set aside a judgment claimed to be void only upon "notice to the other party."

[4] Furthermore, it is important to remember that in this particular case it is the defendant who argues that the court had jurisdiction, and not the plaintiff. The plaintiff would seem to want to appropriate from the corporate defendant a privilege which belonged to it and not to the plaintiff. As stated in Panama R. Co. v. Johnson, 2 Cir., 1923, 289 F. 964, at page 981:

"It is well-settled law that the jurisdiction of courts over the persons of the parties to the suit is one of personal privilege, and if a party appears, failing to make objection to the jurisdiction over his person in limine, the objection is waived. State of Rhode Island v. Commonwealth of Massachusetts, 12 Pet. 657, 9 L.Ed. 1233; Toland v. Sprague, 12 Pet. 300, 9 L.Ed. 1093; Harkness v. Hyde, 98 U.S. 476, 25 L.Ed. 237. The failure to object at the proper time is a waiver of what is a personal privilege, and is a consent to the jurisdiction."

We have had no cases pointed out to us for our consideration wherein the plaintiff has complained that the actions of the defendant were not sufficient to constitute an appearance. This is obviously not the simple type of case wherein a defendant merely seeks an extension of time within which to appear in the case and then the plaintiff contends that the court had jurisdiction over the defendant. It is clear in our opinion that it was the intention of the corporate defendant to appear and submit to the jurisdiction of the court, and that it did so.

The plaintiff asserts that to reverse the order setting aside the judgment would be tantamount to putting the stamp of approval upon a forfeiture. The record does not bear out any such contention.

The order setting aside the judgment of dismissal is reversed.

WHITE, P. J., and LILLIE, J., concur.

166 Cal.App.2d 274

Warren BARLOW, Plaintiff and Respondent,

v.

Geraldine S. COLLINS, also known as Geraldine Collins Barlow, Defendant and Appellant.

Civ. 5783.

District Court of Appeal, Fourth District, California.

Dec. 16, 1958.

Hearing Denied Feb. 11, 1959.

Action by plaintiff who had lived with defendant in a husband and wife relationship without benefit of marriage license or ceremony, for breach of contract, breach of trust and for an accounting and injunction based upon alleged agreement of the parties to pool their earnings. The Superior Court of Riverside County, Wallace P. Rouse, J. pro tem., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Griffin, P. J., held that pleadings were sufficient to state a cause of action for breach of contract by defendant and for breach of trust and an accounting, and evidence sustained judgment giving $6,876.90 to plaintiff as his share of the amount which defendant withdrew from their joint bank account after they broke up.

Affirmed.

1. Contracts ⇐112

Where man and woman agreed to live together as husband and wife without benefit of marriage license or marriage ceremony and agreed to pool their earnings and profits, such agreements are enforceable unless contract is made in contemplation of relationship.

2. Marriage ⇐54

Generally, when a man and woman live together as husband and wife and agree to pool their earnings and share jointly in joint accumulations, equity will protect the interest of each in such property, and even in absence of an express agreement to that effect the woman would be entitled to share in property jointly accumulated, in the proportion that her funds contributed towards its acquisition.

3. Partnership ⇐108

Generally, a partner may not sue his copartner in an action at law with respect to firm transactions until an accounting has been had and this rule is peculiarly applicable to claims for damages arising out of manner in which a partnership business has been conducted and to breaches of agreement as such, but reasons for applying rule are less forceful where wrongful acts complained of are not only a breach of contract but constitute a tort, especially where tort is of such a nature that it not only terminates partnership but wrongfully destroys it, as where erring partner converts the entire assets to his own use.

4. Estoppel ⇐68(6)

Where party brought action to obtain his alleged share of money held by defendant with whom plaintiff had lived in a husband and wife relationship without benefit of marriage license or ceremony upon alleged agreement to pool earnings and profits, fact that plaintiff had obtained a writ of attachment on cause of action for breach of contract and that such writ was dissolved before trial did not estop plaintiff from claiming equitable relief upon claim of action for breach of trust and an accounting.

5. Assignments ⇐31

Where plaintiff, who had lived with defendant in a husband and wife relationship without benefit of marriage license or ceremony, under alleged agreement to pool earnings and profits, brought action to obtain his share of joint bank account withdrawn entirely by defendant, since defendant had placed earnings and profits in joint account and had never parted with any of her money pursuant to pooling agreement, there was no assignment of her wages in violation of statute. West's Ann.Labor Code, § 300.

6. Limitation of Actions ⇐43, 46(6)

Statute of limitation runs from the time of breach or termination of agreement or when cause of action accrues.

7. Marriage ⇐54

In action by plaintiff, who had lived with defendant in a husband and wife relationship, under alleged agreement to pool earnings and profits, to recover from defendant his share of joint bank accounts which defendant had converted to her own use after parties had broken up, evidence sustained finding that the sum of $13,753.80 represented earnings and profits accumulated in accordance with their joint enterprise agreement and plaintiff was entitled to one half thereof.

Leonard A. Bock, Palm Springs, for appellant.

Thurman Arnold, Jr., Palm Springs, for respondent.

GRIFFIN, Presiding Justice.

Plaintiff-respondent brought this action against defendant-appellant, in three separate causes of action alleging in general, breach of contract, breach of trust and for an accounting, and injunction. Therein, he alleged that beginning in the year 1948, up to 1956, excepting certain periods, plaintiff and defendant lived together as husband and wife, without the benefit of a marriage license or ceremony; that during these years they agreed to pool their earnings; that during that period they were both employed by third parties as a cook and waitress or were self-employed in the restaurant business as joint venturers or copartners; that they placed their joint earnings in a bank account in defendant's name for the benefit of both parties; that unhappy differences occurred between them about December 3, 1956, and defendant left with the proceeds; that plaintiff made demand upon her for his share of the proceeds or an accounting which was refused. An attachment was levied upon defendant's bank account. Judgment by default for $11,095 was given plaintiff. It was subsequently set aside and a temporary restraining order was dissolved. By stipulation the money attached was held by plaintiff's counsel in his trust fund account pending the outcome of the action. An execution levied on defendant's bank account in the total sum of the judgment was also set aside.

Defendant answered, admitted they lived together as such, between said dates, with the exception of certain intervals; denied any agreement to share any money; alleged she contributed more money to plaintiff's support than he contributed to hers; claimed plaintiff never gave her any money to deposit in the banks except the sum of $14,000 realized from the sale of a restaurant they jointly owned; and claimed that plaintiff retained one-half of this amount. She denied the other allegations of the complaint.

A pre-trial hearing was had. Later the trial court found generally that the parties lived together as alleged; that they agreed to pool their earnings and share equally in their accumulations; that defendant agreed to deposit them in banks in her name for their joint benefit; that said agreement was independent of and not in consideration of either of them living with the other but was in the nature of a joint enterprise; that the sum of $13,753.80 represented such earnings and profits so accumulated in accordance with their agreement; that unhappy differences arose and defendant refused to account to plaintiff for his share; that certain money had been deposited in certain specified banks and after allowing $7,000 to defendant (being a claimed inheritance from defendant's mother) as her separate property, a balance of $13,753.80 was jointly earned money and plaintiff was entitled to one-half of it or $6,876.90. Judgment was entered accordingly.

Defendant appealed and contends: (1) that the complaint does not state facts sufficient to constitute a cause of action for breach of contract; (2) that plaintiff was estopped from claiming equitable relief since he elected to proceed on the theory of breach of contract by reason of obtaining a writ of attachment; (3) that plaintiff is barred, under section 300 of the Labor Code, from asserting any claim to

defendant's wages; (4) that plaintiff was barred by the statute of limitations from asserting any claim to her share in the profits or wages accumulated beyond the period prescribed by the statute of limitations; (5) that the evidence in support of the judgment is inherently improbable; and (6) that the findings do not support the judgment.

The main claim under this heading is that one partner may not maintain an action against his copartner for claims growing out of the partnership until after the partnership has been dissolved and an accounting has been had, citing such authority as Hall v. Hagerman, 107 Cal.App. 2d 523, 237 P.2d 80; Martyn v. Leslie, 137 Cal.App.2d 41, 61, 290 P.2d 58; Shearer v. Davis, 67 Cal.App.2d 878, 879, 155 P. 2d 708; and Martin v. Going, 57 Cal.App. 631, 207 P. 935.

[1, 2] Under the first claim the complaint in the first cause of action did allege breach of contract and set forth in detail the particulars from which it was claimed such breach arose. It is true an attachment was levied but it was, before trial, dismissed or released. The second cause of action alleges a breach of trust and seeks an accounting. It incorporates the allegations of the first cause of action in support thereof. The court made general findings applicable to both counts. By obtaining the attachment there was no definite election of plaintiff to stand on the first count, as opposed to the election of the second count. Each stated similar facts and in substance the complaint stated a cause of action for claimed breach of an agreement to pool their earnings and profits. Such agreements have been held enforceable in protecting the interests of each in such property unless the contract is made in contemplation of such relationship. Bridges v. Bridges, 125 Cal.App.2d 359, 270 P.2d 69; Garcia v. Venegas, 106 Cal. App.2d 364, 368, 235 P.2d 89; Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884. The general rule is that if a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. Even in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed towards its acquisition. Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761. The pleadings were sufficient to state a cause of action in this respect.

[3] Defendant relies on the general rule that a partner may not sue his copartner in an action at law in respect to firm transactions until an accounting has been had. While this general rule is well established, a different rule or at least an exception to the general rule, has been quite generally recognized and has been indicated and applied in several cases in this state. The general rule is peculiarly applicable to claims for damages arising out of the manner in which a partnership business has been conducted and to breaches of said agreements as such. But the reasons for applying the general rule are less forceful where the wrongful acts complained of are not only a breach of contract but constitute a tort, and this is especially true where the tort is of such a nature that it not only terminates the partnership but wrongfully destroys it, and where the erring partner converts to his own use its entire assets. Laughlin v. Haberfelde, 72 Cal.App.2d 780, 165 P.2d 544; Tufts v. Mann, 116 Cal.App. 170, 2 P.2d 500; Keyes v. Nims, 43 Cal.App. 1, 184 P. 695.

[4–6] Under the second claim plaintiff was not estopped from claiming equitable relief. De Hart v. Allen, 49 Cal.App.2d 639, 122 P.2d 273. Third, plaintiff was not barred from claiming his purported share of the profits and his earnings which were found in defendant's bank account under section 300 of the Labor Code. Defendant placed her earnings and profits in said account. She never parted with any of her money pursuant to the pooling agreement. There was no assignment of her wages in violation of that section and

defendant could not equitably assert such claim. Cline v. Festersen, 128 Cal.App.2d 380, 275 P.2d 149. Fourth, this same conclusion applies to the claimed bar of the statute of limitations. Such a statute would run from the time of the breach or termination of the agreement or when the cause of action accrues. Niles v. Louis H. Rapoport & Sons, 53 Cal.App.2d 644, 128 P.2d 50; Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. Fifth, while there were considerable contradictions of both parties in reference to their financial affairs it cannot be said that plaintiff's testimony was inherently improbable. Sixth, the evidence and findings do support the judgment. Under this heading defendant makes numerous charges, including a claim that the court failed to take into account, in the accounting, and specifically failed to find as to the truth or falsity of defendant's statement that there was an item of $14,000 and several other claimed amounts which the parties had previously divided between them and that by again dividing her proportionate share of it, which was deposited in her bank account, defendant was being again charged for these earnings; that the court failed to specifically find as to whether the amount accumulated was from earnings or from profit, and failed to find when the agreement went into effect, whether it was effective during their separation of nearly two years, when she went away with another man, and as to who supported plaintiff for more than six months when he was unemployed; that a full accounting for loans, advances and contributions for the full period they were living together was not had, and that the court arbitrarily based its findings on what sums remained in her bank account at the termination of their agreement.

[7] Plaintiff testified generally that he commenced living with defendant as man and wife in 1948; that he was separated from his former wife at the time and defendant knew he was not divorced from her; that he was then employed as a cook and bartender and defendant was employed as a waitress; that they agreed to pool their earnings after taking out expenses and he turned the balance over to defendant to handle and to keep for both of them; that she kept it in a bank account and safety deposit box in her name for several reasons, i. e., because of probable demands of his former wife and on account of his drinking problem; that they subsequently went into business together on several occasions under the same arrangements; that they both drank a little and he knew generally what they had saved and made. He itemized the amounts paid and received from such sales and operations and said that the bank account constituted about the only record of their transactions and earnings; that in 1951 they went to Arizona and defendant took the money and deposited it there in her name, as before; that while there for the period of two years he was employed except for six months when he was away from employment because of a brawl in which he broke his leg; that defendant kept working; that they returned to California and they jointly went into business in Los Angeles; that he then opened up an additional separate bank account for himself (about $500), to pay for supplies and overhead; that they made about $14,000 that year; that together they bought $13,500 in war bonds, payable to her and on her death to plaintiff, from the money in her account; that equipment was purchased for other business enterprises in which they were jointly engaged; that they also purchased $300 in stock from said savings account; that in 1955 they "split up" and each had a separate apartment; that while she did not live with him, she came to his place nearly every night for two years; that he invested about $400 of his own money in another enterprise; that he was still giving his money to her to save for both of them even though she was working as a waitress at another place; that they went to Las Vegas in 1956 and lived together again as husband and wife under the same arrangement; that subsequently they went to Palm Springs and there they

"broke up", due to his drinking; that all during that period they had a lot of "break-ups" each for a short time, and then they would resume their former status, both financial and otherwise; that one time she ran away with another man and was gone three or four weeks and on her return she told plaintiff she had no more money; that she said she had put up with him for a long time and he had nothing coming, and for him to "try and get it—sue me"; that he believed at that time she had between $22,000 and $23,000, and named the amounts and banks where this sum was deposited. He testified he never borrowed any money from her.

Savings account bank books of defendant were received in evidence and showed deposits and withdrawals over a two-year period. One showed a balance of $7,505.94 withdrawn on March 7, 1957; another a balance of $3,257.87 withdrawn on December 5, 1956; and a balance in another account of $2,360 on June 26, 1956. One showed a deposit of $10,000 on April 20, 1956, which was not withdrawn.

Defendant testified generally about their meeting and subsequent transactions. She said she left him about 50 times between 1948 and 1954, and she claims she had $7,000 of her own money from her mother's estate when she first met plaintiff, which she kept in the several banks named and in a specific safety deposit box (the officer at the bank denied any record of such safety deposit box or accounts); that after paying expenses she placed their savings in their accounts in several banks, and invested some of her money in some of these business enterprises; that she profited on some and lost on others; that she considered her wages and earnings she made in Arizona as her own; that each of the parties came out with a profit of $4,000 on one sale in 1953; that she purchased war bonds totaling $9,700 with her money; and that in making some of these investments she loaned plaintiff money which he did not repay.

Defendant was confronted with her verified affidavit used in support of her motion to set aside the default. Therein she alleged she and plaintiff split $14,000 as a result of joint restaurant operations. She later said this was untrue, that it was only $4,000 that she made out of it. She testified that when they separated she had $10,000 in one bank, $8,500 in another, and $3,000 in another. She said they did not pool their earnings; that plaintiff kept his and she kept hers; that they had no agreement about pooling their earnings; that she helped support plaintiff during his illness in Arizona and at other times. She admitted having saved $22,000 at the time of the separation but claims $7,000 was her own money; that she gave plaintiff $2,000 the first six months she knew him, $2,900 to invest in the several businesses, and extra money to support himself.

Apparently there was some discussion at the pre-trial hearing pertaining to a limitation in reference to the accounting, i. e., that the court, under the pleadings, did not desire to go into a complete accounting between the parties since they started living together but would limit it to the allegations of plaintiff's complaint. The complaint alleges the agreement to be that each party agreed to deposit his earnings and profits in bank accounts and each agreed to share such money as was deposited therein. Then follows the names of the banks and the amounts then on deposit. The prayer was for a division of the money in the bank accounts. From the evidence produced it appears that the court did, to a great extent, trace the money deposited to these accounts back to the time these parties started living together. A sharp conflict in the testimony of the two parties existed. Defendant testified as to a $7,000 inheritance, claimed to have been deposited in certain banks prior to this time. This testimony stands uncorroborated. She produced no other evidence of such deposit or of such inheritance. In fact, the testimony of the officers of those banks negative her claim in this respect. The court might well have believed that no such inheritance existed and that the money found in the bank account was the

joint earnings and profits of the parties. However, it did give her credit for this sum. Under the pleadings no specific finding as to each item about which defendant testified was necessary. It did find that they did agree to pool their earnings, to share equally in the accumulations, and that the money deposited in the banks was to be shared equally, as indicated. It thereafter gave plaintiff $6,876.90. By inference, at least, the court found the allegations of defendant's answer to be untrue. The evidence fully supports the findings and the findings support the judgment. The other claims made do not appear to be meritorious.

Judgment affirmed.

SHEPARD, J., and COUGHLIN, J. pro tem., concur.

166 Cal.App.2d 141

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William A. GARCIA, Defendant and Appellant.

Cr. 6288.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1958.

Hearing Denied Feb. 11, 1959.

Prosecution for burglary. The Superior Court, Los Angeles County, Richard C. Fildew, J., entered judgment of conviction of second degree burglary and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence was sufficient to sustain conviction and remark of trial judge as to defendant's prior convictions, after verdict had been returned and jurors dismissed did not constitute misconduct.

Affirmed.

1. Criminal Law ⇐1144(13), 1159(2)

Duty of reviewing court, where claim has been made as to insufficiency of evidence, is performed when it determines that there is substantial evidence tending to prove elements of crime and it must assume as true every fact that jury could have reasonably deduced from evidence and then determine whether such facts are sufficient to support the verdict, but it may not weigh the evidence or inferences to be drawn.

2. Burglary ⇐41(3)

Where defendant was prosecuted for burglary in the second degree, prosecution had burden of proving beyond reasonable doubt that defendant entered house with intent to commit theft, and this could be proven circumstantially. West's Ann.Pen. Code, § 459.

3. Burglary ⇐41(1)

Evidence sustained conviction of burglary in the second degree. Penal Code, § 459.

4. Criminal Law ⇐655(1)

In prosecution of defendant resulting in conviction of burglary in the second degree, judge's remark, after verdict had been returned and jurors dismissed, with respect to prior convictions of defendant which state did not file on, did not constitute misconduct. West's Ann.Pen.Code, § 459.

5. Criminal Law ⇐1031(4)

Failure to interpose plea of once in jeopardy in trial court effects a waiver of same and hence cannot be raised and considered upon appeal for the first time. West's Ann.Pen.Code, §§ 1016, 1017.

William A. Garcia, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

ASHBURN, Justice.

The record discloses no good grounds for this appeal. Appellant asserts (1) insufficiency of the evidence, (2) misconduct of the trial judge, and (3) former jeopardy. None of these points has substantial support in the record.

Defendant was charged by information with four counts of burglary and three prior convictions of felony,—two robberies and one violation of § 503, Vehicle Code. Originally represented by the public defender, a lawyer of defendant's own selection was substituted at the beginning of the trial and the prior convictions were thereupon admitted. Defendant did not testify or call any witnesses in his own behalf. The trial ended in acquittal with respect to all charges except count III, which alleged that defendant committed burglary (Pen.Code, § 459) on September 29, 1957, in that he willfully entered the house occupied by Alex Corsero and Anna Corsero with intent to commit theft. Convicted of that charge, the offense was fixed at second degree burglary and defendant sentenced to prison for the term prescribed by law, the court making no finding as to the prior convictions.

The evidence shows that Alex Corsero left his residence, 651 Alpine Street, Los Angeles, at about 9:30 p. m. on September 29, 1957, taking with him his entire family except a 16-year-old son (who was probably absent on a mission of his own). Upon return at about 10 or 15 minutes before 1:00 a. m., the Corseros found all lights burning; part of a cake which had been on the table was lying on the floor; the screen in a window of the daughter's bedroom was raised; there were blood spots on the floor and bed; the girl's purse, which had been left on the bed, was lying on the floor and the contents scattered; also on the floor was icing from the cake; upon a glass in the bathroom were dirt and blood spots and cake icing; the father's wrist watch was missing from the said bedroom but none of the contents of the purse had been taken. Mr. Corsero heard a noise outside; went into the patio and found defendant sitting on the edge of a bench; when asked, "What are you doing here?" he said, "I am sleeping. I am sleeping." Corsero grabbed defendant, who tried to get away, but with the help of a friend Corsero held him face down on the ground until the police arrived. When they asked what he was doing there defendant said, "I live here," according to the daughter, Anna Corsero. Officer Sedgeman testified that defendant would not tell where he lived and when asked what he was doing there said, "it was a cousin's house"; he refused to answer questions as to what he was doing in the area and how old he was. The officer observed that defendant had a minor injury to the little finger of his right hand and there was fresh dried blood on it; under the finger nails of three other fingers of the same hand were moist white particles. The cake was white and had finger marks on it. Defendant had alcohol on his breath but was not intoxicated; had no difficulty with speech or walk. A search of his person revealed no watch nor was it found elsewhere. As above stated, defendant did not testify and called no witnesses.

[1] The duty of a reviewing court concerning a plea of insufficiency of the evidence has been performed when it determines that there is substantial evidence tending to prove the material elements of the crime. It must assume as true every fact that the jury reasonably could have deduced from the evidence and then determine whether such facts are sufficient to support the verdict. It may not weigh the evidence or the inferences to be drawn. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. "The 'test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt.'" People v. Poindexter, 51 Cal.2d 142, 330 P.2d 763, 767.

[2, 3] The prosecutor had the burden of proving beyond reasonable doubt that defendant entered the house with intent to commit theft (Pen.Code, § 459; People v. Wilson, 158 Cal.App.2d 553, 555, 322 P.2d 966); but this can be proved circumstantially (People v. Henderson, 138 Cal.App.2d 505, 509, 292 P.2d 267; People v. Franklin, 106 Cal.App.2d 528, 530, 235 P.2d 402; People v. Smith, 84 Cal.App.2d 509, 512, 190 P.2d 941), as was done in the present instance. Consideration of the recited facts in the light of the stated rules and the strengthening influence of defendant's

own silence at the trial (see, People v. Adamson, 27 Cal.2d 478, 488, 165 P.2d 3; People v. Ashley, 42 Cal.2d 246, 268, 267 P.2d 271), leaves no doubt of the sufficiency of the evidence to support the verdict of guilty upon count III.

[4] The asserted misconduct of the trial judge finds no support in the record. After the verdicts were returned and the jurors had been dismissed,—indeed it was a month later, at the time of sentencing—remarks were made by the judge which appellant now claims to have been prejudicially erroneous. Defendant's attorney made a plea for probation and at its conclusion the following occurred: "The Court: I can only mention this, Mr. Tighe; I must surely compliment you on the job that you did with the jury here. *There were several other Counts that he was not convicted of. The report shows repeated typical offenses in his back record, that they did not file on because this was open and shut.* I have never seen a lawyer do a better job with trying a case *where the defendant was as guilty as this defendant was, and where there was absolutely no defense, and then to have the defendant convicted of second degree burglary. This man has at least six priors that we know of.*" Emphasis has been supplied to indicate the portions to which appellant directs attention. Obviously there was no misconduct here and the matter is not one which deserves further elaboration.

The claim of former jeopardy. There is nothing in the clerk's transcript or the reporter's transcript to suggest such a plea or contention. Both are wholly silent on the subject. Appellant now undertakes to say that he pleaded guilty to vagrancy (Pen. Code, § 647, subd. 12) based upon the occurrences of September 29, 1957, at the Corsero home, and that while he was serving a 30-day jail sentence the charge of burglary, previously dismissed, was renewed in the information which resulted in the conviction now under review, and that this worked double jeopardy.

[5] Section 1016, Penal Code, enumerates five kinds of pleas to an indictment or information, one of which is "once in jeopardy," and § 1017 says: "Every plea must be made in open court and may be oral or in writing, and must be entered upon the minutes of the court and must be taken down in shorthand by the official reporter if there is one present." Subdivision 3 of the section sets forth the form to be used. Failure to interpose this plea in the trial court effects a waiver of same and hence the claim cannot be raised and considered upon appeal for the first time. See, In re Harron, 191 Cal. 457, 467–468, 217 P. 728; In re Hess, 45 Cal.2d 171, 176, 288 P.2d 5; People v. Mims, 136 Cal.App.2d 828, 833, 289 P.2d 539; People v. Rogers, 150 Cal.App.2d 403, 415, 309 P.2d 949; Fricke, California Criminal Procedure (4th ed.), p. 154. Such is the situation at bar and the claim of former jeopardy, unsupported as it is, cannot be considered on appeal.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

Alberta WOLFSMITH, Plaintiff and Appellant,

v.

Paul King MARSH and Robert M. Barr, Defendants and Respondents.

Civ. 9323.

District Court of Appeal, Third District, California.

Dec. 22, 1958.

Rehearing Denied Jan. 19, 1959.

Hearing Granted Feb. 18, 1959.

Action for alleged malpractice in administering a hypodermic injection of sodium pentathol. The Superior Court, Lake County, Benjamin C. Jones, J., rendered judgment for defendants, and plaintiff appealed. The Third District Court of Appeal, Peek, J., held that question whether injuries resulting from injection were

*Opinion vacated 337 P.2d 70.

of type which ordinarily did not occur in absence of negligent administration of drug was for jury and refusal of instructions on doctrine of res ipsa loquitur was improper.

Reversed.

1. Appeal and Error ⇐928(4)

In determining whether evidence supported theory of proposed res ipsa loquitur instruction which court failed to give at request of plaintiff against whom judgment was rendered, reviewing court would view evidence in light most favorable to plaintiff.

2. Negligence ⇐121(2)

Conditions to be met before doctrine of res ipsa loquitur is applicable are that accident or injury must be of a kind which ordinarily does not occur in absence of someone's negligence, that it must be caused by an agency or instrument in the control of defendant and that it must not have been due to any voluntary action or contribution on part of plaintiff.

3. Negligence ⇐136(6)

Question whether plaintiff has produced sufficient evidence to permit jury to draw inference of negligence under doctrine of res ipsa loquitur is one which is within exclusive province of trier of facts.

4. Physicians and Surgeons ⇐18(9)

In action for alleged malpractice in administering a hypodermic injection of sodium pentathol, question whether injuries resulting from injection were of type which ordinarily did not occur in absence of negligent administration of drug was for jury.

5. Physicians and Surgeons ⇐18(10)

In action for alleged malpractice in administering a hypodermic injection of sodium pentathol, refusal of res ipsa loquitur instruction was improper.

6. Physicians and Surgeons ⇐18(10)

In action for alleged malpractice in administering a hypodermic injection of sodium pentathol, instructions upon presumption of due care, that mere happening of an accident did not support an inference of negligence and upon unavoidable accident were erroneous.

Russell P. Studebaker and Carl B. Munck, Oakland, for appellant.

Joseph F. Rankin and Richard G. Logan, Oakland, for respondent Marsh.

Peart, Baraty & Hassard and Alan L. Bonnington, San Francisco, for respondent Barr.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in favor of defendants in an action for alleged malpractice in administering a hypodermic injection of sodium pentathol.

[1] Plaintiff does not question the sufficiency of the evidence, but she does contend that the court erred in failing to give to the jury her proposed instruction upon the doctrine of res ipsa loquitur. Under such circumstances, "in determining whether or not the evidence supports the theory of the requested instruction an appellate court must view the evidence in the light most favorable to the party offering the instruction. Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 255 P.2d 795." Edgett v. Fairchild, 153 Cal.App.2d 734, 738, 314 P.2d 973, 975.

The record, when viewed in light of the rule set forth in the cited case, shows that plaintiff, a housewife, 47 years of age, while under the care of the defendant Doctor Barr, was admitted as a patient to the Lakeside Community Hospital in Lakeport to determine the cause of her obesity. Although she was nervous and in somewhat poor health, she suffered no particular pain or other discomfort. During the first 12 days of her hospitalization numerous laboratory tests and examinations were made. Finally Doctor Barr ordered that she be given basal metabolism tests. Be-

cause of her nervous condition and emotional makeup, the doctor ordered one such test to be given her under sodium pentathol and another without. In accordance with the custom at the hospital, any doctor who was free would act as anesthetist. In this case it was the defendant Doctor Marsh. According to plaintiff's testimony, Marsh first endeavored to inject the left arm, and being unsuccessful there, proceeded directly to inject the inner aspect of her right knee. This was denied by Marsh who testified that he attempted to make the injection in both arms but was unable to find a vein, although he did obtain some blood from the left arm. Her further testimony was that at the point where the injection was made there was visible to her a small "raised bubble place" which she characterized as a "varicose vein." She further testified that although she became a bit "fuzzy" following the injection, she did not go to sleep; that the pain in her leg was immediate; that she was unable to complain vocally because of the rubber apparatus in her mouth which was attached to the equipment being used; and that upon being returned to her ward she felt "excruciating" pain in her leg. Marsh testified that when he saw her approximately an hour after the injection she made no complaint of pain. Barr, however, testified that when he saw her at approximately the same time she was complaining of pain in her leg; that he examined it and found a reddened area around the site of the injection which was more firm than the surrounding tissue. She suffered constant pain in her leg during the next 63 days, 55 of which she spent in the Lakewood Community Hospital undergoing treatment in an attempt to effect a cure of her injury. Within two or three days of the injection, a thrombosis developed, and shortly thereafter, at the site of the injection, a condition characterized as a "slough ulcer" developed. From 1953, when she first went to Doctor Barr, plaintiff had been given sodium pentathol under his direction on at least four occasions and had shown no allergy to it, nor had she suffered harm from its injection. One of such injections had been given by Doctor Marsh, and all were given in the plaintiff's arm. Following her dismissal from the hospital in October of 1954, she continued to have extreme pain in her leg. In January of 1956 she engaged Doctor Kenney of Santa Rosa. He testified that his examination of plaintiff's leg disclosed a scar into which ran two visible varicose veins. He placed her in a hospital for nine days, during which time he and other doctors in consultation with him made a further study of her condition. He concluded that she had phlebitis, an inflammation of the vein; anterior tibial strain due to the manner in which she walked to alleviate the pain; and that at the point of the original injection she was suffering from causalgia, an "irritating type of pain * * due to some type of irritation within the blood vessel." Under the same anesthetic, which he injected into her arm, Doctor Kenney performed surgery to the leg and removed the vein, which was diagnosed as varicose, from the groin to the ankle and also removed the scar on her knee. At the same time an incision was made on her right flank and a piece of the sympathetic nerve removed.

Following submission of the case to the jury, and after some deliberation, it was requested the testimony and deposition of the defendant Marsh be re-read. The jury again retired and shortly thereafter returned with a verdict of nine to three in favor of the defendants.

[2] The conditions to be met before the doctrine of res ipsa loquitur is applicable are too well established to warrant citation of authority. They are that the accident or injury must be of a kind which ordinarily does not occur in the absence of someone's negligence; that it must be caused by an agency or instrument in the control of the defendant; and that it must not have been due to any voluntary action or contribution on the part of the plaintiff. There can be no question that in the present case the last two conditions have been met. It is

only the first that presents difficulty of disposition.

The testimony pertinent to the first condition may be summarized as follows: Doctor Barr testified under cross-examination that in the exercise of the standard of care in that community, a physician would not inject sodium pentathol into a varicose vein, the reason being that the walls of such veins do not have normal tensile strength; that they tear easily and do not have the resistence to irritants that normal veins have. Doctor Roberson, a local physician called by defendants, testified under cross-examination that only in an emergency would he inject a varicose vein, and that the standard of practice in the community forbade such an injection. Another defense witness, Doctor Wylie, did not share the apprehension expressed by the other experts concerning an injection directly into a varicose vein. The defendant Marsh testified that he had seen leakage and it had happened to him "* * * scores of times, but never a reaction like this patient had." Both Barr and Kenney testified that plaintiff's difficulties were the result of the injection. While one Doctor Woods testified that there was no doubt the ulcer was the result of some extravasation of the agent outside the vein, all of the expert testimony was to the effect that in such an injection one could expect some extravasation.

The question whether plaintiff's injuries resulting from the sodium pentathol injection are of the type which ordinarily do not occur in the absence of negligent administration of the drug necessitates two inquiries: (1) Has the plaintiff produced sufficient evidence to permit the jury to draw an inference of negligence? (2) In the light of the evidence offered, does the balance of probabilities favor the conclusion of negligence? As to the latter inquiry, as been stated: "That conclusion is not the court to draw, or to refuse to draw as there is enough to permit the draw it; and even though the court it itself infer negligence, it must still leave the question to the jury where reasonable men may differ as to the balance of probabilities." Res Ipsa Loquitur in California, Prosser, 37 Cal.L.Rev. 183, 194–195.

[3, 4] However, before the latter inquiry can be answered, there must be a determination of the question whether "plaintiff has produced sufficient evidence to permit the jury to draw the inference." While some confusion has existed in the cases as to whether such determination devolves upon the court or the trier of fact, it appears to us that the decision in Seneris v. Haas, 45 Cal.2d 811, 827, 291 P.2d 915, 924, 53 A.L.R. 2d 124, in which the court states, "the existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved," clearly indicates that the question whether the plaintiff has produced sufficient evidence to permit the jury to draw an inference of negligence is one which is within the exclusive province of the trier of fact.

[5] Consequently, upon the authority of the Seneris decision, we are compelled to conclude that the trial court erred in refusing instructions on res ipsa loquitur.

[6] Although unnecessary to this opinion, yet in view of the possibility of a new trial, we note that instructions were given upon the presumption of due care; that the mere happening of an accident does not support an inference of negligence; and upon unavoidable accident. Such instructions, under the facts and circumstances of this case, were likewise erroneous. See Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 323 P.2d 391; Maertins v. Kaiser Foundation Hospitals, 162 Cal.App.2d 661, 328 P.2d 494; Brenner v. Beardsley, 159 Cal.App.2d 304, 323 P.2d 841; Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500.

The judgment is reversed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

166 Cal.App.2d 194

KAORU KADOTA, an Incompetent, by his Guardian ad litem, Ernest O. Meyer, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.

Civ. 17941.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1958.

Action in which plaintiff appeals from judgment of the Superior Court, City and County of San Francisco, Theresa Meikle, J., dismissing action. The District Court of Appeal, Dooling, J., held that where before stipulated time of trial had expired a jury was impaneled and sworn, action had been brought to trial within time fixed by written stipulation and it was error for court to dismiss action under provision of statute requiring any action not brought to trial within five years after filing thereof to be dismissed except where parties have stipulated in writing that the time may be extended.

Reversed.

Dismissal and Nonsuit ⇐60(2)

Where parties entered into written stipulation extending time of trial until a certain date which was more than five years after action had been filed, and before expiration of last day as provided in stipulation a jury was impaneled and sworn and then court was asked to continue case for several days because of illness of counsel, action was "brought to trial" within time fixed by written stipulation and it was error for court to dismiss action under statute providing for mandatory dismissal of any action which has not been brought to trial within five years after filing of same, except where parties had stipulated in writing that time might be extended. West's Ann.Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Brought to Trial".

Fredricks & Sullivan, Benjamin M. Davis, San Francisco, for appellant.

Dion R. Holm, City Atty., C. Wesley Davis, Deputy City Atty., San Francisco, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment of dismissal. The complaint in this action was filed on September 11, 1951. By written stipulation the time of trial was extended until May 11, 1957. On May 9, 1957, the parties regularly appeared in court for trial and a jury was impaneled and sworn. On May 10, 1957, which was a Friday, counsel for plaintiff asked the court to continue the case to Monday, May 13, because, as he stated, he was too ill to proceed with the trial. Counsel for plaintiff was granted a continuance until May 13 in the face of a statement by counsel for defendant that if such continuance was granted counsel for defendant would move for a dismissal of the action under the mandatory five-year provision of section 583, Code of Civil Procedure. Such motion was made on May 13, 1957, and granted by the court.

The pertinent provision of section 583 reads:

"Any action * * * shall be dismissed * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended * * *"

Appellant argues that because the last day of the stipulated extension fell on a Saturday, a non-judicial day, he had in any event until the next Monday, May 13, to bring the action to trial under section 583. We do not find it necessary to decide this question.

The cases are clear that where the trial is before the court, without a jury, the action is not ordinarily "brought to trial" until at least one witness is sworn and gives some testimony. (16 Cal.Jur.2d, Dismissal, § 33, p. 188; § 35, pp. 192–194.) However the question has apparently never been

presented whether under section 583, where the case is set for trial before a jury, the case is "brought to trial" when the parties commence the examination of prospective jurors and the impanelment of the jury.

Our Supreme Court in Silcox v. Lang, 78 Cal. 118, 124, 20 P. 297, 301, said: *"The impaneling of a jury is a part of the trial,* within the meaning of the Code, and any ruling of the court with respect thereto, if erroneous, is an error of law occurring at the trial * * *" (Emphasis ours.) This case was decided in 1889 and section 583 was not adopted until 1905. (Stats. 1905, p. 244, ch. 271.) We are entitled to assume that in using the language "brought to trial" the Legislature was aware of this previous judicial determination that the impanelment of the jury is a part of the trial. (45 Cal.Jur.2d, Statutes, §§ 101–102; pp. 615–617.)

The holding of our court in Silcox v. Lang, supra, that the impanelment of the jury is a part of the trial not only comports with the common understanding among lawyers and judges, but finds support in the rulings of the courts of other jurisdictions in a variety of circumstances. In the following cases, both civil and criminal, the courts have held that the impanelment of the jury is a part of the trial. Civil cases: Wilhite v. Agbayani, 2 Ill. App.2d 29, 118 N.E.2d 440, 442; Meyer v. Welsbacher, 80 Ohio App. 200, 75 N.E.2d 89, 90; Inter-Ocean Casualty Co. v. Copeland, 184 Ark. 648, 43 S.W.2d 65, 67; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 188; Criminal cases: Hopt v. Utah, 110 U.S. 574, 578, 4 S.Ct. 202, 28 L.Ed. 262; Caples v. State, 3 Okl.Cr. 72, 104 P. 493, 502 et seq.; Henry v. State, 10 Okl.Cr. 369, 136 P. 982, 986; State v. Neal, 350 Mo. 1002, 169 S.W.2d 686, 693; State v. Crocket, 90 Mo. 37, 1 S.W. 753, 755.

Under the facts of this case we are satisfied that the action was brought to trial within the time fixed by the written stipulation of the parties, and it was error for the court to dismiss it under the five-year provision of section 583.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.

Alvin A. IMMEL et al., Contestors and Appellants,

v.

Ray B. LANGLEY, Contestee and Respondent.*

Civ. 6112.

District Court of Appeal, Fourth District, California.

Dec. 19, 1958.

Rehearing Denied Jan. 15, 1959.

Hearing Granted Feb. 11, 1959.

Election contest. The Superior Court, Imperial County, Elmer W. Heald, J., entered judgment dismissing proceeding and contestors appealed. The District Court of Appeal, Mussell, J., held that where officers canvassing returns of election for member of board of county supervisors had certified results and had declared contestee elected and a certificate of election had been issued by county clerk but contestors had alleged errors therein sufficient to change result and on recount of ballots a tie vote resulted, court could not render judgment annulling certificate of election nor declare either candidate elected in view of statute providing that in any election, except that for governor or lieutenant governor, the election board shall determine a tie vote for candidates voted for wholly within one county, and judgment dismissing contest was proper.

Affirmed.

Elections ⇐303

Where officers canvassing returns of election for member of board of county

* Opinion vacated 338 P.2d 385.

supervisors had certified results and had declared contestee elected and a certificate of election had been issued by county clerk but contestors alleged errors therein sufficient to change result and on recount of ballots a tie vote resulted, court could not render judgment annulling certificate of election nor declare either candidate elected in view of statute providing that in any election, except that for Governor or Lieutenant Governor, the election board shall determine a tie vote for candidates voted for wholly within one county. West's Ann. Elections Code, §§ 2743–2745, 8511(e), 8512, 8514, 8556, 8557, 8570, 8571, 8701.

Horton, Knox & Carter, El Centro, for appellants.

Dickenson, Sattinger & McKee and Beard & Wien, El Centro, for respondent.

MUSSELL, Justice.

This is an election contest involving the office of County Supervisor, Fifth Supervisorial District in the county of Imperial. The proceeding was brought under the provisions of section 8511, subd. (e), of the Elections Code, which provides, as far as is material here, as follows:

"8511. Grounds for contest. Any elector of a county, city, or of any political subdivision of either, may contest any election held therein, for any of the following causes: * * *

"(e) That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected."

The agreed statement on appeal herein shows the following facts: On or about the 3rd day of June, 1958, an election was held to elect a member of the board of supervisors from the fifth supervisorial district in the county of Imperial, State of California. There were only two candidates named on the ballot at said election for said office, namely, J. R. Snyder and R. B. Langley. After said election the votes were canvassed and showed that J. R. Snyder received a total of 774 votes, and R. B. Langley received a total of 788 votes. On the 16th day of June, 1958, the duly appointed officers canvassing the returns of said election certified the result of the election and declared that R. B. Langley, contestee herein, was elected to the office of supervisor for the fifth supervisorial district. A certificate of election was issued to contestee on July 2, 1958, by the county clerk. On or about the 9th day of July, 1958, contestors herein filed a "Statement to Contest Election Proceedings" under Division 10, Chapter 2, of the Elections Code of the State of California (Elec. Code, sec. 8511, subd. (e). The statement to contest alleged in part that "the precinct boards in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election", as to any person who has been declared elected. Pursuant to said statement to contest, a hearing was scheduled in accordance with law, and on the 21st day of August, 1958, a recount of the ballots cast at all the precincts was had before the above entitled court, with all interested parties being present, and contestors and contestee were represented by counsel. Upon completion of the recount, the court found that J. R. Snyder received a total of 808 legal votes and R. B. Langley received a total of 808 legal votes, a tie vote.

Thereafter, on the 29th day of August, 1958, the court filed its findings of fact and conclusions of law. They state in part that the court found J. R. Snyder received 808 votes and R. B. Langley received 808 votes, and a tie vote. The court concluded that the contestors take nothing by their proceedings and that the same be dismissed. On August 29, 1958, the court signed and filed its judgment based on said findings of fact and conclusions of law, providing therein that the contestors take nothing by their proceedings and that the same be dismissed.

Contestors, who appeal from the judgment, contend that the trial court should

have rendered a judgment annulling the declaration and certificate of election and decreeing that neither candidate was elected.

In McClintock v. Abel, 21 Cal.App.2d 11, 68 P.2d 273, plaintiff and defendant were the only candidates for the office of supervisor of Kern County whose names appeared on the ballot in the primary election. After the canvassing of the returns by the board of supervisors it appeared that defendant had received a majority of all votes cast for that office. On September 8, 1936, a certificate of election was issued to him and on October 7, 1936, plaintiff filed his contest of election. On appeal it was held that the effect of section 2¾ of article 2 of the Constitution, which provides in part as follows: "Any candidate for a judicial, school, county, township, or other nonpartisan office who at a primary election shall receive votes on a majority of all the ballots cast for candidates for the office for which such candidate seeks nomination, shall be elected to such office.", has been to transmute a primary election, held for the purpose of nominating candidates, into a general election of those nonpartisan candidates receiving in the primary a majority of all votes cast for their respective offices; that section 1111 et seq. of the Code of Civil Procedure (now Elections Code, sections 8511 et seq.) sets up the legal machinery for the contest of an election to a public office; that this chapter of the code concerns itself with the contest of elections and has nothing to do with the contest of a nomination in a primary election.

In Doran v. Biscailuz, 128 Cal.App.2d 55, 274 P.2d 691, 695, in an action instituted to contest the right of the sheriff of Los Angeles County to the office to which he had been elected in the primary election held on June 8, 1954, the court held that "An elector may contest a general election on the ground that the person who has been declared elected to an office was not at the time of the election eligible to that office (Elections Code, § 8511, subd. (b).) The procedure to be followed in the contest is set out in the Elections Code, §§ 8530 and 8531." The above cases are cited and commented upon in County of Alameda v. Sweeney, 151 Cal.App.2d 505, 511, 312 P. 2d 419.

Section 8556 of the Elections Code provides that after hearing the proofs and allegations of the parties the court shall pronounce judgment in the premises either confirming or annulling and setting aside the election. If it appears that a person other than the defendant has the highest number of votes, the court must declare that person elected (Elec. Code, sec. 8557.) Section 8570 provides that the person declared elected by the superior court is entitled to a certificate of election to be issued by the county clerk, and section 8571 provides that if the clerk has issued an election certificate to any person other than the one declared elected by the court, such certificate is annulled by the judgment of the court.

In 17 Cal.Jur.2d, section 212, page 477, it is said that under the above provisions a contestant cannot have himself declared elected unless he proves that he received the highest number of votes, citing Keller v. Chapman, 34 Cal. 635, and Shinn v. Heusner, 91 Cal.App.2d 248, 204 P.2d 886. In the latter case respondent Heusner, who was the incumbent supervisor of the third supervisorial district in El Dorado County, was opposed for reelection by appellant Shinn at an election held June 1, 1948. The final count gave Heusner 431 votes, including 32 by absentee ballots, and gave Shinn 425 votes, including 4 by absentee ballots. The contestant contended that certain of the absentee ballots should not have been counted, and that if the same were eliminated he would be the winner by 22 votes. Judgment for the contestee was affirmed and the court said on page 251 of 91 Cal.App.2d, on page 888 of 204 P.2d:

> "While the prayer of plaintiff's complaint is that the court annul the absentee ballots submitted by Heusner, that the latter be debarred from holding public office, and that plaintiff be declared elected, if the real purpose

of the action is to secure the position for plaintiff, the debarring of respondent would not have the effect of entitling plaintiff to such office unless enough absentee ballots were annulled that it could be said that contestant received the majority of the votes cast. See Bush v. Head, 154 Cal. 277, 284, 97 P. 512; People [ex rel. Drew] v. Rodgers, 118 Cal. 393, 396, 46 P. 740, 50 P. 668; Campbell v. Free, 7 Cal. App. 151, 153, 93 P. 1060; Budway v. Hollibaugh, 68 Cal.App.2d 473, 476, 157 P.2d 30."

It is further stated in said section 212 that where a contest results in a tie vote, the election is not annulled or the contestant elected, since he has not obtained the highest number of votes, but the judgment is that the proceeding be dismissed and the contestant take nothing.

Section 8512 of the Elections Code provides as follows:

"Irregular and improper conduct of judges. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the defendant to be declared either elected or one of those receiving an equal and highest number of votes where no one person has received the highest number of votes, when he had not received that number of legal votes."

Section 8514 of the same code provides the following:

"Illegal vote. An election shall not be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person."

Snibley v. Palmtag, 128 Cal. 283, 60 P. 860, was an election contest for the office of supervisor of San Benito County under section 1111 et seq. of the Code of Civil Procedure (now 8511 et seq. of the Elections Code). The trial court found that there was a tie vote. The ground of contest was "on account of illegal votes". The court said:

"The proceeding is statutory, and can be inaugurated in four different cases, stated in section 1111, Code Civ. Proc. The fourth ground is, 'On account of illegal votes.' That some other person received more votes than the person declared elected, or an equal number with such person, is not made a ground of contest. Section 1114, [of the Code of Civil Procedure] reads as follows: 'Nothing in the fourth ground of contest specified in section eleven hundred and eleven, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.'

"Section 1123 of the Code of Civil Procedure reads as follows: 'If in any case it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected.' Under these provisions it is obvious that the judgment annulling the election is unauthorized by the statute, or by the facts found. The judgment should have been that the contestant take nothing by the proceeding, and it be dismissed, and the cause is remanded, with direction that the superior court make such modification."

In this connection the Code Commission notes on section 8511 (West's Annotated Codes, Elections Code) are in part as follows:

> "Why subdivision (b) should not apply in contesting elections resulting in a tie, does not appear, but under C.C. P. 1124 (now Elec.Code, secs. 8511, 8514) it clearly does not. As the law now stands, subdivision (e) also does not apply in the case of tie votes. This may have been the result of an oversight. When C.C.P. 1124 was enacted, C.C.P. 1111 contained only four grounds of contest. When C.C.P. 1111 was amended in 1935 (Stats.1935, c. 406, p. 1458) it may be that C.C.P. 1124 would have been amended had it been called to the attention of the Legislature."

In Wright v. Ashton, 143 Cal. 544, 77 P. 477, in an election contest involving the office of a justice of the peace, the contest was instituted on the ground that the boards of election in each of the two precincts of the township had been guilty of malconduct, in that they had miscounted the ballots, and that in each of the precincts illegal votes had been given to the contestee, Frank Ashton. The case was submitted to the court for decision solely on the recount of the ballots. The court found thereon that there were 265 legal votes cast for said office at said election, of which Ashton received 79, Wright 79, Simmons 77, and Wixon 30. Judgment was thereupon entered that Wright take nothing by the action, and that the action be dismissed. This judgment was affirmed on appeal.

Section 1112 of the Code of Civil Procedure (now section 8512 of the Elections Code) then read as follows:

> "No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the *highest* number of legal votes."

It was appellant's claim that based on this section the election of the contestee should have been annulled. In construing the then applicable code sections the court said [143 Cal. 544, 77 P. 478]:

> "The statute provides that the right of any person declared elected may be contested, first, on account of the malconduct of election officers, and, fourth, on account of illegal votes. Code Civ.Proc., § 1111, subds. 1, 4. Section 1114, Code Civ.Proc., provides that 'nothing in the fourth ground of contest specified in section 1111 is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes *below* the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.' There is apparent no sound reason why the election should be annulled where one of two persons receiving an equal and the highest vote has been procured to be declared elected because of the irregularity or improper conduct in the proceedings of the judges of election, and not be annulled when such result was procured by illegal votes. Yet such would be the result if appellant's construction of section 1112, Code Civ.Proc., in this regard, be correct, for there can be no question as to the proper construction of section 1114, Code Civ.Proc. If the concluding provision of section 1112, Code Civ. Proc., viz., 'when he had not received the highest number of legal votes,' be read as meaning 'when he had not received as many votes as were given to some other person'—a construction

supported by section 1067, Pol.Code—the section is brought into harmony with section 1114, Code Civ.Proc., the language of which latter section strongly indicates the intention of the Legislature that an election shall not be set aside for either malconduct on the part of the judges, or illegal votes, where the true result can be, and is with certainty ascertained by the trial court, unless it appears that another person than the one declared elected has in fact received a higher number of legal votes.

"This much has been said in support of the construction already given to these sections by this court, for it is undoubtedly settled by the decisions that where the question on an election contest is as to whether the person declared elected did in fact receive the highest number of legal votes, the election will not, under our statutory provisions, be annulled unless it appears that another person received a higher vote."

When Wright v. Ashton, supra, was decided subdivision (e) of section 8511 of the Elections Code was not a ground for contest of an election and the court was there concerned with a contest based upon malconduct of the boards of election in that they had miscounted the ballots. Then, as now, section 1114 of the Code of Civil Procedure (now section 8514 of the Elections Code) provided that an election should not be set aside on account of illegal votes unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person. In the instant case, as in the Wright case, supra, 143 Cal. at page 547, 77 P. at page 479, "There is apparent no sound reason why the election should be annulled where one of two persons receiving an equal and the highest vote has been procured to be declared elected because of the irregularity or improper conduct in the proceedings of the judges of election, and not be annulled when such result was procured by illegal votes."

Section 8556 of the Elections Code provides that the court pronounce judgment either confirming or annulling and setting aside the election and no provision is made therein to apply when the election results in a tie vote. Since J. R. Snyder, the candidate opposing Langley failed to prove that he received the highest number of votes cast at said election he could not have himself declared elected. 17 Cal.Jur.2d, sec. 212, p. 477, supra. While it appears that an election may be contested on the ground stated in subdivision (e) of said section 8511 of the Elections Code, no provision is made for annulling the election in the event of a tie vote. Contestors argue that if the trial court had given its judgment annulling the certificate of election and declaring a tie vote, the names of both candidates would have been placed on the ballots as candidates for the supervisorial office at the ensuing election, all in accordance with sections 2743 to 2745, inclusive, of the Elections Code. However, these sections relate to nominations at a primary election. Section 8701 of the Elections Code, applying to elections other than primary elections, provides that in any election, except that for Governor or Lieutenant Governor, the election board shall determine a tie vote for candidates voted for wholly within one county. This proceeding does not involve the annulment of the election. Since the trial court found that neither candidate received a majority of the votes cast at said election, neither candidate could be declared elected by the court and the judgment dismissing the proceedings was proper.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

166 Cal.App.2d 334

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George E. HURLBURT, Defendant and Appellant.

Cr. 3535.

District Court of Appeal, First District, Division 1, California.

Dec. 18, 1958.

Hearing Denied Feb. 11, 1959.

Prosecution for violation of section 288 of Penal Code. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Peters, P. J., held that trial court erred in ruling that defense counsel could neither cross-examine complaining witness nor introduce testimony on question as to whether witness had, in the past, made similar charges against other men, which charges witness had admitted were false or which were proven to be false.

Reversed.

1. Witnesses ⇐344(2)

Generally, specific acts of wrongdoing may not be used to impeach a witness. West's Ann.Code Civ.Proc. § 2051.

2. Witnesses ⇐344(2)

Rule declared by statute authorizing impeachment of witness by evidence that general reputation for truth, honesty or integrity is bad but not by evidence of particular wrongful acts, is a sound one but is not absolute, and in sex cases of various sorts, exceptions to its application have been recognized. West's Ann.Code Civ.Proc. § 2051.

3. Criminal Law ⇐768(1), 1173(2)

It is reversible error to fail to instruct that because sex charges are easy to make and hard to disprove testimony of prosecutrix must be carefully scrutinized, and even qualifying normal instruction by stating that nevertheless if jury believes that defendant is guilty beyond a reasonable doubt, a guilty verdict should be returned, is reversible error.

4. Witnesses ⇐268(1)

Defense should be allowed the widest latitude in cross-examination of prosecutrix in sex cases. West's Ann.Code Civ.Proc. § 2051.

5. Witnesses ⇐352

Where issue goes beyond general reputation of witness for truth, honesty, or integrity, and involves truthfulness of basic fact in issue evidence of particular wrongful acts may be admissible. West's Ann.Code Civ.Proc. § 2051.

6. Infants ⇐20

Rape ⇐40(2)

Evidence of specific acts of prior unchastity of a complaining witness in a statutory rape charge or case involving violation of section 288 of Penal Code is not admissible because consent is not involved, but if consent is in issue as in a forcible rape charge, evidence of prior particular acts of unchastity is admissible on issue of consent. West's Ann.Code Civ. Proc. § 2051; West's Ann.Pen.Code, § 288.

7. Witnesses ⇐372(1)

An attitude of animosity toward defendant in a sex case by prosecutrix may be shown.

8. Criminal Law ⇐338(1)

Total value and relevancy of evidence does not necessarily determine its admissibility.

9. Witnesses ⇐349, 352

In prosecution for violation of section 288 of Penal Code, trial court erred in refusing defense counsel opportunity of either cross-examining witness or introducing evidence on question as to whether witness had, in the past, made similar charges against other men which were later admitted by witness to be false or which were later proven to be false. West's Ann.Pen.Code, § 288; West's Ann.Code Civ.Proc. § 2051.

Stanley Brooks, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

In a prosecution for a violation of section 288 of the Penal Code the trial court ruled that defense counsel could neither cross-examine the complaining witness nor introduce evidence on the question as to whether the witness had, in the past, made similar charges against other men, which charges the witness had admitted were false or were proved to be false. In our opinion such rulings were erroneous, and under the facts, prejudicial.

As is usual in such cases, the prosecution was forced to rely primarily on the testimony of the complaining witness to establish its case, while the defense, by necessity, was forced to rely almost entirely on the denials of the defendant. Thus, the credibility of the complaining witness was one of the basic issues presented to the jury.

The alleged victim, Maria, on November 23, 1957, the date of the charged offense, was nine years old. On that Saturday evening Maria's mother left Maria and several younger children with the defendant at his apartment for him to care for while the mother went out for the night. When the mother brought Maria and the other children to defendant's apartment, the defendant was in the kitchen of his residence having drinks with his newly married daughter, her husband, and a neighbor. Defendant frankly admitted that he had had several drinks that evening, but there is no evidence that he was intoxicated. Shortly after Maria's mother left, the daughter and her husband left on a date, intending to return home later that evening, and the neighbor returned to her home. Almost immediately thereafter three of the youngest children were put to bed in an upstairs bedroom by Maria and defendant. Maria then undressed, put on her nightgown, and went to bed. Defendant returned downstairs and prepared to retire on the sofa. Maria had difficulty getting to sleep and came downstairs to get something to eat and to watch television. In a short time the electricity went off. It is an admitted fact that there was an electrical failure in the area that night which lasted for some time.

When the lights went out Maria returned upstairs and went to sleep. Shortly after the lights went out a neighbor called at the defendant's apartment and borrowed a candle from defendant, remaining some time to talk to defendant. The defendant was downstairs when the witness arrived and gave her the candle.

Maria testified that while the lights were still out she was awakened by the defendant who was pulling up her nightgown, and that then the defendant committed the indecent acts upon her body which constitute the basis of the 288 charge. Maria also testified that while the defendant was committing these acts she told him that she had to go to the lavatory, that he desisted, and that when she returned from the bathroom he made no attempt to resume the acts, but returned downstairs in search of cigarettes.

The time intervals are not too clear from the testimony, but apparently before the acts are supposed to have occurred the adult daughter of defendant had telephoned stating that she and her husband would be right home. Apparently the lights went out about 10:40 and the defendant's daughter and her husband arrived home about 10:45 p.m. Maria admitted that when the daughter came home, Maria got up and kissed her and talked to her, and, although she was frightened by what had happened, she said nothing about it.

It also appears that Maria's mother came to defendant's apartment Sunday, and that she and Maria spent that day with defendant and spent Sunday night at his residence. Admittedly Maria, on Sunday, said nothing to her mother about what she claims had happened on Saturday evening. Complaint was first made on Monday

morning when Maria and her mother returned to their home.

The defendant flatly denied the testimony of Maria and attempted to account for all of his time and actions on the night in question.

During the cross-examination of Maria counsel asked the witness whether she had not made prior false accusations of a similar nature against other men. The precise questions asked, the objections and the court rulings were as follows:

"Q. Maria, have you ever lied to your mother concerning a thing of this nature? A. No.

"Mr. Rudden [Prosecutor]: Incompetent, irrelevant and immaterial.

"The Court: Just a minute.

"Mr. Rudden: And it is objected to for that reason.

"The Court: Yes, it is objectionable. The objection will be sustained and the answer will be stricken and the jury instructed to disregard the answer. * * *

"Q. Now, Maria, do you recall telling Betty and your mother some time ago concerning the identical same facts as these facts you have testified to?

"Mr. Rudden: Objected to as improper cross-examination, compound, complex and calling for the opinion and conclusion of the witness.

"The Court: Yes, I think I'll have to sustain the objection, counsel.

"Mr. Perasso [Defendant's counsel]: On what basis, your Honor?

"The Court: On all of the grounds. * * * The Court will sustain the objection on all the grounds offered. If you want to cross-examine the witness or impeach her you are certainly entitled to do that, but I do not think that the question is proper at all.

"Mr. Perasso: I will rephrase it.

"The Court: Or, if you want to establish a motive there is a way to do that too.

"Mr. Perasso: Q. Did you once before, Maria, accuse someone else of the very same thing?

"Mr. Rudden: Incompetent, irrelevant and immaterial.

"The Court: The objection will be sustained.

"Mr. Perasso: I won't pursue that at this moment."

Later in the trial, upon further cross-examination of this witness, the defendant's counsel attempted to establish the fact that the complaining witness had prior knowledge of the nature of the charge to which she had testified. Objections were properly sustained to these questions, whereupon counsel made an offer of proof. The principal offer was to show that the complaining witness had prior knowledge of the nature of the offense in question, but counsel also offered to show that the witness had made similar charges in the past which had proved to be false. Thus, counsel offered to show that in the immediate past she had made an identical charge against Bud Calleen, whom her mother had "been running around with or going with," and "she made the identical statement at a prior time against another person after which she said it was a lie." The trial court sustained the prosecuting attorney's objection, stating "I think you are entitled to proceed to attack the girl's reputation in other ways, but not by a particular act or anything of that sort."

[1, 2] The sole point urged on this appeal is that it was error to exclude evidence of the fact that the complaining witness had made prior false accusations that other men had committed acts against her similar to those charged against the defendant. Respondent supports the ruling by contending that specific acts of wrongdoing may not be used to impeach a witness. This is undoubtedly the general rule, and is codified in this state. Section 2051 of the Code of Civil Procedure provides: "A witness may be impeached by the party against whom he was called, * * * by evidence that his general reputation for

truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation." The rule declared by this section is a sound one, but it is not absolute. In sex cases of various sorts, exceptions to its application have been recognized. As early as 1856 the California Supreme Court referred with approval to the language first used by Lord Hale many years before to the effect that no charge is more easily made and more difficult to disprove than a sex charge, particularly if made by a young child. The court said that "In such cases the accused is almost defenceless." People v. Benson, 6 Cal. 221, 223.

[3] Of course, it has been the rule in this state for many years that it is reversible error to fail to instruct that because such charges are easy to make and hard to disprove the testimony of the prosecutrix must be carefully scrutinized. People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; People v. Garrett, 27 Cal.App.2d 249, 81 P.2d 241. In fact, even qualifying the normal instruction by stating that, nevertheless if the jury believes that the defendant is guilty beyond a reasonable doubt a guilty verdict should be returned, is reversible error. People v. Lyons, 47 Cal.2d 311, 303 P.2d 329.

[4] Several times the California courts have insisted that the defense be allowed the widest latitude in the cross-examination of the prosecutrix in such cases. People v. Baldwin, 117 Cal. 244, 49 P. 186; People v. Goldberg, 110 Cal.App.2d 17, 242 P.2d 116; People v. Vaughan, 131 Cal.App. 265, 21 P.2d 438.

These cases are cited not because they are direct authority on the issue here presented but because they indicate that the California courts have not been blind to the possibility that a prosecutrix may be untruthful in such cases, and that a defendant is practically powerless to defend against such a charge. Dean Wigmore felt so strongly about the problem that he recommended that the rule be, by statute if necessary, that the complaining witness, in all such cases, should be subjected to a psychiatric examination. III Wigmore on Evidence, § 924a, p. 459.[1]

[5, 6] The rule contained in section 2051 is a sound one, and exists in most jurisdictions. It is that, while a witness may be impeached "by evidence that his general reputation for truth, honesty, or integrity is bad," evidence of specific acts of bad character, except as to conviction of a felony, is generally not admissible. But where the issue goes beyond general reputation and involves the truthfulness of the basic fact in issue, evidence of particular wrongful acts may be admissible. Thus, evidence of specific acts of prior unchastity of a complaining witness in statutory rape or 288 cases is not admissible, because consent is not involved. People v. Harlan, 133 Cal. 16, 65 P. 9; People v. Benc, 130 Cal. 159, 62 P. 404; People v. Johnson, 106 Cal. 289, 39 P. 622; People v. Bell, 96 Cal.App. 503, 274 P. 393; People v. Williams, 52 Cal.App. 609, 199 P. 56. But if consent is the issue, as it is in a forcible rape charge, evidence of prior particular acts of unchastity is admissible on the issue of consent. People v. Murphy, 53 Cal.App. 474, 200 P. 484; People v. Kruvosky, 53 Cal.App. 744, 200 P. 831; People v. Walker, 150 Cal.App.2d 594, 310 P.2d 110; People v. Battilana, 52 Cal.App.2d 685, 126 P.2d 923.

1. One state, at least, has held that it was error not to submit the prosecutrix to a psychological examination to test her truthfulness. The state is Indiana. Burton v. State, 111 N.E.2d 892. This case was later overruled in Wedmore v. State, Ind., 143 N.E.2d 649; see also People v. Stice, 161 Cal.App.2d 610, 327 P.2d 201, where the defendant's motion in a 288 case to have the prosecutrix subjected to a psychiatric examination was denied and the appellate court held the "matter was one within the discretion of the trial judge." 161 Cal.App. 2d at page 613, 327 P.2d at page 203.

On the specific question of whether specific acts of making false sex charges is or is not admissible, Dean Wigmore (III Evidence, § 963, p. 519) indicates that there is a conflict of authority.[2] There is substantial authority that such evidence is admissible not simply to impeach the prosecutrix, but as independent evidence that the charged crime was not in fact committed. People v. Evans, 1888, 72 Mich. 367, 40 N.W. 473, appears to be the leading case. In that case the defendant was charged with the rape of his 14-year old daughter. Counsel asked the prosecuting witness (40 N.W. at page 477): "Rose, haven't you made other charges of this same nature against other men that were perfectly innocent?" An objection was interposed, to which the trial court ruled: "You may ask the question, but you will have to accept her statement," whereupon the witness answered in the negative. Later another witness was asked (40 N.W. at page 478): "Did you ever have any conversation with Rose about a charge she made at one time against George Evans having made a similar assault upon her?" Answer: "Yes, sir; she said ———" An objection was sustained and the trial court did not allow the question or answer. An offer of proof was made by defendant's counsel that the prosecuting witness had made similar accusations against a number of men, family members and others. The Michigan Supreme Court reversed, stating (40 N.W. at page 478): "If she was accustomed, and had on numerous occasions, as claimed by counsel for * * * [defendant], made statements charging, not only her brothers, but numerous other men of that community, with other similar offenses, and then admitted the falsity of such charges, it would have a tendency to show a morbid condition of mind or body, and go a long way in explaining this charge, which, under the circumstances, and the surroundings shown to exist, seems almost unaccountable."

The Evans case was re-affirmed in People v. Wilson, 170 Mich. 669, 137 N.W. 92, 41 L.R.A.,N.S., 216. There at the trial the question was posed to the prosecutrix (137 N.W. at page 92): "haven't you made the same complaint against a number of other men?" An objection was sustained on the grounds that a witness may not be impeached by showing her unchastity. In reversing, the court said (137 N.W. at page 93): "Counsel for the people cite cases to the effect that other specific acts of unchastity cannot be shown in such a case; also, that the girl's general reputation for unchastity is not involved in a case where the girl is under the age of legal consent. We agree * * * but * * * do not understand by the line of evidence offered that any attack was being made upon the chastity of this girl. As cross-examination, as laying the foundation for collateral impeachment, and as an offer of independent evidence relating to similar charges and their denials, we are constrained to hold that the court erred in excluding the offered testimony." See also State v. Poston, 199 Iowa 1073, 203 N.W. 257; Dawes v. State, 34 Okl. 225, 246 P. 482. There are contrary cases. See Peters v. State, 103 Ark. 119, 146 S.W. 491, and cases cited in III Wigmore on Evidence, § 963, note 2, p. 520.

[7] The specific problem does not seem to have been fully discussed by the California cases, but there are analogous situations where evidence of specific wrongful acts has been held admissible. Thus, in a forcible rape case, it has been held that the question asked of the prosecutrix if she had not conspired "to put up jobs" on defendant in the past should have been allowed as laying the foundation for independent evidence that she had. People v. Lambert, 120 Cal. 170, 52 P. 307. In People v. Gardner, 98 Cal. 127, 32 P. 880, a statutory rape case, it was held that testimony of a third party witness to the effect that in the past the prosecutrix was "put-

2. He indicates that such testimony is offered not as to general reputation but to indicate the state of mind of the prosecutrix which "partakes of the nature of corruption and of bias."

ting up jobs" on defendant to extort money from him would have been admissible to show interest or prejudice had a proper foundation for the question been laid. In People v. Adams, 92 Cal.App. 6, 267 P. 906, a forcible rape case, it was held that it was proper for the defendant to show that a conspiracy existed between the prosecutrix and others to extort money from the defendant. It is also settled that an attitude of animosity toward the defendant by the prosecutrix may be shown. People v. Reyes, 194 Cal. 650, 229 P. 947, a 288 case; see also People v. McAfee, 82 Cal. App. 389, 255 P. 839, an incest case; People v. Williams, 52 Cal.App. 609, 199 P. 56, a statutory rape case. It has also been held that the fact the prosecuting witness has been coached is relevant on the basic issue of the truth of the charge. People v. Watrous, 7 Cal.App.2d 7, 45 P.2d 380—a 288 case involving a four-year old girl; People v. Wilder, 151 Cal.App.2d 698, 312 P.2d 425. In these various situations the state of mind of the prosecutrix may be shown by specific acts.

There are two California cases that mention the problem here involved. In People v. Russell, 80 Cal.App. 243, at page 246, 251 P. 699, at page 700, a 288 prosecution, it is stated: "While the prosecutrix was being cross-examined she was asked if she had not made similar charges against other men and that she had been found guilty of immoral behavior. It is settled law that such evidence was not admissible as going to the credibility of the witness." There is no further analysis of the problem. The only authority cited for the quoted rule is People v. Murphy, 53 Cal.App. 474, 200 P. 484. That case simply held that the general moral delinquency of the complaining witness cannot be admitted to impeach her testimony. Thus, the authority cited does not support the rule that prior false accusations by the prosecutrix of the same type may not be inquired into in a 288 case.

A somewhat similar statement to the one above quoted appears also in People v. Stice, 161 Cal.App.2d 610, 327 P.2d 201, 202, in which the appellate court justifies the exclusion of such testimony on the ground that a "witness for the People may not be impeached on cross-examination by questions as to specific acts of unchastity." Obviously, the fact that prior unchaste acts may not be used to impeach is not relevant to the question of whether or not prior false accusations of the same type may be admissible.

[8] The attorney general concedes that evidence of prior false accusations in such a case might have probative value, and is relevant on the issue involved, but quite properly points out that probative value and relevancy do not necessarily determine admissibility. We agree. The attorney general then argues that the only purpose of such evidence is to impeach the prosecutrix on her general reputation and that section 2051 of the Code of Civil Procedure precludes impeachment by proof of specific untruthful acts.

[9] This is not a complete answer to the problem. As already pointed out, the California courts have been quite liberal in admitting evidence that may be impeaching, but does more than merely generally impeach. Thus, where the state of mind of the prosecutrix is relevant, showings of possible motives for the charge, instances of extortion by the prosecutrix against the defendant, animosity of the prosecutrix, and the possibility that the witness has been coached, all have been held admissible. None of these is of as great probative value or relevancy as evidence of prior false accusations of the same charge involved in the main case. Such evidence is not offered for the purpose of impeaching or discrediting the general character or reputation of the witness, but is offered to disprove the very charge before the court. It is relevant as to the state of mind of the prosecutrix. Because of its high degree of relevancy and its high probative value, such evidence should be admitted. From the very character of the offense involved the jury has very little to go on in such cases. They have usually nothing more than the testi-

mony of a young child and the denials of the defendant. This fact, which, as already pointed out, has frequently been recognized by the courts and text writers, indicates that a liberal rule should be adopted so that the jury have before it as much relevant information as is legally permissible so that it can reach a just verdict. The point does not have to be labored that the chances of the verdict of the jury being correct will definitely be enhanced if the jury has before it the fact that the prosecutrix had, on occasions in the past, made similar charges against the defendant or others which were subsequently denied or proved false. The courts have been quite liberal, and properly so, in allowing the admission of evidence of the prior acts of the *defendant* toward the *prosecutrix*. People v. Anthony, 185 Cal. 152, 196 P. 47. Equally relevant, and for the same reasons, is evidence that the prosecutrix has in the past lied about the type of acts charged to defendant.

In stating that the courts should be liberal in this field in order that the ends of justice best be served, a word of warning is called for. Because of the fear that a grave injustice to the defendant may occur, the courts should not forget the rights of the People. There are men who do commit the sort of acts here involved. Such men are a danger to society, and should be kept out of circulation. The State has a duty and a real interest in protecting its young people from such detestable and criminal behavior. The courts should protect this interest. While it frequently has been recognized that charges of this type are easy to make and hard to disprove, it should also be noted that charges that the child prosecutrix has lied about such matters in the past can also be easily made. The courts should be vigilant in seeing to it that the privilege of cross-examination here approved should not be abused. But, weighing all of these possibilities, it is our opinion that the ends of justice will best be served if the jury is permitted to know that in the past this seemingly young and innocent child has made false charges about such matters. Such rule, in our opinion, does not violate the sound provisions of section 2051 of the Code of Civil Procedure.

The judgment and order appealed from are reversed.

BRAY, J., and ST. CLAIR, J. pro tem., concur.

166 Cal.App.2d 494

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Elton BULLOCK, Defendant and Appellant.

Cr. 6201.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1958.

Defendant was convicted of forging a fictitious name. The Superior Court of Los Angeles County, Maurice C. Sparling, J., rendered judgment, and defendant appealed. The District Court of Appeal, White, P. J., held that where it was stipulated that witness by reason of his education, study and experience qualified as expert in art of handwriting, his testimony respecting handwriting on check which defendant had deposited in bank and handwriting of defendant on sheriff's department form was admissible although it was based solely on visual examination.

Affirmed.

1. Criminal Law ⇨491(1)

In prosecution for forging a fictitious name, wherein it was stipulated that witness by reason of his education, study and experience was qualified as an expert in art of handwriting, his testimony respect-

ing handwriting of defendant based on comparison of signature on check deposited by defendant and handwriting of defendant on sheriff's department form was admissible although witness based his opinions solely on visual examination and it was not necessary for witness to have seen defendant write or have seen writing purporting to be his, upon which he had acted or had been charged. West's Ann.Pen.Code, § 470; West's Ann.Code Civ.Proc. §§ 1870, subd. 9, 1943, 1944.

2. Criminal Law ⇐741(4)

In prosecution for forging a fictitious name, weight and effect of opinion of handwriting expert, or results of comparisons of handwritings, was a matter for arbiter of facts. West's Ann.Pen.Code, § 470; West's Ann.Code Civ.Proc. §§ 1870, subd. 9, 1943, 1944.

3. Criminal Law ⇐1036(6)

Where no timely objection to introduction of evidence of handwriting expert was made in trial court, objection thereto, on appeal, came too late.

John Elton Bullock, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County containing five counts, defendant was accused in Count I of the crime of forging a fictitious name (Penal Code, Section 470). The remaining four counts charged separate offenses of issuing a check without sufficient funds (Penal Code, Section 476a).

In Count I, it was charged that defendant wilfully and with intent to defraud John Shrayer and Bank of America, South Whittier Branch, made, passed, uttered and published a fictitious check in the sum of $2,172 on or about April 26, 1957, knowing the check to be fictitious.

In Count II, it was alleged that defendant wilfully and with intent to defraud Esther Jessup, Thriftimart, and Bank of America, South Whittier Branch, made, drew, uttered and delivered a check in the sum of $50 on or about April 28, 1957, knowing that he had neither funds in nor sufficient credit with the drawee bank to meet the check.

In Count III, it was charged that defendant had committed the same offense on or about May 2, 1957, by making, drawing, uttering and delivering a check in the sum of $50 with intent to defraud Frieda Edgerton, Thriftimart and Bank of America, South Whittier Branch.

In Count IV, it was alleged that defendant had committed the same offense on or about May 6, 1957, by making, drawing, uttering, and delivering a check in the sum of $75 with intent to defraud Joe Brown, Market Basket and Bank of America, South Whittier Branch.

In Count V, it was charged that defendant had committed the same offense on or about May 26, 1957, by making, drawing, uttering, and delivering a check in the sum of $50 with intent to defraud Lois Dafoe, Nixon's Market and Bank of America, South Whittier Branch.

The information also charged three prior felony convictions, two for forgery and one for issuing checks without sufficient funds.

Defendant entered pleas of not guilty as to each count of the information and denied the alleged prior convictions. Trial by jury was duly waived and by stipulation the cause was submitted to the court on the testimony adduced at the preliminary examination, each side reserving the right to offer additional evidence. Defendant did not testify or offer any evidence in his behalf.

Defendant was found guilty on all counts of the information, no finding was made as to the alleged prior convictions, his motion for a new trial was denied, and he was sentenced to state prison. From the judgment of conviction, defendant prosecutes this appeal.

As to the factual background of this prosecution, the record reveals that defendant maintained an account in Bank of

America, South Whittier Branch, under the name of Jay Reed Enterprises. On April 26, 1957, he presented a check in the sum of $2,172 for deposit to his account to John Shrayer, an employee of the Bank of America, South Whittier Branch. The check was drawn on the Bank of America, Fresno Main Office, and was dated April 24, 1957. The payee was Jay Reed Enterprises and the signature of the drawer was "E. G. Griffiths". The check was credited to defendant's account and he subsequently drew four checks against the account: a check for $50 on April 28; a check for $50 on May 2; a check for $75 on May 5; and a check for $50 on May 26. These checks were honored on the dates they bore and were received by the persons named in the information, each of whom gave to defendant the money received for said checks. If the aforesaid check for $2,172, signed "E. G. Griffiths", had been dishonored on the date it was presented, there would not have been funds in defendant's account to meet the subsequent checks.

The check signed "E. G. Griffiths" was dishonored by the Bank of America, Fresno Main Office. There was no account in the name of "E. G. Griffiths" in that bank, nor was there any record concerning such a person. The Fresno bank Main Office had no arrangements for credit with any "E. G. Griffiths" or with the defendant, and the South Whittier Branch had no arrangements for credit to defendant or to Jay Reed Enterprises.

It was stipulated that John Harris, an examiner of questioned documents, "is an expert in the comparison and identification of handwriting". He testified that in his opinion the signature "E. G. Griffiths" appearing on the face of the check for $2,172 (People's Exhibit 1) and the handwriting specimens supplied by defendant were written by the same hand.

Appellant's sole contention on this appeal is that although the witness Harris was called as an expert on handwriting and his qualifications as an expert in the field of comparison and identification of handwriting were stipulated nevertheless, the witness "presented his evidence strictly as a layman" because, says appellant, "There is no evidence of an expert's method of comparison or identification of People's Exhibit 1, the signature 'E. G. Griffiths' on the $2172.00 check and People's Exhibit 6, Los Angeles County Sheriff's Department form, the handwriting 'John Elton Bullock'" (defendant). As to the method utilized by Mr. Harris in arriving at his opinion the record reflects the following:

"Q. (By Mr. Umann, counsel for appellant): What type of examination did you make, a visual? A. Well, just normal visual examination.

"Q. Anything more than that? A. No, I made no photographs of it or didn't examine it under a microscope.

"Q. Are there any other types of tests that you could have made? A. Not that would be necessary in this case.

"Q. Now, the visual tests were made without the aid of any magnifying glass or microscope; is that correct? A. That's right.

* * * * * *

"Q. You did base your opinion on certain factors that you observed; is that right? A. Well, yes, the characteristics of the handwriting.

"Q. Now, did you find any similarities upon which to base this opinion? A. Well, I certainly did or I wouldn't have reached a conclusion that they were both the same handwriting."

[1, 2] It is appellant's contention in effect that a handwriting expert who bases his opinion solely on a visual examination testifies as a layman and the admissibility of his testimony is governed by the provisions of Section 1943 of the Code of Civil Procedure—that is, he must have seen the subject write or have seen writing purporting to be his, upon which he has acted or been charged, and has thereby acquired a knowledge of the subject's

writing. Appellant cites no authority for this proposition and we are satisfied it is without merit. When, as in the instant case, it was stipulated that the witness Harris, by reason of his education, study and experience was qualified as an expert in the art of handwriting, his testimony respecting the handwriting of appellant was admissible (People v. De Mordaigle, 138 Cal. App.2d 435, 440, 292 P.2d 3; Code Civ. Proc. § 1944; Code Civ.Proc. Sec. 1870, subd. 9; 19 Cal.Jur.2d, Evidence, Sects. 352, 354). We are satisfied the testimony of Mr. Harris, based as it was on his experience, knowledge and skill in a field in which his competency was stipulated, was clearly admissible. While the particular method adopted by him might go to the weight of his testimony, it clearly does not warrant its rejection. The weight and effect of the opinion of the expert witness, or the results of comparisons of the handwritings, was a matter for the duly constituted arbiter of the facts.

[3] Furthermore, since no timely objection to the introduction of this evidence was made in trial court, the objection thereto, on this appeal, comes too late (People v. Millum, 42 Cal.2d 524, 528, 267 P.2d 1039).

Appellant relies upon the cases of People v. Simon, 107 Cal.App.2d 105, 120, 121, 236 P.2d 855 and People v. Zoffel, 35 Cal. App.2d 215, 221, 95 P.2d 160, 163, but in these cases, the court was not concerned with testimony given by an expert witness. People v. Simon, supra, simply holds that under Section 1943 of the Code of Civil Procedure a non-expert or lay witness may testify as to the identity of handwriting of the purported writer where a proper foundation has been laid showing the knowledge required by the aforesaid section of the Code of Civil Procedure. In the Zoffel case, supra, it is held that certain cards bearing the name of the accused were inadmissible because the defendant "* * * was not present when the cards were found, was not proved to have ever been in the apartment, *and no evidence was offered that they were in her handwriting.*" (Emphasis added.) Both cases involve questions and issues not present in the case at bar.

The judgment is affirmed.

LILLIE, J., concurs.

FOURT, Justice.

I concur in the judgment, however, I would direct that the defendant be returned to the superior court, and that the trial court be directed to make the finding required by law as to the prior convictions.

The reporter's transcript discloses the following:

"The Court: People vs. John Elton Bullock. You are John Elton Bullock?

"The Defendant: Yes.

"The Court: The Court has read and considered the reporter's transcript of the preliminary examination in this proceeding and has considered People's Exhibit 7 having to do with the alleged priors against the defendant.

"Mr. Klein: People rest, your Honor.

"Mr. Umann: And the defendant rests, your Honor. The matter is all contained within the transcript. As to the priors, however, I discussed that with the District Attorney. He has no objection in the event the Court is so disposed to permit them to go over depending upon the decision of the Court.

"The Court: Is the matter submitted without argument?

"Mr. Klein: Yes, your Honor.

"The Court: The Court finds the defendant guilty on each of the five counts of the Information, guilty as charged.

"Mr. Umann: At this time we request the matter of the priors go over and waive time for sentence, and ask for permission to file a written application for probation.

"The Court: Permission will be granted."

(It was stipulated that the person named in the certified copies of the prison records was the defendant in this case.)

On January 6, 1958, the time set for the hearing of a motion for a new trial, and the time set for considering the probation officer's report, and for judgment and sentence, the following occurred:

"The Court: Well, *with his past record,* which, as you say, is *going back to 1916, but there is forgery, forgery, escape, checks, swindling, checks, wanted checks, forgery, fugitive, wanted checks.* And I would *judge at least thirty aliases* and names which he has gone under, *starting out again under his same old procedure. He doesn't seem to have learned anything, this being a $2,172.00 check.* The probation officer says the defendant was *extremely evasive, fretful, frequently changed his replies.*

"The *Sheriff states that he had checks all over, based on the same fictitious name check; between the time* he *was let out on bail another check,* seven thirty, dated August 17, 1957.

"When I saw that, I was just disgusted. *The Court just doesn't believe that the defendant is in a position to be helped by any leniency.*

"No legal cause appearing why judgment should not now be pronounced, it is the judgment and sentence of this Court that the defendant be sentenced to State's Prison for the term prescribed by law. The defendant is remanded to the custody of the Sheriff, to be by him delivered to the Director of Corrections, Chino Institution for Men, Chino, California. Probation is denied.

* * * * * *

"The Clerk: No finding as to the priors, Judge?

"Mr. Umann: In view of the time of the priors, we ask that they be stricken in the interests of justice, your Honor.

"The Court: *The Court is deliberately making no finding as to the priors in order to give the Adult Authority greater latitude in the handling of the defendant.* (Emphasis added.)

"Mr. Umann: Thank you very much."

Pending the appeal, bail was then reduced from the sum of $3,000 as set and furnished in the first instance, to $2,000.

The certified copies of the former prison records, which were before the judge, were not questioned. They show on their face that the defendant was convicted of forgery of uttering a forged check in Ohio, and that he was sentenced to the state penitentiary and admitted therein on November 25, 1916, and conditionally released March, 1920, and released on parole July 15, 1926, and granted final release from parole in July, 1936.

In Michigan, on November 10, 1920, he was sentenced to the state prison on being convicted of "forgery and uttering" and served a term in that prison therefor. He then apparently escaped from the Michigan state prison, but was sometime later caught and returned.

In Los Angeles county, in 1932, he was convicted of several counts of forgery and issuing checks without sufficient funds, and was sentenced therefor to the state prison and served a term in Folsom prison. It is interesting to note that in that series of cases the defendant admitted at least one of the then prior convictions. He was released and discharged from parole in 1938.

It is clear that when the legislature provided for added penalties in cases where the defendant had suffered one or more prior felony convictions, it had in mind, or believed that if a defendant had not benefited by his prior experience and continually displayed a tendency to commit substantially the same offenses over and over again, he should by his subsequent crime or crimes receive a greater punish-

ment or a longer period of incarceration than would be the case of a first offender. This case is such an instance. The judge, first of all, failed to make the finding required by section 1158 of the Penal Code, which reads in part as follows:

"Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the *judge* if a jury trial is waived, *must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction.* * * *" (Emphasis added.)

It is apparent that no finding was made in this particular instance because to do so would have required a finding that the prior convictions were true. Had they been true, and it is obvious that they are, then the defendant would not have been eligible even to apply for probation, let alone have it granted.

As the matter now stands, the defendant is eligible to be treated as a first offender, and as though he had never before committed a public offense, whereas, if the truth had been found, he would be placed in the category where certain minimums must be complied with. Penal Code, § 3024(c).[1]

I am convinced that the rise in the crime rate in this state will never be curbed, or even held at its present level, by following the procedures used and adopted in this case. Furthermore, I can see no reason whatsoever for judges failing to do that which the statutes obviously require—namely, as in this case, finding whether the prior convictions were true or untrue. To do otherwise is to fail to dispose of a substantial element in the case.

1. "The following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence: * * *

"(c) For the person previously convicted of a felony either in this State or elsewhere, but not armed with a deadly weapon at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, two years; * * *."

166 Cal.App.2d 571

Joseph KEJR, Plaintiff and Respondent,

v.

NATURAL RESOURCES, INC., a California corporation, P. E. Whitten and Mendocino Logging Company, Defendants and Appellants.

Civ. 9366.

District Court of Appeal, Third District, California.

Dec. 24, 1958.

Action was brought to quiet title to timber land against defendants, who claimed under grantee of ambiguous quitclaim deed and holding agreement. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding that it was the intent of the grantors and grantee, who was a real estate broker, that grantee had no power to bind grantors by any contract he might make concerning timber land or timber except with consent of grantors, and that therefore grantee's attempt to contract away right to timber without consent of grantors was nugatory.

Judgment affirmed.

1. Logs and Logging ⇨2

Where quitclaim deed of timberland and holding agreement were executed simultaneously, and deed contained statement that interest conveyed was subject to holding agreement, deed and holding agreement were required to be construed together as though they were one document.

2. Logs and Logging ⇨2

Where quitclaim deed of timberland and holding agreement, which were required to be construed together, were ambiguous and uncertain as to just what

title and powers grantee had, trial court, in action to quiet title, as aid in discovering intent of parties, could look to circumstances surrounding the making of the deed and holding agreement, including the object, nature, and subject matter thereof, and preliminary negotiations between the parties, and thus place itself in same situation in which parties found themselves at time of execution of deed and holding agreement.

3. Brokers ⇐106

In action to quiet title to timberland against defendants, who claimed under grantee of ambiguous quitclaim deed and holding agreement, evidence sustained finding that it was intent of grantors and grantee, who was a real estate broker, that grantee had no power to bind grantors by any contract he might make concerning timber land or timber except with consent of grantors and that therefore grantee's attempt to contract away right to timber without consent of grantors was nugatory.

4. Principal and Agent ⇐170(3)

Rule that where rights of third persons depend on election of principal, principal must disaffirm unauthorized act of agent within reasonable time after acquiring knowledge thereof, or principal's silence may be deemed ratification or acquiescence, in order to protect unsuspecting third party, was not applicable, where there were no unsuspecting third parties involved.

Darling, Shattuck & Edmonds, Donald K. Hall, Los Angeles, for appellants.

David B. Fyfe, San Rafael, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff-respondent brought this action against defendant-appellant Mendocino Logging Company and defendant-appellant Construction Engineers, Incorporated, to quiet title to forty acres of timber land in Mendocino County. The appeal is from a judgment decreeing that plaintiff is the owner of the property and quieting his title thereto. The complaint is in the usual brief form of an action to quiet title. Appellants' answers denied the allegations of plaintiff's ownership and affirmatively pleaded that they owned the timber on the land.

On September 27, 1948, six people, four of whom bore the name "Hopkins" and two of whom bore the name "Raderchak", and all of whom were related, were the owners of the subject property. We shall refer to this group as "Hopkins". On that day, and simultaneously, they executed two documents with O. O. Barker. One was a quitclaim deed and the other was a document called a holding agreement. The deed contained a statement that the interest thereby conveyed was subject to the holding agreement. The deed was recorded. The holding agreement was not. The trial court found on sufficient evidence that appellant Construction Engineers, Inc., had both actual and constructive notice of the existence and contents of the holding agreement at the time it now claims to have acquired title to the timber on the property by a contract of sale from Barker. Construction Engineers, Inc. later assigned its interest in the timber to appellant Mendocino Logging Company which, as the court found, also took with notice of the holding agreement.

The holding agreement begins by reciting that the parties have a mutual interest in the forty acres described therein, and then continues to state the following: That it is desirable "that no transfer of any interest which each of us may hold in the property be transferred or assigned without the mutual consent of all", including Barker; that Barker is to act as the representative of Hopkins in the performance of certain things which by the agreement he agrees to perform; that Barker is to accept a transfer of the property to him by deed and is to hold the transfer and deed for the following uses and purposes: (a) In his discretion to bring a suit to quiet title if needed, (b) If necessary, to engage the services of a surveyor to survey and cruise the land in order that he may be "in a position to effectively negotiate either resale of the premises, or if he deems it more desirable, agreements for sale of timber only without conveying the

lands", (c) To advance necessary expenses for surveys, quiet title actions or in any other manner other than by action, and to prorate to each of the owners the expenses thereof, (d) As remuneration, Barker was to receive 10 per cent of the revenue resulting either from a sale or from income derived from any contract for the sale of the timber which he might make. It is stated that Barker, by written acceptance of the agreement became obligated "to carry forth the purposes of this holding agreement for the joint and mutual interests of all of the parties." For the holding agreement the parties used a printed form on which the property description was filled in. It was in evidence that the form was commonly used by Barker along with quitclaim deeds in aggregating small timber holdings for the purpose of being able to offer large tracts of timber for sale. Barker purported to sell the timber on some 7,000 acres of land of which the forty acres, the subject of this action, was a part. The consent of Hopkins to the contract of sale was not obtained.

It is appellants' primary contention that Barker had power not only to negotiate for a sale of the timber, but to sell and transfer the same and bind Hopkins by his acts.

After a time, five of the Hopkins group conveyed their interests in the forty acres to plaintiff. During the trial Barker quitclaimed such interest in the land and timber as he might have to plaintiff. The decree quieted plaintiff's title to an undivided five-sixths interest in the land and timber thereon.

It appears that Barker was a licensed real estate broker whose principal business was negotiating sales of timber lands to logging companies. His method of operation was to have owners quitclaim their property to him subject to holding agreements similar to the holding agreement executed between himself and Hopkins. He would then endeavor to sell the timber or the land in large blocks rather than in the smaller units covered by the individual transactions between himself and small owners. When representatives of Construction Engineers, Inc., were negotiating with Barker for the purchase of the timber on the 7,000 acres covered by the contract later executed by Barker, they had before them many of these holding agreements and in many instances used them for the purpose of describing parcels of the lands included in the contract with Barker. It appears also that Barker told them of the existence of the holding agreements and some reference was made in the contract between Construction Engineers, Inc., and Barker to the effect that some of the lands were under holding agreements.

[1, 2] When the quitclaim deed and the holding agreement are construed together, as they must be, as though they were one document, it becomes apparent at once that the holding agreement placed limitations upon the title purportedly conveyed by the deed to Barker and upon his power to deal with the land and timber. It is equally apparent that the two documents are ambiguous and uncertain as to just what title and powers Barker had. Considerable evidence concerning the negotiations between the parties was introduced. As said in Universal Sales Corporation Ltd. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665, 671:

> "As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement * * *, including the object, nature and subject matter of the writing * * *, and the preliminary negotiations between the parties * * *, and thus place itself in the same situation in which the parties found themselves at the time of contracting."

[3] With the instruments and the evidence before it, the trial court determined that Barker was given no power to bind Hopkins by any contract he might make concerning the property or the timber, except as they, in some effective way, consented thereto. The record amply sup-

ports this determination of the trial court. Although as a part of the transaction between them the Hopkins group gave to Barker a quitclaim deed, they tied that deed to the holding agreement by apt reference. It is expressly stated therein that no transfer of any interest which the parties hold in the property can be transferred or assigned without the mutual consent of all. If there be any ambiguity in this provision as one limiting the title and the power of Barker, the trial court was fully authorized in interpreting the contract as denying to him any power to transfer or assign any interest in the property without Hopkins' consent. We think it unnecessary to labor the point and we uphold the conclusion of the trial court that, to the actual as well as to the constructive knowledge of appellants, Barker's attempt, if it was in fact that, to contract away the right to the timber without the consent of Hopkins was nugatory and that by the execution of that agreement by Barker, without such consent no interest in the property passed.

Appellants also contend that Hopkins consented to the sale of the timber. They argue as follows: Barker first sold the property to Hopkins in 1947. In 1948 he received the quitclaim deed and the holding agreement. Much correspondence was exchanged between him and Hopkins concerning disposition of the property. On December 27, 1949, one of the Hopkins group wrote to Barker complaining that Barker was slow in putting the property on the market and was quoting an inadequate price. The writer said: "That you are fully within the rights granted you is a fact of which we are well aware. However, we are hard put to reconcile some of your past statements with the price you have put upon our land. Upon two separate occasions you assured us that the timber would be on its way to market * * * The power of sale that you have gives you leave to exercise your judgment regarding the best deal for us. We do not dispute your judgment, we merely would like to know the basis for it." The letter, say appellants, was a recognition of Barker's authority to sell or at least evidences a consent. Only one person was writing and it was not shown he had authority to speak for all; and what was said was in conflict with the language of the holding agreement and the oral testimony. It was for the trial court to draw or not to draw the inferences argued for by appellants.

[4] Appellants claim ratification of the contract of sale. They argue that on December 27, 1949, Barker advised Hopkins that he was negotiating a deal with Construction Engineers, Inc.; that eight days later the contract was signed; that in January following Barker published, in a periodical he disseminated and to which Hopkins subscribed, a statement that he had sold the 7,000 acres of timber under a contract which included the Hopkins' timber; that like publications were made later; that not until 1955 did they deed their land to respondent; that in the interim they made no objection to the contract of sale. Appellants say that by their conduct they acquiesced in Barker's acts and could no longer deny his authority. They invoke the rule stated in Gates v. Bank of America Nat. Trust & Savings Ass'n, 120 Cal.App.2d 571, 576–577, 261 P.2d 545, that where the rights of third persons depend on his election a principal must disaffirm an unauthorized act of his agent within a reasonable time after acquiring knowledge thereof, else his silence may be deemed ratification or acquiescence in order to protect an unsuspecting third party. The statement of the rule demonstrates its inapplicability to this case. Among other things, there were no unsuspecting third parties. Appellants knew Barker was unauthorized. At most, the plea of ratification or acquiescence and the supporting evidence posed an issue of fact for the trial court which that court resolved against appellants.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

The TEXAS COMPANY, a corporation, Plaintiff and Appellant,

v.

The COUNTY OF LOS ANGELES, a body corporate and politic, and The City of Los Angeles, a municipal corporation, Defendants and Respondents.

FORSTER SHIPBUILDING CO., Inc., a corporation, Wilmington Boat Works, Inc., a corporation, Fellows and Stewart, Incorporated, a corporation, Al Larson Boat Shop, a corporation, and Harbor Boat Building Co., a corporation, Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES, a body corporate and politic, and City of Los Angeles, a municipal corporation, Defendants and Respondents.*

Civ. 23134, 23335.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1958.

Hearing Granted Feb. 11, 1959.

Suit seeking a determination of the proper method of evaluating for taxation, the lessee's interest under a tideland lease through application of valuation method known as "capitalization of income." From judgments of the Superior Court of Los Angeles County, H. Eugene Breitenbach and John F. Aiso, JJ., the plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that where assessor in valuing lessee's interest under a tideland use undertook to capitalize the gross income to be derived by a purchaser of the leasehold from use of the premises without reference to rents he would have to pay to the lessor and leasehold was valued as if it bestowed a rent-free occupancy on the tenant, valuation of lessee's interest was erroneous.

Judgment reversed with instructions.

1. Taxation ⇐348

"Capitalization of income", as a method of valuation of leasehold interest, is employed as a means of approximating the market value of such interests, meaning the price which would be paid by a willing buyer to a willing seller, both parties being fully advised of all pertinent facts and neither acting under compulsion and a reasonable time being allowed for the production of a purchaser and is the price which such buyer would pay for an assignment of the leasehold interest.

See publication Words and Phrases, for other judicial constructions and definitions of "Capitalization of Income".

2. Taxation ⇐348

Lessees' interest in a lease of an improved land has market value for taxation purposes, only if the fair rental value exceeds the rent value payable under the terms of the lease, thus giving it a "bonus" value.

3. Taxation ⇐348

"Income capitalization" as a basis of valuing leasehold interest for taxation, starts from net income and consists of projecting that income into the future over a given period, having due regard to the risk of nonreceipt and interest upon the use of invested capital and then discounting same at a given rate.

See publication Words and Phrases, for other judicial constructions and definitions of "Income Capitalization".

4. Taxation ⇐348

Where assessor through application of a valuation method known as "capitalization of income" undertook to value lessee's interest under a tideland lease by capitalizing the gross income to be derived by a purchaser of the leasehold from use of the premises without reference to rents he would have to pay to the lessor and leasehold was valued, as if it bestowed a rent-free occupancy on the lessee, method of valuing lessee's interest was erroneous. 12 U.S.C.A. §§ 1748–1748h; West's Ann. Const. art. 13, § 1; West's Ann.Rev. & Tax.Code, § 107.1.

5. Courts ⇐89

Expressions used in judicial opinions are to be construed and limited by reference to matters under consideration and they cannot be safely applied in their

* Opinion vacated 338 P.2d 440.

largest and most universal sense to dissimilar cases.

6. Evidence ⇐4

Where facts asserted by counsel seem to be self-evident, they are cognizable in the District Court of Appeal.

J. A. Tucker, C. L. Mead, Jr., R. K. Barrows, Los Angeles, for appellant The Texas Co.

Holbrook, Tarr & O'Neill, W. Sumner Holbrook, Jr., Francis H. O'Neill, Los Angeles, for appellants Forster Shipbuilding Co., Inc., and others.

J. Kerwin Rooney, Oakland, for amicus curiae on behalf of appellants.

Harold W. Kennedy, County Counsel, Los Angeles, Alfred Charles De Flon, Deputy County Counsel, Hollywood, for respondents.

ASHBURN, Justice.

The Problem

The problem common to these cases (heard together in this court) is a determination of the proper method of evaluating for taxation the lessee's interest under a tideland lease through application of the valuation method known as capitalization of income.

Summary of Conclusions

[1-3] The fee being exempt from taxation, the only assessable interest in the land is the possessory right conferred by a leasehold (or occupancy permit) upon a private person or entity. As valuation through comparison with other sales is a practical impossibility, all parties agree that the capitalization of income is an acceptable method of valuation of such leaseholds. It is employed as a means of approximating the market value of such possessory interests, meaning the price which would be paid by a willing buyer to a willing seller, both parties being fully advised of all pertinent facts, neither of them acting under compulsion of any kind and a reasonable time being allowed for the production of a purchaser. It is the price which such a buyer would pay for an assignment of the leasehold interest. The authorities agree that the lessee's interest in a lease of unimproved land has market value only if the fair rental value exceeds the rent payable under the terms of the lease, thus giving it a "bonus" value. No informed and sane purchaser will buy any leasehold of unimproved property where stipulated rents exceed the present rental value (the economic value) of the property. It is excess of rental value over agreed rent which alone gives value to the leasehold. The authorities also agree that income capitalization starts with net income and consists of projecting that income into the future over a given period, having due regard to risk of non-receipt and interest upon the use of invested capital, then discounting same at a given rate, with the result representing the present worth of the future net income plus interest for the use of the invested capital. This can succeed (under existing formulae such as Hoskold's or Inwood's tables) only if net income (e. g., the bonus value of a leasehold) is used as the basis of the computation. In the instant cases the county assessor undertook to capitalize the gross income to be derived by a purchaser of the leasehold from the use of the premises, without reference to the rents he will have to pay to the lessor; thereby having reached a satisfactory result, the assessor undertook to call it the fair market value of the lessee's possessory interest. The leasehold was valued as if it bestowed a rent-free occupancy on the tenant. This finds no support in any recognized authority cited or known to us. It seems to be derived from a manual for "Appraisal of Possessory Interests and Equities Therein," prepared by Mr. Oscar C. Brothers (formerly of the Los Angeles County Assessor's office) and issued by the State Board of Equalization. The county assessor, apparently adopting the ideas of Mr. Brothers, conceived the theory that the De Luz line of cases authorizes the severance of a leasehold into two parts, (1) a

property interest, and (2) contractual obligations,—with the tax assessment limited to the property interest without regard to the condition attached to its very existence, i. e., payment of accruing rents. This is an unrealistic approach, is not consonant with precedents, is not sanctioned by the De Luz and companion cases, supra, and results in an unlawful assessment and tax.

The Facts

The Texas Company, plaintiff and appellant in No. 23134, held on the first Monday of March, 1956, three tideland leases or permits from the Board of Harbor Commissioners of the City of Los Angeles, covering certain tidelands and carrying fixed rental charges. The agreed rents then in effect were: For Lease No. 1: $7,681.83 per quarter plus $3,990.68 per annum for a pipe-line easement included in the leased property, plus wharfage charges. For Lease No. 2: $5,585.73 per quarter plus wharfage charges. For Lease No. 3: $2,331 per quarter. Each lease expires on July 23, 1967, and requires readjustment of the rent as of February 11, 1963. Each provides for termination upon default in payment of rent. The total annual rents (exclusive of wharfage) amount to $66,384.92; the accruals between the assessment date and the rental readjustment date of February 11, 1963, would aggregate about a half million dollars. Lease No. 1 was assessed at $93,730 upon which a tax of $6,703.85 was levied and collected; No. 2 was assessed at $84,300 and a tax of $6,038.57 paid; No. 3 was assessed at $21,890, a tax of $1,568.02 being paid thereon. All these payments were made under protest. The improvements were separately assessed and are not involved in this action. Appropriate proceedings before the County Board of Equalization having been unsuccessfully pursued, this action was brought for recovery of said taxes and was seasonably filed. A general demurrer to the complaint was sustained with leave to amend but plaintiff elected to stand upon the original complaint and has appealed from the judgment entered in favor of defendants. That complaint alleges, and the demurrer necessarily admits, that "for and during each quarterly period between the assessment date and July 23, 1967, the amount of the rentals payable therein is and will be in excess of the cash value of the use and occupation of said land during such quarter. In other words, there was, on said assessment date, no excess of the cash value of the use of such land over and above the said rentals."

Each of the plaintiffs in the case of Forster Shipbuilding Co., Inc., No. 23335, held on the first Monday of March, 1957, certain "harbor orders" or "revocable permits" leasing to it the right to occupancy of certain tidelands belonging to the City of Los Angeles.

The Forster lease specified a rental of $7,419.40 per year. For that tax year the assessor valued the "possessory interest" in the land at $2,170 and the "possessory interest" in the improvements at $8,530. An attempt to procure relief from the County Board of Equalization failed and the tax, $765.29, was paid under protest. Thereupon suit was brought against city and county to recover the amount paid as tax upon the possessory interest in the land, namely, $155.20. The complaint alleged that the assessor "did value the alleged possessory interest as if no rent had been paid or was required to be paid under and pursuant to said contract for the use and occupancy of said property." This the demurrer admits. The complaint is in five counts, the allegations of each being substantially the same except as to the applicable figures.

In Count 2 plaintiff Wilmington Boat Works, Inc. alleges that it held a like lease to tideland in March, 1957, with rental prescribed at $7,085.60 per year; that its possessory interest in the land was assessed at $13,910 for the said year 1957, and its possessory interest in the improvements at $25,780. The total tax, $2,843.07, was paid under protest and, after unsuccessful application for relief from the County Board of Equalization, suit was brought for recovery of $934.08, which amount represents the tax upon the possessory interest

in the land. Like allegations are made as in the Forster Shipbuilding Company count as to method of assessment and invalidity of same.

In Count 3 Fellows and Stewart, Inc. sues for tax paid under protest in the sum of $6,543.84. Its rent was $18,840.63 per year and its complaint alleges illegality of assessment of its possessory interest in the land for the same reasons as its co-plaintiffs.

Count 4. Al Larson Boat Shop sues for $1,082.14 as tax paid upon its possessory interest in the land. Its prescribed rent is $5,038.20 per year.

Count 5. Harbor Boat Building Co. Rent, $15,481.56 per year. Sues for $1,529.87 as the amount of tax unlawfully levied upon its possessory interests in the land and improvements, paid under protest.

As in the Texas case a general demurrer was sustained, plaintiffs elected to stand upon their complaint and appealed from the judgment entered upon demurrer.

None of the claims asserted in these suits (except Harbor Boat Building Co.) relates to the assessment of the possessory interest in the improvements, only to the separately assessed interest in the real estate. There is no problem of amortization or payment upon a mortgage indebtedness present in either case. The validity of the assessments is to be determined exactly as would such impositions upon vacant land.

The Law

The basic principles governing this case are declared in De Luz Homes, Inc., v. County of San Diego, 45 Cal.2d 546, 290 P. 2d 544, but, as later shown, that opinion has been misinterpreted by the assessor and counsel for respondents with respect to its application to the matter of rents payable by the hypothetical assignee of an uncomplicated lease such as those held by appellants. De Luz says, 45 Cal.2d at pages 561–566, 290 P.2d at page 554: "The standard of valuation prescribed by the Legislature is that, '[A]ll taxable property shall be assessed at its full cash value.' Rev. & TaxCode, § 401. 'Full cash value,' as defined in section 110 of the Revenue and Taxation Code, 'means the amount at which property would be taken in payment of a just debt from a solvent debtor.' It provides, in other words, for an assessment at the price that property would bring to its owner if it were offered for sale on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. It is a measure of desirability translated into money amounts * * * and might be called the market value of property for use in its present condition. * * * [45 Cal.2d at page 561, 290 P.2d at page 554]

"Since nonexempt possessory interests in land and improvements, such as the leasehold estates involved in the present actions, are taxable property [citations], they too must be assessed at 'full cash value.' * * * [45 Cal.2d at page 562, 290 P.2d at page 554]

"Since the possessory interest must be assessed in accord with the standard of valuation applicable to all other property, its estimated value is the price it would bring if offered on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and this hypothetical market price is its value even though a sale of the property has not been made or contemplated. * * * [45 Cal.2d at page 563, 290 P.2d at page 555]

"In the present case, the assessor purported to value the leaseholds by the capitalization of income method, a generally accepted method of valuing property from which income may be or is derived. [Citations.] According to this method, the value of property is the sum of anticipated future installments of net income from the property, less an allowance for interest and the risk of partial or no receipt. (See, American Institute of Real Estate Appraisers, The Appraisal of Real Estate, ch. 17, 18; Babcock, The Valuation of Real Estate, pp. 39, 127–129; 1 Bonbright, The Valuation of Property, ch. XI.) '[I]t involves a capitalization or discounted valuation of the realized or prospective net monetary income derivable by continuous exploitation rather than by resale.' (1 Bonbright, op. cit. supra, p. 230.) The first step in the process is to

determine prospective net income and this is done by estimating future gross income and deducting therefrom expected necessary expenses incident to maintenance and operation of the property. * * * [45 Cal.2d at page 564, 290 P.2d at page 555]

"Since it is generally accepted that a person who agrees to receive payment in the future is entitled to interest both for waiting and the risk of partial or no receipt, the second step is to discount each future installment of income by a rate of interest that takes into account the hazards of the investment and the accepted concepts of a 'fair return.' The sum of the discounted installments is the present value of the property. * * * [45 Cal.2d at page 565, 290 P.2d at page 556].

"In valuing property, the assessor must adhere to the statutory standard of 'full cash value', and must therefore estimate the price the property would bring on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. The net earnings to be capitalized, therefore, are not those of the present owner of the property, but those that would be anticipated by a prospective purchaser. 'Anticipated future earning power is the *sole* matter of consequence, since reported earnings are already water under the mill.' (Bonbright, op. cit. supra, p. 229; see also Babcock, op. cit. supra, pp. 229–230.) * * * If a purchaser would buy a given property on an open market, the property has a value equal to the price such purchaser might be expected to pay.

"The standard of 'full cash value' applies equally to a leasehold interest. Accordingly, the assessor must estimate the price a leasehold would bring on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. He must therefore capitalize, not the anticipated net earnings of the present lessee, but those of a prospective assignee." 45 Cal.2d at page 566, 290 P.2d at page 556.

At this point the court turns to the special type of lease before it and the main contention of the taxpayer, namely, that amortization of cost of construction of improvements should be deducted from gross income to arrive at a proper basis for capitalization. To this matter we will return after considering the principles applicable to a simple possessory right to the land unrelated to any amortization of the existing lessee's improvements or mortgage payments.

A ground lease, considered apart from any improvements (as must be done here because of separate assessment of possessory interests in land and improvements), has no value to the lessee or a prospective assignee (a purchaser) unless the fair rental value exceeds the rent specified in the lease. If the reverse is true the leasehold has no value and of course no purchaser can be found for it. To value it by the capitalization method this difference, the bonus value where it exists, must be the basis of the computation. The rents payable by a purchaser-assignee cannot be divorced from the problem, for the right of possession is conditioned upon payment of the specified rents regardless of any contractual relation between the landlord and the one in possession. Upon default in payment the tenant's possession immediately becomes subject to termination, and this is true regardless of any default clause in the lease. 30 Cal. Jur.2d § 183, p. 329; § 280, p. 422; Tiffany on Real Property (3rd ed.), § 915, p. 586; 52 C.J.S. Landlord and Tenant § 718b, p. 583.

The capitalization process is thus described in Schmutz, on The Appraisal Process, page 87: "§ 1603. Income is not value. However, it is the yardstick by which value is measured. The connecting link between income and value is known as the capitalization rate. This is a discount rate; and, the capitalization process is a discounting process. § 1604. The capitalization of income, irrespective of the technique employed, is a simplified method of finding the sum of the present value (the value after discounting for loss of interest) of each future annual amount of the income expectancy. § 1605. By way of illustration, a net rental income of $1,000 collectible at the end of one year has a present day value of $1,000 less inter-

est for one year; that due in 2-years has a present value of $1,000 less interest for 2-years; and so on. The sum of the discounted future amounts is called the capitalized value; and the interest rate at which the future amounts are discounted is called the capitalization rate." Page 88: "§ 1608. The income capitalization approach commences with the preparation of: (a) An estimate of the amount of the reasonably expectable future gross income, which may or may not be indicated by past and present incomes; (b) An estimate of the amount of the reasonably expectable future operating expense, taxes, insurance, etc.; and (c) By subtraction of the latter from the former to indicate the amount of the probable future net income. § 1609. The next steps in the process involve: (d) The estimation of the probable duration of the net income; (e) The estimation of the size of the capitalization (discount) rate; and (f) The selection of the technique by which the data is to be processed."

It is axiomatic that the basic factor is future net income from the interest to be appraised. "It is only in those cases where the net income from the property is in excess of the rent reserved that the tenant's interest becomes valuable." (Taxation of Leasehold Interest, 21 Cal.Law Rev., 596, 603.)

"The lessee's interest, or the 'leasehold estate,' normally consists in the right of the use of the property in a stipulated manner and on the payment of agreed rentals. From the standpoint of value, the lessee's interest is to be found in any excess of annual benefits derived from the use of that property over the annual burdens or rents paid. * *

"It should be noted that, whereas all realty has value, our problem when dealing with a possessory interest is to assign a portion of the total value of the realty to the possessory interest. It may be that the possessory interest has little or *no* value. When a municipality charges full rent for the use of its land by a private person, and no improvement has been erected on that land, no value exists for the lessee. Consequently, the possessory interest is valueless. Mathematically, the sum of (1) the present worth of all future rents, and (2) the reversionary value of that land, should equal the entire value of the land, thus leaving no value for the leasehold estate, when a fair rent is being paid and no improvement is on the land.

"It is only under two conditions that considerable value can accrue to the lessee and create a possessory interest. The first condition comes into existence when the lease was made at a rent under the present fair rental of the land. This could happen for a number of reasons. Usually, the lease was made a number of years ago during a period when the land had a lesser value than at present. Ofttimes, a favorable rent is offered as an inducement to private industry for locating in the community. The second condition under which a leasehold estate may attain value is created upon the construction of a sizeable improvement. Here, however, the lessee usually has a diminishing interest in the improvement until such time as the full present value of the improvement reverts to the lessor." (Taxation of Possessory Interests, by Abram F. Goldman, 23 So.Cal.Law Rev., 169, 171–172.)

"It is entirely proper that the net income should be the basis of the capitalization process because while gross income, operating expenses, and certain fixed charges are considered in the income approach to value, it is net income productivity which creates value. Regardless of the gross income which may be produced, if the operating expenses and fixed charges are such that no net income remains after their payment, prudent capital would scarcely seek such an enterprise as an investment. * * * The net income before amortization or capital recapture provision is the proper amount to be multiplied by the factor because the recapture of capital is provided for in the factor. If the net income after capital recapture provision were used, the result would be erroneous because provision for that item would have been made twice." (Capitalizing Income Into Value, by David L. Montonna. Reprinted in Selected Readings in Real Estate Appraisal, issued by

American Institution of Real Estate Appraisers, at pp. 1072 and 1079.)

"On the other hand, the value of the property to the lessee will depend upon the amount of his net income, after all operating expenses and his obligation to the lessor have been paid." (Contract v. Economic Rent, by Ivan A. Thorson. Reprinted in last cited "Selected Readings," at p. 1197.)

"Earning Expectancy Refers to Net Earnings.—Earning expectancy, in form for use in valuation, must be a prediction of future *net* incomes. This means net in the sense that it is the actual difference between the yearly 'puts' and 'takes.' It is the predicated net collections before allowances for depreciation, obsolescence, financial charges, and other allowances which are not actually items of paid expense. Net earnings therefore include both the interest returns on invested capital and installments representing a return of the invested capital. In other words earning expectancy includes only actual revenues or actual expense items such as *rentals*, gas bills, taxes, insurance premiums, and wages." (Emphasis added.) (Babcock on Valuation of Real Estate, p. 229.) The same author, discussing the Valuation of Leasehold Estates, says at page 364: "In the valuation process, the valuator usually commences with a valuation of the property in fee simple, assuming that there is no ground lease. He then proceeds to determine the return on the leasehold estate *by deducting the ground rentals* from the total real estate returns which he has predicted. This amount year by year is then divided between the return on the leasehold interest in the building and the return on the leasehold interest in the land." (Emphasis added.)

Schmutz, The Appraisal Process, page 264: "§ 3515. The Lessee's interest, also known as the Leasehold, is the right of use and occupancy. The measure of the value of a Lessee's interest is: (a) The present worth of the difference between the fair value of the property, the economic rent, and the contract rent, if the latter is the lesser, which also is known as the 'bonus value' in a lease; (b) The present value (not cost) of the improvements constructed by the Lessee; and, (c) The present value of any adjustments in favor of the Lessee at the end of the lease term, for improvements constructed by Lessee and left for the Lessor, or otherwise. § 3516. In order that the Lessee have a valuable interest in leased property, it is essential that Lessee could sublet for a higher rent than Lessee is obligated to pay; and, or, that valuable improvements have been made by the Lessee. In brief, the market value of the interest of the Lessee is the amount Lessee can expect for an assignment of its lease. § 3517. By way of illustration, in the example mentioned in Paragraph 3511, a vacant lot, the value of the Lessee's interest is zero. It is assumed that the Lessee is paying the full amount of the fair ground rent, and therefore has no bonus value; and, it is further assumed that there are no improvements on the land, and thus no improvement value."

A correct application of the capitalization process to a lessee's interest is described in 21 California Law Review, at page 601, as follows: "In the few instances in which the courts have given careful consideration to the method of evaluating the leasehold interest the usual procedure has been to determine the lessee's interest without having first computed the value of the lessor's estate. In such cases the lessee's interest is measured by the excess of net income the property may yield over the rent reserved. * * * In any event, the value of the lessee's interest at any time is the present worth of the difference between the rent reserved and the net income the property will yield during the term of the lease." In 23 Southern California Law Review, at page 195: "The correct procedure to be used is one that takes as its major factor, the excess of annual benefits over annual burdens." Schmutz, The Appraisal Process, page 265: "§ 3518: However, in the modification of the problem, as stated in paragraph 3512, where it is assumed that the land value at the time of the appraisal is $150,000 and, as a consequence, the fair rental value is $9,000 per year (6% on

$150,000), and the rental obligations of the Lessee is $6,000 per year, it follows that the Lessee has a rental saving of $3,000 per year (for 76 years). Further assuming that there are no improvements made by the Lessee, then the computation of the market value of the Lessee's interest is as follows:

"*Present Worth of Net Gain,*

Or saving in rent, or annual profit in the event of subletting the property:

The P. W. of $1 per annum for 76 years at 6% = 16.468

Then 16.468 x $3,000 = $49,404"[1]

[4] Unless De Luz and companion cases, supra, hold otherwise, the result seems clear that the method of valuation employed by the assessor in the instant case is fundamentally unsound because it ignores rents to be paid by the prospective purchaser and hence the resulting assessment and tax are unlawful. Correctly interpreted, De Luz and related cases do not sanction the capitalization of prospective gross income without regard to rents necessary to be paid by the lessee in order to produce that gross income.

The De Luz cases deal with a unique situation which presented questions different from those inherent in the causes at bar. In each instance (De Luz Homes, Inc. v. County of San Diego, supra, 45 Cal.2d 546, 290 P.2d 544; Fairfield Gardens, Inc. v. County of Solano, 45 Cal.2d 575, 290 P.2d 562; Victor Valley Housing Corporation v. County of San Bernardino, 45 Cal.2d 580, 290 P.2d 565 and El Toro Development Co. v. County of Orange, 45 Cal.2d 586, 290 P.2d 569) the taxpayer was lessee of a government-owned property which was devoted to a housing project for military and civilian personnel stationed at a military camp,—Camp Pendleton, Travis Air Force Base, George Air Force Base and El Toro Marine Air Base, respectively. The leases extended for 75 years, were in the same form and made pursuant to the Wherry Act (12 U.S.C.A. §§ 1748–1748h); each required the lessee to erect a housing project at its own cost; the Federal Housing Commissioner was authorized to insure mortgages on the property; the buildings and other improvements became the property of the United States as completed; ranges, refrigerators and similar items must remain on the premises and became the property of the United States after full payment of the mortgage debt. Construction of the Camp Pendleton project cost in excess of $4,516,000, and De Luz borrowed through mortgage of its leasehold $4,516,000 and furnished the lender a mortgage insurance policy issued by the Federal Housing Administration. Like procedure was followed in the other cases. Travis Air Force Base cost the lessee $8,295,500 and

1. "The lessee's interest is sometimes called the leasehold. It is the market value of the lease. If the leased property is unimproved, the lessee's interest, if any, is simply the bonus value in the lease. * * *

"For the purpose of illustration; let it be assumed that a vacant lot was (in the past) leased for a term of 50 years at a net ground rental of $6,000 per year, which at that time was 6 percent net on a land value of $100,000. However, at the time of appraisal (10 years later) the land has increased in value to $120,000 and the reasonable ground rental $7,200 per year.

"The lease has 40 years to run. The lessee's interest is the present worth of $1,200 per year ($7,200 — $6,000) for 40 years. This is $1,200 X 15.046, factor for 40 years at 6 percent, or $18,055. This is the lessee's interest in the land. The lessor's interest (in the land) would be $120,000 less $18,055, or $101,945. * * *

"Not only is it possible for a lessee's interest in real estate to be composed of a bonus value, when the ground rental is less than it should be at the time of the appraisal, in addition to the value of the lessee's improvements, but it is also possible, and even common, for a lessee's interest to be less than the value of its improvement. This condition exists when the ground rent being paid by the lessee is excessive and, as a consequence, absorbs some of the property income that should be imputable to the structure."

(Appraising Leasehold Estates, by Stanley L. McMichael. Reprinted in Selected Readings in Real Estate Appraisal, issued by American Institute of Real Estate Appraisers, at p. 1192.)

was mortgaged for the same amount. George Air Force Base cost $4,419,000; was mortgaged for said sum. El Toro Marine Air Base cost $4,543,000, and was mortgaged for the full amount. Each lease carried a nominal rental of $100 per year. The lessee was required, among other things, to accumulate a fund for replacing worn out improvements and equipment throughout the term of the lease. The basic contest in each case was over allowance or disallowance of amortization of the cost of the improvements; this seems to have also taken the form of a claim to deduction for payments upon the principal of the mortgage loan. If allowed, each leasehold would have had a value much less than that fixed by the assessor, who declined to make any deduction from the capitalization base on that account. The De Luz case, supra, also involved military bases known as Wire Mountain Homes Number 1 and Wire Mountain Homes Number 2, built and held under similar leases. The lessees contended that disbursements would exceed income until the mortgage was paid in full and the possessory interest should be valued at zero. Fairfield contended its leasehold was worth no more than $20. Victor Valley and El Toro made similar contentions.

The trial court found that none of the leaseholds involved in the De Luz case had taxable value at the time of assessment. The Supreme Court reversed. After announcing the general principles hereinbefore quoted, the opinion considers the claim of a right to amortization deductions in reaching a base for capitalization and incidentally a right to deduction of rents paid by the taxpayer (the theoretical assignor), rents so nominal that they were treated as de minimis in the Fairfield opinion, supra, at page 579. In this connection the court said, in De Luz, supra, 45 Cal.2d at page 566, 290 P.2d at page 556: "The net earnings to be capitalized, therefore, are not those of the present owner of the property, but those that would be anticipated by a prospective purchaser. * * * The present owner may have invested well or poorly, may have contracted to pay very high or very low rent, and may have built expensive improvements or none at all. To value property by capitalizing his anticipated net earnings would make the value of property equal to the present value of his profits; since, however, the legislative standard of value is 'full cash value', it is clear that whatever may be the rationale of the property tax, it is not the profitableness of property to its present owner." Also: "To a prospective assignee, anticipated net earnings equal expected gross income less necessary expenditures for maintenance, operation, and taxes. No deduction is made for the cost of the lease to *the present lessee*, i. e., his charges for rent and amortization of improvements, for to a prospective assignee the value of a leasehold is measured solely by anticipated gross income less expected necessary expenditures." (Emphasis added.) We deem it a fair interpretation of the opinion to say that all rentals mentioned therein were those which had been paid by the existing lessee, not those to be paid in the future by an assignee of the lease. The context so indicates and the record shows that prior to the rendition of the opinion all counsel agreed upon the propriety of deduction of rents in finding a base for capitalization.

The case of Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 474, 14 P.2d 512, 84 A.L.R. 1304, was disapproved (at pages 569–570 of 45 Cal.2d, at page 559 of 290 P.2d) so far as it recognized the propriety of deducting amortization items and rents in arriving at net income of the present lessee, the theoretical assignor of the lease. At page 567 of 45 Cal.2d, at page 557 of 290 P.2d it is said: "The unamortized cost reflected on the balance sheet has no relation to the 'full cash value,' i. e., the price that a willing buyer would pay a willing seller. Furthermore, in determining the income to be capitalized to establish value for appraisal purposes, no deduction can be made for amortization." Also: "Rent paid for a leasehold interest, like the cost of improvements that revert to the lessor, is part of the cost or purchase price of the leasehold, and to include a deduction for it, is likewise

to include an item of expense based on the answer, i. e., the value of the property. Thus, it would not only be anomalous to deduct any part of that value, the very answer sought, from the income that is to be capitalized to obtain that answer, it would be a duplication, for the interest rate applied in capitalizing net income provides for a return of capital value as well as interest. (American Institute of Real Estate Appraisers, The Appraisal of Real Estate, p. 321; *ibid.*, p. 214; Babcock, op. cit. supra, p. 230; see example given below.)

"It is apparent, therefore, that in requiring the assessor to deduct the present lessee's charges for rent and amortization from estimated gross income the court in the Blinn case confused income for accounting purposes with income for appraisal purposes."

At page 569 of 45 Cal.2d, at page 559 of 290 P.2d: "Statements in the Blinn cases, 216 Cal. 474, 478–482, 14 P.2d 512, 84 A. L.R. 1304; Id., 216 Cal. 468, 472–473, 14 P.2d 516, requiring the assessing authorities to deduct the *present lessee's* charges to rent and amortization from expected [gross] income when valuing possessory interests by an analysis of anticipated earning power are therefore disapproved." (Emphasis added.)

[5] It is well to remember at this point that "[i]t is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." Porter v. Bakersfield & Kern Elec. Ry. Co., 36 Cal.2d 582, 590, 225 P.2d 223, 228. "[I]t is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimiliar cases." City of Pasadena v. Stimson, 91 Cal. 238, 250, 27 P. 604, 606.

The court's reference in De Luz, supra, to page 230 of Babcock on Valuation of Real Estate, furnishes evidence of the restricted sense in which the language just quoted from De Luz, pages 567–568 of 45 Cal.2d, page 557 of 290 P.2d, was used. Babcock there says: "In other words earning expectancy includes only actual revenues or actual *expense items such as rentals,* gas bills, taxes, insurance premiums, and wages." (Emphasis added.) Elsewhere reference is made in De Luz to page 364 of Babcock which is quoted supra. At page 567 of 45 Cal.2d, at page 557 of 290 P.2d, in De Luz, Babcock is quoted as follows: "'[I]n valuation, net earnings are net "before depreciation," i.e., net earnings are a combination of income and capital returns and are computed as the actual difference between the "puts" and "takes." Appraising presupposes a purchaser, and the valuation is made at a figure which the net earnings can support including a return of capital equal to the successive losses of value expected in the depreciation of the property.'"

In the aggregate these passages rule out the thought that future rentals are to be disregarded in the case of valuation of a mere lease of unimproved land.

While the Blinn treatment of amortization was disapproved in De Luz, the case of Hammond Lumber Co. v. County of Los Angeles, 104 Cal.App. 235, 285 P. 896, 899, was not overruled or expressly disapproved. It involved no question of amortization; the possessory interests in land and improvements were separately assessed, as in the present instance. "The deputy assessor stated that in arriving at the value of the leasehold interest, the land itself was first taken at a valuation of $13,000 per acre, which corresponded with the value of surrounding property; then the annual average rent per acre, representing the income from the investment, was capitalized on the basis of an annual interest return of 6 per cent, and the difference between the value of the land and the capitalized rent charge or income represented the average value of the possessory interest per acre." 104 Cal.App. at page 242, 285 P. at page 899. This was held to be proper, the court saying, at page 246, of 104 Cal.App., at page 901 of 285 P.: "The board determined that the method pursued by the assessor was a

correct method, and that his assessment was a fair and just valuation for purposes of taxation. The evidence before the trial court tends to confirm the judgment of the board, and supports the court's finding that plaintiff's interest was not assessed improperly, or in excess of its cash value, but only in proportion to the value of the possessory right." Essentially this process is the one advocated by appellants at bar, for it takes cognizance of rents payable by the lessee. Footnote 10 of the De Luz opinion, 45 Cal. 2d on page 570, 290 P.2d on page 559, says that "the District Court of Appeal, in affirming a judgment denying recovery of taxes on a possessory interest, explained a method of valuation that deducted the lessee's rent from imputed gross income and that was presented in evidence to the county board of supervisors by the assessing authorities. 104 Cal.App. at page 244, 285 P. at page 900. That method did not control the decision of the court in the Hammond case, see especially, 104 Cal.App. at page 246, 285 P. at page 901, and it should not be inferred that it now controls assessing authorities." It is not clear whether this footnote emphasizes use of "imputed income" (rejected in De Luz, 45 Cal.2d at page 571, 290 P.2d at page 560) or deduction of rents. It does no more than throw a mantle of doubt upon the Hammond decision. It certainly does not overrule it or foreclose reexamination of the question.

It seems to be generally agreed throughout the United States that the basis for valuation of a leasehold in an eminent domain proceeding is its bonus value, the excess of fair rental value over agreed rents if any there be. Orgel, on Valuation Under Eminent Domain, § 126, p. 536: "It is usually assumed that this market value is equal to the excess of the rental value over the rent reserved." In an article entitled "Some Legal and Appraisal Considerations in Leasehold Valuation under Eminent Domain", by John P. Horgan, 5 Hastings Law Journal 34, 36, it is said: "It is apparent from the cases in California that this state follows the general rule as to the measure of the value of a condemned leasehold interest. That measure is the difference between th *economic* rent and the *contract* rent. Obviously, if the economic rent, which is the price which could be obtained on a sale of the lease in the open market, is equal to or less than the contract rent provided for in the lease, then the lease has no market value and the ousted tenant has no compensable claim for damages.

"In situations where the economic rent exceeds the contract rent, giving a market value to the lease, this excess is sometimes spoken of as the *bonus value* of the lease. More properly, however, it is the market value." At page 38: "The principles deducible from the cases of many jurisdictions and from the text writers support the conclusion that where the entire remaining interest of a tenant under a lease is taken the damages payable to the tenant are measured by the market or bonus value, if any, of the unexpired term." To the same effect, see, 29 C.J.S. Eminent Domain § 143 b, p. 988; 3 A.L.R.2d 286, 291–294; 17 Cal.Jur.2d, § 36, p. 616; § 99, p. 666. In principle there is no perceivable distinction between eminent domain and taxation in this respect. If one whose property is taken *in invitum* can recover only the value computed upon his net income, it seems equally true as a matter of fairness and, indeed, due process of law that he should not be taxed upon a much higher valuation computed upon the basis of his gross income.

Finally, the interpretation placed upon De Luz and related opinions by respondents would lead to an illegal assessment and taxation of the fee which is exempt because of its tideland status. Calif.Const. Art. XIII, § 1. An intention to ignore this constitutional provision or to sanction a tax which in effect violates it cannot be attributed to our Supreme Court.

The interests of lessor and lessee constitute the totality of ownership in leased property; in sum they equal the value of the fee. The lessor's interest for valuation purposes represents the capitalized value of the rents to be received by it less necessary outlays; that of the lessee, the

capitalized value of his estimated gross income less obligatory rentals and other necessary disbursements. "Basically the valuation of a leasehold is a matter of dividing the value of the property free of the lease, into separate values imputable to the fee and leasehold interests. The sum of the values of the fee subject to the lease and leasehold interests should tend to be the same as the value of the property free and clear. However, under certain circumstances, the sum of these different interests may be worth more or less than the freehold. It could be more only if a financially capable lessee were liable for contract rent in excess of the present fair economic rent." ("Factors Influencing Fee and Leasehold Interests." Published by American Institute of Real Estate Appraisers in "The Appraisal of Real Estate" at p. 419.) "First and foremost it must be acknowledged that the combined interests of both lessor and lessee in any property cannot exceed the *feehold* value of such a property." (Appraising Leasehold Estates, by Stanley L. McMichael. Published in "Selected Readings in Real Estate Appraisal" by American Institute of Real Estate Appraisers, p. 1188.)

"The appraisal of the value of any interest in a leased property commences with the appraisal of the value of the Freehold, i. e., the combined value of all interests in the property, giving recognition to the existing leases and sub-leases. *This combined value may be greater than the value which the property would have if it were not leased.* If, however, the combined interests of all parties in a leased property sum-up to more than the value of the property on an unleased basis, then, and in such event, the freehold is composed of both tangible and intangible properties. This, the 'Two-property Concept' is described in Paragraphs 311–319 in this book." (Schmutz, The Appraisal Process, § 3507 p. 262.)

"Taken together the sum of the lessor's and the lessee's interests represents the total value of the property. * * * That portion left to the lessor consists only of two parts, the right to receive the rents reserved and the estate of reversion; the residue of the property rights belongs to the lessee. The value of the lessor's estate, then, must always consist of (1) the present worth, at the time of the assessment, of the future series of rent payments reserved by the terms of the lease, and (2) the present worth, at the time of the assessment, of the reversion. If the lease remains in force he can receive nothing more than the sum of these two valuable interests. Whatever value the property may have at any period during the term of the lease in excess of the sum of these two items represents the value of the tenant's interest. The value of the lessee's estate, then, may be determined by subtracting the value of the lessor's interests from the total appraised value of the property." (21 Cal.Law.Rev. 600.)

The problem under consideration is one of ad valorem taxation, nothing else. In the gross income used by the assessor in making the instant appraisements there is included an item payable to the lessor, rents, which must be the basis of capitalization when valuing the lessor's interest; that value is to be deducted from the value of the fee in order to reach a tax basis for the lessee's interest. When this step is omitted and the lessee is taxed upon a sum which includes the amount apportionable to the lessor (and subject to tax payable by him in the case of a private landlord), the impost is truly levied upon the exempt interest of the lessor. That the lessee does not own that interest is immaterial as is the further fact that the lessor does not have to pay any tax. See, United States v. County of Allegheny, 322 U.S. 174, 186, 189, 64 S.Ct. 908, 88 L.Ed. 1209. When the exempt interest is assessed and the tax imposed upon the lessee the rule of exemption has been violated and the lessee has been required to pay pro tanto a tax which nobody owes.

Parr-Richmond Industrial Corp. v. Boyd, 43 Cal.2d 157, 272 P.2d 16, is in point. Plaintiff had a possessory interest in certain government-owned property

which had been offered for sale; it had made a bid which was accepted and which contemplated a merchantable title or no deal. While this was being worked out, and on the tax day, plaintiff was in possession by consent of the War Assets Administration. In the following June good title was made to plaintiff. The assessor imposed a tax upon all of said realty, assessed it to plaintiff in the same manner and with the same effect as if it owned the fee. Plaintiff conceded liability for a tax upon a possessory interest but, having paid under protest, sued to recover that part of the tax which was properly apportionable to the owner of the fee. It prevailed and the judgment was affirmed, the court saying, 43 Cal.2d at page 169, 272 P.2d at page 24: "In determining the tax on plaintiff's possessory interest the trial court followed the formula similarly used in Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879, which was a valuation method theretofore judicially approved in cases presenting analogous considerations affecting possessory rights. Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 474, 478–479, 14 P.2d 512, 84 A.L.R. 1304; Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. 235, 244–245, 285 P. 896. The tax as so computed was then deducted from the amount of tax claimed by defendants, and the judgments herein were entered for the difference." We perceive no difference in principle between that case and the situation at bar.

Also pertinent and persuasive is The California Company v. State of Mississippi, 221 Miss. 766, 74 So.2d 856, which involved a severance tax. Plaintiff was lessee of certain government-owned oil lands and the government was entitled to receive one-eighth of all oil produced. The statute required payment by the person in charge of production operations, who was authorized to deduct it proportionately from the persons owing the tax. In this instance the tax was measured by the entire production, including the government's one-eighth; it would not consent to a deduction of its proportionate share of the tax, plaintiff paid same in full and sued to recover one-eighth of the amount. From an adverse judgment it appealed and obtained a reversal, the Supreme Court holding that the tax was a direct levy upon oil belonging to the government. At pages 857 and 858, of 74 So.2d, the court said: "Under the statutory formula, the United States is a 'producer', and as such the Mississippi oil severance tax is levied upon it to the extent of the one-eighth interest owned by the United States. Consequently, Chapter 134, Laws of 1944, is unconstitutional insofar as it attempts to impose a severance tax upon the United States of America. * * * The California Company was entitled to a credit for the amount of the tax which would ordinarily be charged to the holder of the royalty interest." See, also, United States v. County of Allegheny, supra, 322 U.S. 174, 186, 189, 64 S.Ct. 908, 88 L.Ed. 1209; Gottstein v. Adams, 202 Cal. 581, 584, 262 P. 314.

[6] Counsel for the Legislative Committee of California Association of Port Authorities, appearing as amicus curiae, stresses an argument that the county's application of the De Luz ruling to the situation before us effects a diversion of the economic impact of the tax to all Port Authorities, in that they are placed under the practical necessity of lowering their lease rentals to compete successfully with private owners of similar properties; that this is likewise true of municipally owned airports, warehouses and other facilities. Lessors of privately owned lands, according to long established custom, suffer an assessment of the fee without segregation of the lessee's interest, then pay the tax themselves, thus reducing the prescribed rentals indirectly to an extent of two per cent, or three or four per cent as the case may be. Owners of exempt lands can rent in competition with such private property by prescribing the same rents upon the theory that there will be no bonus value to the lease and hence no tax upon the possessory interest; the owner of the tax

exempt fee thus has an advantage over the private owner of similar property. But when a tax is imposed upon the possessory interest so substantial as to make rent plus tax exceed rent paid to the private owner, the prospective lessee of public property is no longer interested, for his ultimate burden is substantially greater than that of the lessee of private land. Hence the public owners must reduce their rents to stay in business and the economic burden of the tax rests upon the public owner of the land. While no allegation to this effect appears in either complaint, the facts asserted by counsel seem to be self-evident and hence cognizable here. True, the shifting of economic burden probably would not alone invalidate the tax (De Luz, supra, 45 Cal.2d at page 570, 290 P.2d at page 559; Timm Aircraft Corp. v. Byram, 34 Cal.2d 632, 636, 213 P.2d 715), but it is not to be lightly assumed that the Supreme Court swept away from public property such as tidelands the economic benefit of the constitutional tax exemption without specifically considering and declaring that result.

It is our conclusion that the subject assessments and the taxes based thereon are illegal because of refusal of the assessor and the County Board of Equalization to take into consideration future rents payable by a purchaser of the lease in arriving at a base for valuation by capitalization of net income.

Counsel for appellants in the Forster case have presented other interesting questions. They contend that the De Luz line of cases should have prospective application only, this through application of the principles discussed in County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 and Abbott v. City of Los Angeles, 50 Cal. 2d 438, 326 P.2d 484. It is also argued that § 107.1, Revenue & Taxation Code,[2] is curative in nature and hence should be given retroactive effect, thus applying its healing balm to leases under consideration here.

As we see it, the Faus case, supra, does not apply because the Supreme Court in De Luz and related cases itself gave retroactive application to the doctrine therein declared, in that it applied the same to existing leases; that seems to leave no room for treating differently other leases in effect at the time of those decisions.

Section 107.1, Revenue & Taxation Code, has been held unconstitutional by the Attorney General (31 Ops.Cal.Atty. Gen. 17) but the Legislative Counsel (by letter of May 19, 1958, to Honorable Vin-

2. Rev. & Tax.Code, § 107.1: *"Possessory interest: What to consist of when arising out of lease of exempted property: As personal property: Cash value: Basis of assessment: Application of section.* A possessory interest, when arising out of a lease of exempt property, consists of the lessee's interest under such lease and is hereby declared to be personal property within the meaning of Section 14 of Article XIII of the Constitution of the State of California.

"The full cash value of such possessory interest is the excess, if any, of the value of the lease on the open market, as determined by the formula contained in the case of De Luz Homes, Inc. v. County of San Diego, 1955, 45 Cal.2d 546, [290 P.2d 544], over the present worth of the rentals under said lease for the unexpired term thereof.

"A possessory interest taxable under the provisions of this section shall be assessed to the lessee on the same basis or percentage of valuation employed as to other tangible property on the same roll.

"This section applies only to possessory interests created prior to the date on which the decision of the California Supreme Court in De Luz Homes, Inc. v. County of San Diego (1955), 45 Cal.2d 546, 290 P.2d 544, became final. It does not, however, apply to any of such interests created prior to that date that thereafter have been, or may hereafter be, extended or renewed, irrespective of whether the renewal or extension is provided for in the instrument creating the interest.

"This section does not apply to leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre."

cent Thomas) has ruled, after considering the Attorney General's opinion, that the statute is constitutional. If applicable to the situation presented at bar, the statute seems to proceed upon a misinterpretation of the De Luz opinion, and we do not feel obligated to pursue further the question of its validity or its effect if found valid.

Hence our decision does not rest upon the Faus doctrine or upon consideration of § 107.1, Revenue & Taxation Code. It rests upon the conclusion above stated, that the assessment was unlawful because it proceeded upon a faulty basis and a misinterpretation of the De Luz and related opinions.

Judgment in each case is reversed with instructions to overrule demurrer to complaint, with leave to defendants to answer within a reasonable time prescribed by the Superior Court.

FOX, P. J., and HERNDON, J., concur.

166 Cal.App.2d 589

Edwin A. MURRAY, Vineta M. Holden and William J. Mitchell, Plaintiffs and Appellants,

v.

James E. WRIGHT and Wayne Heape, Individually and doing business as Wright & Heape, a copartnership, Defendants and Respondents.

Civ. 9364.

District Court of Appeal, Third District, California.

Dec. 29, 1958.

Action for personal injuries sustained by plaintiff as a result of operation of an automobile which was taken from defendants' used car lot by a named person. The Superior Court, Butte County, Dudley G. McGregor, J., sustained defendant's general demurrer without leave to amend and entered judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that complaint alleging that defendants were negligent in maintaining their used car lots so that persons were able to take automobiles therefrom, and alleging a second cause of action based on a named person's alleged operation of an automobile taken by him from the lot based on implied consent of defendants as set forth in the Vehicle Code, stated a cause of action based on such negligence, and implied consent, or if insufficient, could have been amended to state a cause of action based on such causes of action.

Judgment reversed in part, and in part affirmed.

1. Pleading ⇐225(1)

Unless it is palpably clear that a pleading is not susceptible of amendment so as to state a cause of action, a demurrer thereto should not be sustained without leave to amend.

2. Automobiles ⇐238(2)
Pleading ⇐246(3)

Complaint alleging that defendants were negligent in maintaining their used car lot so that persons were able to take automobiles therefrom, and alleging a second cause of action based on a named person's alleged operation of an automobile taken by him from the lot based on implied consent of defendants as set forth in the Vehicle Code, stated a cause of action for personal injuries based on such negligence, and implied consent, or if insufficient, could have been amended to state a cause of action based on such causes of action. West's Ann.Vehicle Code, § 402.

3. Automobiles ⇐238(1, 7)

Complaint for personal injuries sustained by plaintiff arising out of operation of an automobile taken from defendants' used car lot, failed to state a cause of action based on defendants' alleged maintenance of a nuisance in leaving automobiles on their lot with the ignition keys in the

locks, and also failed to state a cause of action based on defendants' alleged wanton and reckless disregard of the safety of others in so maintaining their lot.

Glassman and Rose, San Rafael, Melvin M. Belli, San Francisco, for appellants.

Peters & Peters, Chico, for respondents.

PEEK, Acting Presiding Justice.

This is an appeal from a judgment of dismissal entered following the sustaining of defendants' general demurrer without leave to amend in a personal injury action.

A summary of the facts disclosed by plaintiffs' complaint shows that one Brown entered a used car lot owned and operated by defendants Wright & Heape and took a car belonging to defendants. The taking was made easy by the fact that defendants had purposely left the ignition keys in the locks of all cars on the lot. Shortly after the taking Brown collided with plaintiffs.

Specifically the complaint sets forth four causes of action. The first is based on the alleged negligence of defendants in maintaining the lot so that persons were able to take automobiles therefrom. The second is based upon Brown's alleged operation of the car with the implied consent of the defendants as defined in section 402 of the Vehicle Code. The third is based upon defendants' alleged maintenance of a nuisance in so leaving cars on the lot. And the fourth is based upon defendants' alleged wanton and reckless disregard of the safety of others in so maintaining the used car lot. Counsel for plaintiffs did not appear on the date set for hearing on defendants' demurrer nor at the continued hearing, and the same was sustained as to all causes of action without leave to amend. This appeal followed.

[1] At the outset the general rule must be borne in mind that unless it is palpably clear that a pleading is not susceptible of amendment so as to state a cause of action, a demurrer thereto should not be sustained without leave to amend. Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal. App.2d 796, 798, 803–804, 167 P.2d 518.

[2] The first cause, after alleging the ownership and operation by defendants of the lot and the cars located thereon, then alleged that the vehicles were left unlocked by defendants in order " * * * to encourage the general public to examine, inspect and operate those certain vehicles on said used car lot, without regard for the fitness or competence of said general public so to do, and [defendants] knew or should have known that it was common knowledge among the general public in that locale that the keys were at all times left in the ignitions of said unlocked vehicles"; that on the date in question the defendants so negligently and carelessly maintained the lot and the vehicles thereon as to cause the premises to be "* * * unenclosed, unguarded, unprotected and unsupervised * * *"; and that by reason of the alleged carelessness and negligence of the defendants, Brown was induced to take a Buick automobile from the lot. Even if it may be said that such allegations were insufficient in that it does not appear therein that Brown was incompetent to operate a motor vehicle it is alleged in both the third and fourth causes of action that at the time of the taking he was in an intoxicated condition. Obviously, if such had been necessary, under the first cause this fact could easily have been added by amendment.

The second cause of action alleged the operation of the car with the knowledge and consent of the defendant as provided in section 402 of the Vehicle Code; that by reason of such negligent operation, it struck the vehicle in which plaintiffs were riding, and as a proximate result thereof they sustained the damages set forth in the complaint. Although such cause of action incorporated substantially all of the first cause of action, it did not incorporate that portion wherein it was alleged that the defendants were the owners of the car in question. Again, if this was insufficient under the circumstances, a simple amendment would have cured such defect.

In concluding as we do, we are not unmindful of the decisions in Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23, and Richardson v. Ham, 44 Cal.2d 772, 285 P.2d 269, 271, which cases are primarily relied upon by defendants in support of the trial court's order. In the Richards case a divided court held that an owner who had left her car parked on a public street unattended and unlocked, with the ignition key in the car, could not be held to be negligent under the facts in that particular case. The court noted, however, that the owner, under other facts, could be held to be negligent and specifically referred to leaving a car near a school where one might reasonably expect irresponsible children to tamper with it (see Restatement, Torts, sec. 302, item 7); or leaving a car with an intoxicated passenger therein. The Richardson case, which was filed shortly thereafter, showed that a bull dozer was left with its mechanism unlocked; that youths started the vehicle, and in the operation thereof caused serious damage to plaintiffs. There the court distinguished the Richards case and held: "The extreme danger created by a bull dozer in uncontrolled motion and the foreseeable risk of intermeddling fully justify imposing a duty on the owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers."

[3] It is quite apparent that the instant case presents a factual situation far more serious that the parking of a single car on a city street as in the Richards case. Here it is alleged that defendants purposely left the keys in the ignitions of all vehicles parked on their lot which was at all times open and unattended, in order to encourage the general public to enter the lot, examine and operate the vehicles, and that they did so "without regard for the fitness or competence of said general public so to do." It is further alleged that this practice was a matter of common knowledge of the public in the vicinity of the lot, and of course the pertinent details regarding the area where the lot was located was something which could be developed further by plaintiffs at the time of trial.

We must conclude as did the trial court in regard to the third and fourth causes of action. Both of said causes of action are wholly insufficient to charge defendants with the maintenance of a nuisance as defined by section 3479 of the Civil Code, or to charge defendants with reckless and wanton misconduct. Nor does it appear that either of said causes could be so amended as to state a cause of action against the defendants.

As to the first and second causes of action, the judgment is reversed with directions to the trial court to overrule the demurrer, allowing plaintiffs reasonable time in which to amend if they so desire. The judgment as to the third and fourth causes of action is affirmed.

SCHOTTKY, J., and WARNE, Justice pro tem., concur.

166 Cal.App.2d 539

Louis HOZZ and Ettie Hozz, his wife, Plaintiffs and Respondents,

v.

Victor VARGA et al., Defendants.

Don TREVASKIS, as Executor of the Estate of Henry J. Kleefisch, Deceased, Plaintiff in Intervention and Appellant,

v.

Louis HOZZ and Ettie Hozz, his wife (Plaintiffs in the Original Action), and Abe Hozz, Defendants in Intervention,

and

Harry Helfetz, as Receiver, Respondent.

Civ. 9413.

District Court of Appeal, Third District, California.

Dec. 23, 1958.

Rehearing Denied Jan. 19, 1959.

Hearing Denied Feb. 18, 1959.

Proceeding on receiver's second account and petition for discharge. The

Superior Court, Sacramento County, James H. Oakley, J., discharged receiver, directed payment of all funds in his custody, and approved receiver's accounts, and appeal was taken. The District Court of Appeal, Schottky, J., held that where order appointing receiver provided that he was to manage motel, to collect rents and profits and to apply them to payment of all necessary expenses including necessary costs of operation of business, order authorized receiver to make any repairs and purchase any furniture, if such expenditures were necessary for conducting business.

Affirmed.

1. Receivers ⇐201

Although supporting vouchers were not filed with receiver's accounts and were never formally introduced in evidence at hearing for discharge of receiver in accordance with the usual and better practice, where they were admitted for identification, court declared recess in order to enable counsel for opposing party to examine them and receiver testified as to correctness of items in the accounts, approval of accounts was not improper.

2. Receivers ⇐201

It is the usual and better practice for supporting vouchers to be filed in connection with settling of receiver's accounts and an account should not be approved unless it is supported by vouchers or other proof.

3. Receivers ⇐114

Where order appointing receiver of motel provided that he was to collect rents and profits and to apply them to payment of all necessary expenses of property including necessary costs of operation of business, order authorized receiver to make any repairs and purchase any furniture if such expenditures were necessary for conducting business.

4. Receivers ⇐193

A court has power to authorize reimbursement of a receiver for expenditures if they are proper and are approved by court.

5. Receivers ⇐99(2)

Attorney for receiver was not entitled to any attorney's fees as counsel for receiver where he acted as attorney for parties who filed petition resulting in appointment of receiver, but he was entitled to compensation for services as attorney in procuring the receivership. West's Ann.Superior Court Rules, rule 27(b).

6. Mortgages ⇐474

Where receiver was appointed because note for which first deed of trust on motel was security was in default, property was foreclosed and assignees of beneficial interest of deed of trust acquired legal title, reason for appointment of receiver was then over, discharge of receiver was within discretion of trial court even though alleged assignee of debtor intervened asking that rights of parties be determined and that it be decreed that his rights were not divested and that sale was void.

Edward J. Rice, Jr., Oakland, for appellant.

Raymond H. Shone, San Francisco, for respondents.

SCHOTTKY, Justice.

This is an appeal from orders discharging a receiver, directing the payment of all funds in his custody, and approving the receiver's accounts.

Louis Hozz and his wife, Ettie Hozz, were the assignees of the beneficial interest of a deed of trust and the assignees of a note executed by Victor Varga. The deed of trust provided that upon default the beneficiary could personally or through a receiver appointed by the court take possession of the property, operate it, conduct the business (a motel), collect the rents and income and perform such acts as would be necessary to conserve the value thereof. The Hozzes, after an alleged default in the payments due on the note, applied to the superior court for an order appointing a receiver. An order to show cause was issued, and after Varga failed to appear, a

Harry Heifetz was appointed receiver on May 7, 1954, and empowered "To take charge of, use, operate, manage and control the property * * * to conduct the business thereof, to collect the rents, issues, profits and income thereof, to apply the same to the payment of all unsual (sic) and necessary expenses of said property, including taxes, mortgage payments, management costs and all other regular and necessary costs of the operation of the business operated on said premises." On August 10, 1954, Varga and Henry J. Kleefisch filed a motion to vacate the order appointing a receiver. On November 19, 1954, Kleefisch abandoned his attempt to vacate the order and at the same time, after having received permission of the court, filed a complaint in intervention in which it was alleged that he was a party in interest against the original plaintiffs and Abe Hozz, the son of Louis and Ettie Hozz, who was named a defendant; that when the original note in the amount of $44,000 and the deed of trust were executed only $42,175 was actually due; that Varga was induced to sign a note for an amount $1,825 greater than the amount actually due; that on June 3, 1953, Varga executed a second note in the amount of $42,500 and delivered a deed of trust as security which provided that the trustees could sell the property if a default occurred in the payments of the note; that this second deed of trust and the note were assigned to Abe Hozz; that at the time Ettie and Louis Hozz became the assignees of the first note and deed of trust the payments were in default; that they took the note and deed of trust subject to the set-off of $1825; that in February, 1954, before any action was commenced, Varga conveyed his interest in the property to the intervenor; that Heifetz was appointed a receiver and took possession of the property; that Abe Hozz prepared a notice of default which alleged that the junior obligation was in default because of a failure to pay interest when due; that foreclosure proceedings were had; that the power of sale was exercised and the property sold to the Hozzes, acting through and by Abe Hozz; that the sale was contrary to equity and contrary to and in disregard of law; that the intervenor's rights were not divested by the sale; and that the amount in default on the second note, if any, was not a liquidated amount. The intervenor asked that the rights of the parties be determined, that it be decreed that his rights were not divested, that the sale be adjudged void, and that his title be determined.

Thereafter, on March 21, 1955, the receiver filed his first account. He asked that the account be approved and that an order be made allowing compensation for his own services and for the services performed for him by an attorney. In the interim Kleefisch died and Don Trevaskis, the executor of his estate, was substituted for him. On December 31, 1956, the receiver filed his second account and petitioned for discharge on the ground that the property for which he had been appointed receiver had been foreclosed; that Louis and Ettie Hozz had become the owners; that there was no longer any reason for the receivership to continue; that his accounts be approved; that attorney's fees be granted; and that the receiver be discharged.

The matter was heard by the court, and the court made an order settling and approving the first and second accounts of the receiver and providing also that "3. The attorney for said petitioner is hereby awarded $250.00 as and for attorney fees, and said Receiver is ordered to pay said attorney said amount," and that "4. The Receiver, Harry Heifetz, be, and he is hereby discharged as such Receiver, together with his surety, upon said Receiver rendering a closing Supplemental Statement of Account." The receiver filed this account, and the court, on May 22, 1957, ordered the receiver discharged and that he turn over any funds in his possession to Louis and Ettie Hozz. The executor of the intervenor's estate has appealed from each order.

[1, 2] Appellant's first contention is that the court erred in settling the two accounts of the receiver because none of the various items of account are supported by proper vouchers. In the instant case supporting

vouchers were not filed with the accounts and were never formally introduced in evidence at the hearing, although they were admitted for identification and the court declared a recess in order to enable counsel for the appellant to examine them. It is, of course, the usual and better practice for supporting vouchers to be filed, and an account should not be approved unless it is supported by vouchers or other proof. High on Receivers, 4th ed., sec. 798; 75 C.J.S. Receivers § 375, p. 1040; See, also In re Estate of Rose, 63 Cal. 349; Purdy v. Johnson, 174 Cal. 521, 163 P. 893; In re Estate of McCabe, 87 Cal.App.2d 430, 197 P.2d 35. The receiver testified as to the correctness of the items in the account, and the court was, no doubt, satisfied with the sufficiency of the proof and that the expenditures listed in the accounts were proper items or it would not have approved the accounts. While the matter might well have been handled by the respective counsel with more particularity, we do not believe that it can be held that the court erred in approving the accounts.

[3, 4] Appellant also contends that the accounts disclose that the receiver disbursed the sum of $1,595.91 for repairs and furniture which appellant alleges the receiver was not empowered to do without a previous application to the court. The order appointing the receiver read that he was to "take charge of, use, operate, manage and control the property herein described and to conduct the business thereof, to collect the rents, issues, profits and income thereof, to apply the same to the payment of all unsual (sic) and necessary expenses of said property, including taxes, mortgage payments, management costs and all other regular and necessary costs of the operation of the business operated on said premises." We believe that the order authorized the receiver to make any repairs and purchase any furniture if such expenditures were necessary for the conducting of the business. The court in the instant case, no doubt, construed its own order appointing the receiver as authorizing the receiver to make such expenditures without further authorization. Furthermore, there is no rule of law that deprives a court of power to reimburse a receiver for expenditures if they are proper and are approved by the court. (42 Cal.Jur.2d, Receivers, sec. 107.) It is clear that the court considered that the expenditures were proper.

Appellant contends also that "The court not only erred but exceeded its power (jurisdiction) and authority in awarding attorney fees to attorney acting for receiver in violation of law."

[5] The attorney who acted as attorney for the receiver was also the attorney who acted as attorney for Louis and Ettie Hozz when they filed the petition which resulted in the appointment of the receiver. Rule 27(b) of the rules of the superior court forbids a receiver from employing an attorney without the approval of the court, and provides also that the application shall state that the attorney whom the receiver proposed to employ is not an attorney associated with any party to the proceeding. Appellant is correct in stating that the court could not properly, in the instant proceeding allow an attorney's fee to the attorney for the receiver, but it is clear from the record that the court did not make the allowance to the attorney for the receiver but to the attorney who represented the parties who were petitioners in the petition for the appointment of the receiver. Mr. Shone, the attorney for the receiver, stated frankly to the court that he could not be allowed any attorney's fees as counsel for the receiver, but that he was entitled to compensation for services as attorney in procuring the receivership, and the court stated: "On the cases cited I would be disposed to make the order on that basis, that is to say as compensation for procuring the receivership only, and I will do so, subject to checking the case cited." The order read "The attorney for said petitioner is hereby awarded $250.00 as and for attorney fees * * *", and we believe that in the light of the court's statement it should be construed as compensation for the work done by Mr. Shone in the proceeding to appoint the receiver. Thus

construed it was a proper allowance, for as stated in Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, at page 285, 153 P.2d 714, at page 719:

"* * * The expense incurred by a litigant for legal services in causing the appointment of a receiver is as much an expense of administration as the charge of the receiver's counsel and should have priority to the same extent. Farmers' Loan & Trust Co. v. Green, 79 F. 222, 24 C.C.A. 506; Muskegon Boiler Works v. Tennessee Valley I[ron] & R. Co., D.C., 274 F. 836; McLane v. Placerville & Sacramento Valley R. Co., 66 Cal. 606, 622, 623, 6 P. 748. As is stated in Re Estate of Marre, 18 Cal.2d 191, 192, 114 P.2d 591: 'Plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys.'"

[6] Appellant also contends that the court erred in discharging the receiver while the complaint in intervention was not determined. As stated in High on Receivers, 4th ed. 974, 975: "* * * The power of a court of equity to remove or discharge a receiver * * * may be regarded as well settled, and it may be exercised at any stage of the litigation. Indeed, it would seem to be a necessary adjunct of the power of appointment, and to be exercised as an incident to or consequence of that power; * * *" In this case the receiver was appointed because the note for which the first deed of trust was security was in default. The property was then foreclosed and the Hozzes had the legal title. The reason for the appointment was then over. It would seem that the matter of termination was within the discretion of the trial court even though the complaint of intervention was not determined.

No other points raised require discussion.

The orders are affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

166 Cal.App.2d 321

Thurston C. JORDAN and Janet W. Jordan, Plaintiffs and Respondents,

v.

Joseph E. HENCK, Mary P. Henck, Joseph P. Henck, et al., Defendants and Appellants.

Civ. 5775.

District Court of Appeal, Fourth District, California.

Dec. 17, 1958.

Grantees' action against grantors to quiet title as against any claims of grantors of easement for driveway purposes and for maintenance of storage tanks and pipelines in and across lot conveyed. Defendants relied upon implied reservation of easement. The Superior Court of San Bernardino County, A. D. Mitchell, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Shepard, J., held that "necessity for reasonable enjoyment" is a question of fact to be decided by trial court when all of evidence is presented.

Affirmed.

1. Easements ⇐37

"Necessity for reasonable enjoyment" is a question of fact to be decided by trial court when all of evidence is presented in implied easement case. West's Ann. Civ.Code, § 1104.

2. Deeds ⇐90

Words of conveyance are to be construed more strictly against grantor than against grantee.

3. Easements ⇐15

Court will be more circumspect in its approach to decreeing an easement by reservation in favor of grantor than it will in decreeing implied easement for benefit of grantee. West's Ann.Civ.Code, § 1104.

4. Easements ⇐15

Easements by implication are not favored. West's Ann.Civ.Code, § 1104.

5. Trial ⇐375

View of premises had by stipulation of parties constituted evidence in case.

6. Easements ⇐36(3)

In grantees' action against grantors to quiet title as against any claims of grantors to easement for driveway purposes and for maintenance of storage tanks and pipelines in and across lot conveyed, wherein grantors relied upon implied reservation of easement, evidence sustained findings for grantees.

Wilson & Wilson, San Bernardino, for appellants.

Allard, Shelton & O'Connor, Pomona, for respondents.

SHEPARD, Justice.

In 1929 defendants owned Lots 1 and 2 of Block 10 "Arrowhead Lakeview Forest". They then sold Lot 1 to another person. After the sale of Lot 1, they purported by grant deed to convey to the State of California a "right of way and incidents thereto for said State Highway upon, over and across * * * blocks * * * 10 * * * as * * * designated upon that certain map entitled 'Arrowhead Lakeview Forest' * * * etc."

In the year 1947, defendants regained title to said Lot 1. They still owned Lot 2, so that they then owned both Lots 1 and 2. Lot 1 was improved with a store building and a gasoline pump. After this union of title defendants leveled a portion of Lot 2 and established a service station thereon, removing the old pump from in front of the store building on Lot 1, so that Lot 1 was then occupied by a store building and restaurant and Lot 2 by the gasoline service station. One end of the gasoline pump "island" is within five feet of the dividing line between the two lots and a portion of the underground gasoline tanks encroach several feet west of the dividing line and into Lot 1; two of the pipe caps for the filling of these tanks being thus located a few feet west of the said dividing line and on the surface of said Lot 1.

In 1950, defendant sold Lot 1 with the restaurant buildings on it to plaintiffs and retained Lot 2 with the service station. The result of this sale was and is that plaintiffs own a 105-foot frontage on the public highway and defendants own a 104-foot frontage on the public highway.

Until 1953, no trouble arose between these neighbors but in 1953 some irritation arose relating to the use for parking purposes of space unoccupied by buildings and alleged interference with driveway purposes. In 1954, plaintiffs had their lot surveyed and for the first time both parties became aware of the exact location of the true boundary line. In January, 1955, this action was filed to quiet title to Lot 1 as against any claims of defendants for driveway purposes and maintenance of storage tanks and pipelines in and across a portion of the southeasterly corner of Lot 1. Defendants answered and affirmatively claim the right to use for driveway purposes and for storage tank and pipeline facilities a portion of said southeasterly corner of Lot 1.

From a judgment for plaintiffs quieting plaintiffs' title as to Lot 1 but allowing defendants the right to service, refill and use said gasoline storage tanks defendants appeal. On the theory of implied reservation of easement for a right of way, defendants complain that the trial court should have allowed a right of way for the use of defendants across the southeast portion of said Lot 1 for use by defendants and their customers in the operation of the service station business. This is based on the contention that normally the customers of the service station drove into and out of the area occupied by the gasoline pump island across the southeasterly portion of said Lot 1, and that this was routine custom at the time of and before the transfer of Lot 1 to these plaintiffs and fully known to plaintiffs.

The rule of implied easements referred to by defendants comes to us from the common law and has been recognized by the courts of California in many decisions. A portion of it came into the Civil Code

as it now exists in 1872 in section 1104, and has never been altered. However, section 1104 by its terms is only for the benefit of grantees so that it has no force here. The common law rule, as recognized in California, is expressed by the supreme court in the early case of Cave v. Crafts, 53 Cal. 135, 140:

> "When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. 'If the grantor has already treated this portion as a separate property, the mode in which he enjoyed it, or suffered it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it.'"

[1] Various facets of the rule have been emphasized or restated in succeeding cases. Thus in Cheda v. Bodkin, 173 Cal. 7, 14, 158 P. 1025, 1029, the court gives a broader application as well as the basic purpose when it says:

> "'It is a direct recognition of the principle long established and fully recognized by this court (Cave v. Crafts, 53 Cal. 135; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69), that principle being that "where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains,"'."

Further, on page 16 of 173 Cal. on page 1029, of 158 P.:

> "The intention, in view of all the circumstances, is the cardinal subject for inquiry."

In Fristoe v. Drapeau, 35 Cal.2d 5, 8(2), 215 P.2d 729, 732 the court said:

> "The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances."

Attendant upon and recognized as an appendage of the rule as it is applied in California, is "necessity for reasonable enjoyment." This question is one of fact to be decided by the trial court when all of the evidence is presented in the case.

> "Where there is a better and more convenient means of ingress and egress to and from the land conveyed, and the easement is not necessary to the reasonable enjoyment of the part granted, no grant by implication arises. * * * 'The question as to whether or not the use was under a claim of right, or a mere matter of neighborly accommodation, was a question of fact to be determined by the court in the light of the relations of the parties, their conduct, the situation of the property, and all of the surrounding circumstances.'" Grimmesey v. Kirtlan, 93 Cal.App. 658, 664, 665, 270 P. 243, 245.

A further restatement of the rule of necessity appears in Navarro v. Paulley, 66 Cal.App.2d 827, 830, 153 P.2d 397, 398, quoting from 28 C.J.S. Easements § 33 p. 692:

> "'* * * the weight of authority sustains a rule less exacting than that of strict and indispensable necessity, namely, that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. The test of necessity is whether the party claiming the right can, at reasonable cost, create a substitute on his own estate. It has been held that the rules as to ways of necessity should be applied.'
>
> "In this case the trial court heard the testimony and considered the

matter. In the performance of its duty the court determined against the defendant and appellant the essential fact of reasonable user at the time of the severance. With that determination this court can have nothing to do, if there is substantial evidence to support it."

[2–4] Because of the rule that the words of a conveyance are to be construed more strictly against the grantor than against the grantee, the court will be more circumspect in its approach to decreeing an easement by reservation in favor of a grantor than it will for a grantee. It must also be remembered that easements by implication are not favored. Orr v. Kirk, 100 Cal. App.2d 678, 681(3) (2), 224 P.2d 71.

[5, 6] Since the judge in this case, by stipulation of the parties, examined the premises his observation and view of the premises is evidence in the case. Owsley v. Hamner, 36 Cal.2d 710, 719(7), 227 P.2d 263, 24 A.L.R.2d 112; Oppenheimer v. Deutchman, 161 Cal.App.2d 501, 326 P.2d 883. This cause had been previously tried in full before a different judge, and judgment was likewise rendered in favor of plaintiffs at the close of that trial. Some of the defendants were absent in other parts of the world when that trial was had, and on a motion for new trial the same was granted.

The trial judge in this cause had before him a situation in which the highway frontage of Lot 2 is 104 feet immediately adjacent to the grounds of the defendants used for service station purposes while the frontage of plaintiffs is only 105 feet. He saw the premises, he weighed the testimony of the parties, his decision as to what was reasonably necessary cannot properly be interfered with by this court.

Respondents also claim that defendants are estopped from asserting an easement, and also raise the point that at the time defendants granted title to plaintiffs there could be no implied easement reserved because the State of California held a right of way for highway purposes over the portion of Lot 1 which is here involved. Because of the conclusions we have reached as to the trial court's decision on the merits of the controversy, we deem it unnecessary to pass on these latter points injected by respondents' brief.

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J. pro tem., concur.

166 Cal.App.2d 416

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James ROBINSON, Defendant and Appellant.

Cr. 6315.

District Court of Appeal, Second District, Division 1, California.

Dec. 22, 1958.

Hearing Denied Feb. 18, 1959.

Defendant was convicted by jury of possession of marijuana. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Lillie, J., held that where officer testified on voir dire that confidential informer, who had given officer reliable information concerning narcotics on three previous occasions leading to arrests, told officer that informer had been in defendant's apartment the day before and had seen defendant sell marijuana and that defendant was in possession of marijuana there "now" at a certain location, and this was the only information upon which officer acted when one-half hour later he entered apartment and arrested defendant and searched premises and seized narcotics without warrant, de-

fendant was entitled to disclosure of names of persons arrested on prior information given by informer and to disclosure of identity of informer.

Reversed and remanded for new trial.

1. Witnesses ⇐216

Where officer testified on voir dire that confidential informer, who had given officer reliable information concerning narcotics on three previous occasions leading to arrests, told officer that informer had been in defendant's apartment the day before and had seen defendant sell marijuana and that defendant was in possession of marijuana there "now" at a certain location, and this was the only information upon which officer acted when one-half hour later he entered apartment and arrested defendant and searched premises and seized narcotics without warrant, defendant was entitled to disclosure of names of persons arrested on prior information given by informer and to disclosure of identity of informer. West's Ann.Code Civ.Proc. § 1881, subd. 5; West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⇐394.5(4)

Where arrest and search of defendant's person and apartment were made without warrant, the burden of showing proper justification for arrest, search and seizure fell on the prosecution.

3. Arrest ⇐63(4)

Evidence that stranger left defendant's apartment and slammed the door shut was not sufficient evidence, apart from communication of confidential informer, to establish probable cause for arrest of defendant without warrant for a narcotics violation. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⇐394.5(1)

The trial court and not the police officer must determine whether the latter's action is based upon probable cause, and when the officer testifies that he based the legality of arrest without warrant on information given by confidential informer, the court in deciding that probable cause existed for such arrest must find that the informer was reliable, that the officer relied upon such information and that the officer is telling the truth.

5. Criminal Law ⇐1044

Where, at outset of voir dire examination, the defendant interposed objection to introduction of any evidence on the ground that defendant's apartment and person were searched without a warrant without probable cause, and at the close of the hearing on probable cause, after the trial court had ordered the prosecution to proceed on the merits, the defendant voiced his objection by stating that he believed his record to be adequately protected and that he would not object to the admission of evidence during the trial and the trial court affirmatively responded, the defendant, on appeal, could challenge the admission of the officer's testimony, notwithstanding that defendant had made no motion to strike the officer's testimony at the trial.

Earl Klein, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Arthur C. DeGoede, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was convicted by a jury of possession of marijuana under section 11500, Health and Safety Code, and sentenced to the state prison. He appeals from the judgment of conviction and order denying motion for new trial.

The prosecution's evidence discloses that at approximately 8:30 p. m. on the evening of defendant's arrest, officer Charles Fantuzzi, in the presence of two other officers, received information from a confidential informant that he had been in defendant's apartment the day before, saw him sell marijuana and that he was in possession of marijuana there "now" at a certain location. One-half hour later the officers, without a search warrant or warrant of

arrest, arrived at the premises. As they approached the front door of defendant's apartment, one Crowley emerged therefrom and upon learning they were police officers, slammed the door shut. They arrested Crowley and made entry. An altercation ensued, defendant claiming he did not know they were officers, and after handcuffing him, the officers searched the premises and found seven marijuana cigarettes on the floor of the hall leading to the bathroom and loose marijuana on the floor around and in the toilet bowl. Defendant told them he was not a peddler and that the marijuana was for his own use.

Defendant testified he did not use marijuana, did not have any in his possession, had none in the apartment, did not see any there and did not know the officers claimed they found marijuana in his apartment until they took him to the police station. He denied having made contrary statements to the officers.

At the hearing on probable cause in the absence of the jury, officer Fantuzzi was examined concerning defendant's arrest and subsequent search. At the outset the defense objected to the introduction of any evidence on the ground defendant's apartment and person were searched without probable cause. On voir dire, the officer testified he had known the informant for three years and the latter had given him reliable information concerning narcotics on three other occasions from August to October, 1957, leading to arrests or convictions; that he had learned from other officers he was reliable; and that the informant told him he had been in defendant's home the day before when defendant had sold marijuana and "the marijuana is there now," defendant's address, the location and that he lived there with a blond-haired woman.

On cross-examination, the defense asked officer Fantuzzi the names of the persons arrested on the three other occasions in reliance on previous information given by informant. The officer claimed "privilege on that answer." The prosecution objected on the ground that disclosure of the names would tend to lead to the identity of the informant. In sustaining the objection, the lower court declared: "Possibly, and then I don't know whether it is material." A second attempt to cross-examine the officer "on his reliability about the four (three) occasions" likewise resulted in a ruling precluding further inquiry on that point. The defense then asked officer Fantuzzi the identity of the informant. He claimed privilege (under section 1881(5), Code of Civil Procedure), refusing to divulge the name, which refusal the trial court upheld.

Thereafter, the trial judge ruled that the officers had "reasonable cause" and ordered the prosecution to proceed with the trial on the merits. The defense then stated: "I think the record is adequately protected, so that when the offer of evidence does come, I won't make any objection during the trial, because the court has already ruled it is admissible," to which the court affirmatively responded.

[1] Prejudicial error is claimed on two points—on voir dire the trial court limited cross-examination of the officer concerning the names of the persons previously arrested as a result of information supplied by the informant; and the trial judge did not require the officer on voir dire to disclose the identity of the informant. Appellant's real contention, however, is that his arrest was without probable cause making the subsequent search and seizure unlawful, and that in any event, he was entitled to have the name of the informant to aid him in the preparation of his defense. On the record before us we believe appellant's position on the issue of his arrest and search is well taken.

In answer to the claim that in preventing him from ascertaining the names of those arrested on prior information given by the informer, the trial court precluded defendant from inquiring into the reasonableness of the officer's reliance on the informer, which constituted the basis of his arrest and subsequent search, respondent argues that disclosure of their names might divulge the identity of the confidential in-

formant and in any event, the names are immaterial as relating only to collateral issues.

[2] Since it was stipulated at the outset that the arrest and search of defendant's person and apartment were made without warrants, the burden of showing proper justification for the arrest, search and seizure then fell on the prosecution. Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23. This it purported to assume on voir dire by eliciting testimony from officer Fantuzzi that the officers arrested defendant in reliance on information given to him by a confidential informant, upon which he had previously relied. If this was the only information upon which they acted in making forcible entry and arresting defendant, it is clear under the ruling of Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, the objection to the question concerning the names of the arrestees should have been overruled.

[3] Officer Fantuzzi testified on voir dire that the arrest of defendant was made pursuant to the communication he received from the confidential informant. The record discloses that this was the only basis of defendant's arrest. Respondent argues briefly that "the police had more than mere information to sustain the arrest" and alludes to the evidence that prior to entry, one Crowley emerged from defendant's apartment and upon learning they were police officers, slammed the door. Although officer Fantuzzi related this evidence on voir dire, a reading of his testimony discloses that he described the occurrence only in passing and then as a part of a sequence of acts leading up to the entry of the premises. He testified to it at the end of his direct examination and not as a part of that upon which he based the arrest of defendant. Furthermore, he did not recount what if anything he did with Crowley or what if any connection Crowley had with defendant. He did not anywhere in his testimony refer to the encounter with Crowley as any justification for entry of the premises and the subsequent arrest of defendant. Even had he done so, we hardly think that evidence of a stranger leaving defendant's apartment and slamming the door shut is sufficient evidence apart from the communication of a confidential informant to establish probable cause for his arrest.

The objection that the disclosure of the names of the arrestees might divulge the identity of the informant is completely answered by the Supreme Court in Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39. Following the federal rule that requires the government to disclose the identity of the informant unless there is sufficient evidence apart from the confidential communication to establish probable cause the court held in 50 Cal.2d at page 818, 330 P.2d at page 43: "If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. * * * When the prosecution relies instead on communications from an informer to show reasonable cause and has itself elicited testimony as to those communications on direct examination, it is essential to a fair trial that the defendant have the right to cross-examine as to the source of those communications."

On the issue whether the defense had the right to a disclosure of the names to test the reasonableness of the officer's reliance on his informant and the credibility of the officer himself, we deem the answer to the question to which the objection was sustained to be material. The defendant had a right to learn the names of those previously arrested upon information given by the same informant, that he might ascertain if the officer was telling the truth or whether the officer used poor judgment in relying upon this particular informant. Certainly, had defendant, after learning the names, checked official records and found that these three persons had never actually been arrested or, if so, on a charge other than for

narcotics offenses, the officer's credibility would have been irreparably shaken. Had a check revealed that the three had been arrested but not one had been held on preliminary hearing; or all or one or more had been released by police or their cases dismissed by the district attorney, this fact would surely have constituted a substantial showing that the officer exercised poor judgment in relying upon further information from the same informant which, of course, would go to the weight of the evidence.

[4] It must be borne in mind that the trial court and not the police officer must determine whether the latter's action is based upon probable cause, and when he testifies that he based the legality of an arrest on information given by a confidential informant, the court in deciding that probable cause existed for the arrest must find that the informant was reliable, the officer relied upon his information and the officer is telling the truth. "It is the officer's credibility and the soundness of his reasons for relying upon his informant that must impress the court before it can determine that the officer was authorized to make the arrest." People v. White, 159 Cal.App.2d 586, 324 P.2d 296, 298; People v. Weathers, 162 Cal.App.2d 545, 328 P.2d 222. It follows, therefore, on the hearing of probable cause, the defendant has the same right to present a defense on the determination of the reasonableness of the arrest or search as he does on the issue of his guilt at the trial. People v. Lawrence, 149 Cal. App.2d 435, 308 P.2d 821. Since the legality of officer Fantuzzi's conduct in arresting the defendant depended on his credibility and the truth of the information upon which he relied, defendant should have been permitted a fair opportunity to rebut his testimony. The evidence in this case presents a situation similar to that involving the search in Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39. The theory of the Supreme Court relating to disclosure of the identity of the informer in that case, we believe, should apply with equal force, under the circumstances of the case at bar, to the identity of the persons arrested on previous information given by the informer. The court said in 50 Cal.2d at page —, 330 P.2d at page 43: "If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the *truth of the officer's testimony and the reasonableness* of his reliance on the informer can the court make a fair determination of the issue." (Emphasis added.)

[5] Respondent has argued that appellant is precluded from taking advantage of the Supreme Court's pronouncements in Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, because he made no motion to strike the officer's testimony. There is no merit to this contention. The record discloses that at the outset of the voir dire examination, the defense interposed an objection to the introduction of any evidence on the ground defendant's apartment and person were searched without probable cause. Of course, under the circumstances at bar, if the arrest was illegal, so then was the subsequent search and seizure. Again at the close of the hearing on probable cause, after the trial court had ordered the prosecution to proceed on the merits, defendant voiced his objection and believing his record to be adequately protected, advised the court that to eliminate interruption of the proceedings before the jury, he would not object during the trial. The response of the trial judge to this statement was "yes." It is well settled that where "the challenged evidence was obviously inadmissible at the time it was offered and appropriate objection was made to its introduction, a subsequent motion to strike is not necessary to preserve the error on appeal." Dolton v. Green, 72 Cal.App.2d 427, 440, 164 P.2d 795, 801.

We have considered appellant's second contention that it was error to refuse disclosure of the informer's identity on the ground that it prevented him from properly preparing his defense on the issue of guilt but deem it unnecessary to decide the same, having already concluded herein that the trial judge committed prejudicial error in denying defendant disclosure of the names of both those arrested and the informant on the determination of the issue of probable cause for defendant's arrest.

For the foregoing reasons the judgment and order denying motion for new trial are, and the same is each reversed, and the matter remanded for a new trial.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

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M. M. KOEHN, Petitioner and Respondent,

v.

STATE BOARD OF EQUALIZATION, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Russell S. Munro, Director; E. L. Ledger, dba Ledger's Distributing Company, Respondents,

Alcoholic Beverage Control Appeals Board, Ralph McGill, Don Bonar, and Russell Mather, Members, Respondents and Appellants.

Civ. 17256.

District Court of Appeal, First District, Division 1, California.

Dec. 15, 1958.

Hearing Denied Feb. 11, 1959.

Proceeding on a petition for writ of mandate praying for an order vacating an order of the Appeals Board dismissing an indefinite suspension of a wholesale liquor license as made by the State Board and directing the State Board to revoke the license. From a judgment of the Superior Court, County of Alameda, James R. Agee, J., the Alcoholic Beverage Control Appeals Board and members appealed. The District Court of Appeal, Bray, J., held that the State Board has jurisdiction to order reconsideration 48 days after decision; that judicial review could be had by mandamus and was not limited to certiorari; and that the District Court of Appeal would not decide issues not decided by the Superior Court or the Appeals Board.

Judgment affirmed.

1. Administrative Law and Procedure ⇐482

Generally an administrative agency does not have the power to rehear or reopen its decision in the absence of statutory authority, and where that power is conferred by statute, the agency must exercise the power in accordance with the mode prescribed by the statute.

2. Statutes ⇐181(2)

Where language of a statute is, upon its face, reasonably susceptible of either of two constructions, one rendering it reasonable and harmonious and another which would be productive of absurd consequences, the former construction will be adopted.

3. Statutes ⇐219

The construction of a statute by the State Board is entitled to weight.

4. Intoxicating Liquors ⇐108(9)

Under the statute authorizing liquor control agency to order a reconsideration and providing that if no action is taken on a petition within the time allowed for ordering reconsideration the petition shall be denied, the stay provided for is not just to allow additional time for the filing of the petition but also to allow additional time to consider it and to order reconsideration if deemed advisable, and such would apply to a petition already filed, as well as to one that was to be filed. West's Ann.Gov.Code, § 11521(a).

5. Intoxicating Liquors ⇐108(9)

Where defendant was charged with a violation of the Beverage Control Act by

failing to engage in a bona fide wholesale liquor business and the State Board adopted the proposed decision of the hearing officer as its decision and defendant filed a petition for reconsideration and the State Board postponed the effective date of its order, State Board had jurisdiction to order a reconsideration of its decision 48 days thereafter. West's Ann.Bus. & Prof. Code, §§ 23779, 24201; West's Ann.Gov. Code, § 11521(a).

6. Mandamus ⇐174, 187(9)

In mandamus proceeding to vacate an order of Beverage Control Appeals Board dismissing an indefinite suspension as made by the State Board and directing the Board to revoke defendant's wholesale liquor license where there were no issues of fact to be tried and the only question was whether based upon admitted facts the State Board had jurisdiction to reconsider its decision which was a question of law, findings were unnecessary and their correctness need not be determined. West's Ann.Bus. & Prof.Code, §§ 23779, 24201; West's Ann.Gov.Code, § 11521(a).

7. Mandamus ⇐3(12)

Where the State Board of Beverage Control ordered the defendant's wholesale liquor license suspended and defendant filed a petition for reconsideration which was denied and the appeals board held that the State Board did not have jurisdiction and reversed its decision solely on that ground, petition for review of the action of the appeals board was not limited to certiorari but could be had by mandamus. West's Ann.Bus. & Prof.Code, §§ 23082, 23084, 23091; West's Ann.Code Civ.Proc. §§ 1067–1077, 1094.5; West's Ann.Labor Code, § 5950; West's Ann.Public Util.Code, §§ 1756, 1759; West's Ann.Const. art. 6, §§ 4b, 5; art. 20, § 22.

8. Intoxicating Liquors ⇐72
Mandamus ⇐3(12)

Since jurisdiction of the appeals board under the Beverage Control Act is derived directly from the Constitution, either mandamus or certiorari is available to test its decisions. West's Ann.Const. art. 6, § 4b; art. 20, § 22.

9. Mandamus ⇐81

The statute providing that in review of administrative decisions on a writ of mandate court shall sit without a jury and declaring the kind of final order that is to be reviewed applies to decisions of the appeals boards under the Alcoholic Beverage Control Act though the Board does not take evidence or exercise its discretion on the facts. West's Ann.Code Civ.Proc. § 1094.5.

10. Administrative Law and Procedure ⇐489

Statutory provisions that a decision shall be rendered within a defined period after hearing are generally construed as directory only, and failure to reach a final determination within the prescribed period does not deprive the agency of jurisdiction.

11. Intoxicating Liquors ⇐108(10)

Order entered by the appeals board under the Alcoholic Beverage Control Act with respect to suspension of wholesale liquor license which was entered over five months after filing of the appeal was not invalid on the ground that the 60-day period stated in the statute is jurisdictional and that the appeals board lost its jurisdiction to act at the expiration of that time. West's Ann.Bus. & Prof.Code, §§ 7094, 23086, 23779, 24201.

12. Appeal and Error ⇐878(6)

Failure of parties to appeal from a judgment requires the appellate court to assume that they are satisfied with it.

13. Appeal and Error ⇐878(6)

Parties who have not appealed cannot attack findings and the only objections thereto which can be considered are those urged by the appellant.

14. Mandamus ⇐187(9)

In proceeding for mandate to vacate an order of the appeals board under the Alcoholic Beverage Control Act dismissing an indefinite suspension of a wholesale liquor license as made by the State Board and directing the Board to revoke the license, where appeals board held that the State Board had no jurisdiction to grant

reconsideration and refused to consider the merits of the final decision and the Superior Court reversed the appeal board's finding of lack of jurisdiction, but did not pass upon the merits of the State Board's decision but directed the Board to determine two other issues, request by respondents to the Court of Appeal to determine such issues would be denied under the circumstances. West's Ann.Bus. & Prof.Code, §§ 23086, 23779, 24201.

Edsel W. Haws, Senior Counsel, A.B.C. Appeals Board, Sacramento, for appellant A.B.C. Appeals Board.

Dodge & Evans, Robert P. Brorby, Oakland, amici curiae on behalf of appellant E. L. Ledger.

Johnston & Johnston, Willard S. Johnston, George H. Johnston, Benjamin H. Parkinsion, Jr., San Francisco, for Safeway Stores & Beverage Distributors.

Albert G. Evans, San Francisco, for respondent M. M. Koehn.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for State Board Equalization, Dept. of A.B.C.

BRAY, Justice.

The Alcoholic Beverage Control Appeals Board (hereafter referred to as Appeals Board) appeals from a superior court judgment ordering issuance of a writ of mandate commanding said Appeals Board to vacate its order reversing the order of the State Board of Equalization[1] indefinitely suspending the beer and wine wholesale license of E. L. Ledger dba Ledger's Distributing Company and further ordering said Appeals Board to determine all issues left undecided on the appeal from the State Board's order.[2]

Record.

March 24, 1953, petitioner and respondent Koehn filed an accusation under section 40 of the Alcoholic Beverage Control Act (now section 24201, Business and Professions Code) charging Ledger with a violation of section 6(f) of the act (now Bus. and Prof.Code, § 23779) in failing to actually engage in a bona fide wholesale liquor business under his license in that he made no sales for a period in excess of 45 days other than to himself. July 24, the hearing officer filed a proposed decision in which he found the charge not true and recommended that the accusation be dismissed. August 20, the State Board adopted the proposed decision as its decision, ordering it to become effective September 21. September 10, Koehn filed a petition for reconsideration. September 17, the State Board postponed the effective date of its order of August 20 to October 13. September 30 Ledger filed objections to the petition. October 8, the State Board granted the petition for reconsideration and ordered the matter referred to the hearing officer for additional hearing. November 24, the petition was heard. The written stipulation of Koehn and Ledger was filed to the effect that Ledger had made no sales at wholesale of either beer or wine to any retail licensee during the period August, 1948, to date. February 26, 1954, the hearing officer submitted a proposed decision finding that Ledger had made no sales during the period charged and recommended that the accusation be dismissed with a warning. September 16, the State Board declined to adopt the proposed decision and determined to decide the case pursuant to the provisions of subdivision (c) of section 11517, Administrative Procedure Act. December 16, the State Board ordered that Ledger's license be suspended indefinitely until such time as he might

1. Subsequently to the making of this order the State Board of Equalization has been succeeded by the Department of Alcoholic Beverage Control. The term "State Board" as used herein will include both the State Board of Equalization and the Department of Alcoholic Beverage Control.

2. In Koehn v. State Board of Equalization, 50 Cal.2d 432, 326 P.2d 502, it was held that the Appeals Board has the right to bring this appeal.

engage in a bona fide wholesale business. The decision was to become effective January 17, 1955. The certificate of this decision is dated December 28. Ledger filed a petition for reconsideration. This was denied January 11. February 4, Ledger filed with the Appeals Board an appeal from the decision of the State Board raising three points: (1) Did the State Board have jurisdiction to make its decision of December 28, 1954? (2) Did it proceed in the manner required by law in rejecting the stipulation for continuance entered into by the adverse parties? (3) Was the State Board's itnterpretation of the effect of section 23779, Business and Professions Code (formerly § 6(f), A.B.C. Act) accurate? July 20, 1955, the Appeals Board held that the State Board did not have jurisdiction and reversed its decision solely on that ground, stating that it felt that it was unnecessary to pass upon the other two points. Koehn then filed in the superior court a petition for writ of mandate praying for an order vacating the order of the Appeals Board dismissing the indefinite suspension as made by the State Board and directing the State Board to revoke Ledger's license. The superior court judgment was as hereinbefore set forth.

Questions Presented.

1. Did the State Board have jurisdiction to order reconsideration 48 days after decision? This, in turn, depends upon the power of the State Board to order a stay.

2. Were the findings proper?

3. Is judicial review of the Appeals Board's acts limited to certiorari in the District Court of Appeal?

4. Did the Appeals Board exceed its jurisdiction?

5. Should this court decide issues not decided by the superior court or the Appeals Board?

1. Stay Order.

August 20, 1953, was the date of the decision of the State Board. It was to become effective September 21. October 8, the order granting reconsideration was made. This was approximately 48 days after the decision. Admittedly, unless there was a valid stay order in effect, the power to grant reconsideration expired September 21. This brings us to the validity of the stay order made September 17 postponing the effective date to October 13. Appellant contends that section 11521(a), Government Code, which provides for a stay for the purpose of filing an application for reconsideration, is not applicable for the reason that the order of September 17, postponing the effective date of the decision, cannot be a stay for the purpose of filing an application for reconsideration, because such an application was then on file.

[1] It is the general rule that an administrative agency does not have the power to rehear or reopen its decision in the absence of statutory authority. Pacheco v. Clark, 1941, 44 Cal.App.2d 147, 153, 112 P.2d 67. Where that power is conferred by statute the agency must exercise the power in accordance with and in the mode prescribed by statute. 42 Am.Jur. 379; 73 C.J.S. Public Administrative Bodies and Procedure § 156, p. 492. In Moran v. State Board of Medical Examiners, 1948, 32 Cal. 2d 301, 304, 196 P.2d 20, it was stated that the administrative agency's power to order reconsideration expired on the effective date of the decision as set by the agency.

Section 11521(a), Government Code, provides: "The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the 30-day period or *at the termination of a stay of not to exceed 30 days* which the agency may grant for the purpose of filing an application for reconsideration. If no action is taken on a petition within the time allowed for ordering reconsideration the petition shall be deemed denied." (Emphasis added.)

[2-6] Under this section, appellant concedes, had there not been an application for reconsideration on file, the State Board could at any time before the effective date of the decision, namely, September 17, have granted a stay of 30 days "for the purpose of filing an application for reconsideration," but as one was already on file before the effective date arrived, appellant contends that the board had no power to stay the order until the board could act upon such application. Such an interpretation would result in the absurd situation, that if one desiring reconsideration would withhold filing his petition the board could stay for 30 days the effective date of the decision, but if he filed such petition it could not and would have to determine his petition before the effective date of the order arrived. In interpreting section 11521(a) the following language is important: "If no action is taken on a petition within the time allowed for *ordering reconsideration* the petition shall be deemed denied." (Emphasis added.) Thus, the stay provided for is not just to allow additional time for the *filing* of the petition but is also to allow additional time to consider it and to *order* reconsideration if deemed advisable. This would necessarily apply to a petition already filed as well as to one that was to be filed. This is the common sense construction of the statute. See 23 Cal.Jur. p. 736, § 113.

Applicable here is the following from Goldsmith v. Board of Education, 66 Cal. App. 157, 163, 225 P. 783, 785: "It is a cardinal rule of statutory construction that, where the language of a statute is, upon its face, reasonably susceptible of either of two constructions, one which, in its application, will render it reasonable, fair, and just, and harmonious with its manifest purpose and another which, in its application, would be productive of absurd consequences, the former construction will be adopted." Moreover, the construction of the statute by the State Board is entitled to weight. See Witkin, Summary of Cal. Law, p. 529; 23 Cal.Jur. p. 776, § 152.

2. Findings.

[7] Appellant contends that in this type of proceeding findings are not required, and conversely that finding No. 7 to the effect that the postponement of the effective day of the decision was for the purpose of the State Board considering the petition for reconsideration then on file is not supported by any evidence; also that finding No. 7 to the effect that the State Board did have jurisdiction to grant reconsideration is not a finding of fact but a conclusion of law.

It has been held that in a mandamus proceeding if there has been a trial upon questions of fact, findings are necessary unless waived. Delany v. Toomey, 111 Cal.App.2d 570, 572, 245 P.2d 26. In our case there were no issues of fact to be tried; the only question submitted to the court was whether, based upon the admitted facts, the State Board had jurisdiction to reconsider its decision. This, of course, is a question of law. As findings were unnecessary their correctness need not be determined. We are only concerned with the court's determination of the issue of law.

3. Judicial Review.

[8-10] Appellant points to the fact that article XX, section 22, of the California Constitution, and sections 23082 and 23084, Business and Professions Code, provide in effect that the review of the acts of the State Board by the Appeals Board is limited to a quasi-judicial review of the actions of the State Board and that no new evidence may be taken. Appellant then contends that the only review of the Appeals Board's action can be by certiorari to the District Court of Appeal. It points to section 4b, article VI, Constitution, which states that the District Court of Appeal may exercise appellate jurisdiction "in proceedings of mandamus, certiorari, prohibition * * * *and in such other special proceedings as may be provided by law* * * *". (Emphasis added.) It then argues that the Legislature, in designating as the powers of the Appeals Board, the appellate review provisions of section 1094.5, Code of Civil Procedure (writ of man-

damus) applicable to constitutional agencies (compare section 23084, Business and Professions Code with section 1094.5, Code of Civil Procedure as to constitutional agencies) intended by implication that the review provided for in section 23091, Business and Professions Code ("Final orders of the board shall be subject to judicial review as prescribed by law") would fall within the above quoted provision of the Constitution giving the District Court of Appeal original jurisdiction in "such other special proceedings as may be provided by law * * *". Such an interpretation of "judicial review as prescribed by law" is too narrow. "[L]aw" refers to section 1094.5, Code of Civil Procedure (mandamus) and sections 1067–1077, Code of Civil Procedure (certiorari). Both the District Courts of Appeal and the Supreme Court have jurisdiction to issue writs of mandamus and certiorari. In the instances where the sole jurisdiction of certiorari from the acts of an administrative agency is in the appellate courts such exclusive jurisdiction and the necessary procedure has been set forth by the Legislature. Thus sections 1756 and 1759 of the Public Utilities Code, providing certiorari from the acts of the Public Utilities Commission, has placed jurisdiction exclusively in the Supreme Court, and Labor Code, section 5950 providing certiorari from the acts of the Industrial Accident Commission has placed jurisdiction exclusively in the District Courts of Appeal. If, in connection with acts of the Appeals Board, the Legislature intended that certiorari should be the exclusive procedure and that the District Courts of Appeal should have exclusive jurisdiction, it is reasonable to assume that the Legislature would have said so, as it did in the Public Utilities Commission and Industrial Accident Commission matters.

In Covert v. State Board of Equalization, 1946, 29 Cal.2d 125, 173 P.2d 545, it was held that the State Board, although a statewide agency, had quasi-judicial powers "similar in some respects to those of a local administrative tribunal, a decision of which will be sustained if it has committed no error of law and if the evidence, although conflicting, is sufficient to support its findings of fact." 29 Cal.2d at page 131, 173 P.2d at page 548. Mandamus was recognized there as a proper proceeding in which to review the State Board's decision. In Boren v. State Personnel Board, 1951, 37 Cal.2d 634, 234 P.2d 981, the court stated that since the enactment of section 1094.5, Code of Civil Procedure (in 1945) it is no longer open to question that the writ of mandamus is appropriate for the purpose of inquiring into any final administrative order or decision of a statewide agency having quasi-judicial power. It also held that "since the jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from the Constitution * * * the writ of certiorari is also available to review the Board's decisions." 37 Cal.2d at page 637, 234 P.2d at page 983. The jurisdiction of the Appeals Board is likewise derived directly from the Constitution, so either mandamus or certiorari is available to test its decisions. Prior to the creation of the Appeals Board it was proper to use the writ of mandate to review determinations of statewide administrative agencies (either constitutional or statutory) and local boards. Code of Civil Procedure, section 1094.5, codified that law. See 10th Biennial Report of the Judicial Council, p. 45; also People v. County of Tulare, 1955, 45 Cal.2d 317, 319, 289 P.2d 11, 12, where in a tax case the court said, "The Legislature, in section 1094.5 of the Code of Civil Procedure, has provided an appropriate method of reviewing acts of a statewide administrative and quasi-judicial agency such as the State Board of Equalization." While none of these cases deal with decisions of the Appeals Board, as the board is of recent creation, we find nothing indicating that the rule of these cases should not apply to it. The main basis upon which appellant claims that section 1094.5, Code of Civil Procedure, does not apply is that the Appeals Board does not take evidence or exercise its discretion on the facts. But the only

reasonable interpretation of the whole paragraph of section 1094.5(a), Code of Civil Procedure, demonstrates that it does apply to decisions of the Appeals Board. It is only stating that in reviewing administrative decisions on a writ of mandate, the court shall sit without a jury. It starts out: "Where the writ is issued for the purpose of *inquiring* into the *validity of any final* administrative *order or decision* made as *the result of a proceeding* in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the * * * board or officer * * *". (Emphasis added.) It is thus just stating the kind of final order. Such applies to the Appeals Board.

The decision of the Appeals Board is the result of a proceeding mentioned in the section and is the *final* decision sought to be reviewed. See Fiscus v. Dept. of Alcoholic Bev. Control, 1957, 155 Cal.App. 2d 234, 317 P.2d 993, 994, which held, because of the failure to exhaust administrative remedies by appealing to the Appeals Board, that a petitioner could not seek to review a decision of the department by mandamus. "'* * * The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; *it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention* * * *.'" (Emphasis added.) Thus the decision of the department could not be the final order or decision referred to in Code of Civil Procedure section 1094.5(a), as contended by the Appeals Board, since that section must be referring to judicially reviewable final orders or decisions and not any final order or decision which may be the result of, at different levels, a hearing and determination of facts. The Fiscus case, supra, reached its holding even though section 24301, Business and Professions Code, states that subject to article XX, section 22 of the Constitution, any ruling or order of the department is subject to review as provided by law in any court of competent jurisdiction. In reality the judicial review is of the department's decision, although it is taken from the order of the Appeals Board, since, under article XX, section 22, the only order the Appeals Board can make is for reversal or affirmance. "When the alternative writ of mandate was issued the return and answer of the appeals board raised not only the issue of whether the state board had acted within its jurisdiction, but also the issue whether the appeals board had acted within its jurisdiction and pursuant to its constitutional grant of authority." Koehn v. State Board of Equalization, supra, 1958, 50 Cal.2d 432, 326 P.2d 502, 505.

Both the Superior Courts and the District Courts of Appeal have jurisdiction to issue writs of mandamus and certiorari. Art. VI, §§ 4b and 5, Const. It has been the policy of both the Supreme Court and the District Courts of Appeal not to encourage original proceedings before it unless there are exceptional circumstances present. See 3 Witkin's California Procedure, p. 2470.

Thus, mandamus in the Superior Court lies to review the decision of the Appeals Board.

4. Appeals Board Jurisdiction.

[11, 12] Section 23086, Business and Professions Code (Alcoholic Beverage Control Act), provides: "Order: Time for entering. In all cases, the board shall enter its order within 60 days after the filing of an appeal." The Appeals Board order was entered over five months after the filing of the appeal. Respondent Koehn contends that the 60 day period stated in the section is jurisdictional and that the Appeals Board lost its jurisdiction to act at the expiration of that time. Applicable here is the language in Peak v. Industrial Accident Commission, 82 Cal.App.2d 926, 187 P.2d 905. There the commission made an award after the expiration of the 30 days mentioned in section 5800, Labor Code, which provides: "After final hearing by the commission, it shall, within thirty days, make and file * * * Its order

* * *" The court stated (82 Cal.App. 2d at page 932, 187 P.2d at page 909): "To hold that a failure of the commission to so act within the prescribed period causes the commission to lose jurisdiction * * * would be absurd." See 2 Cal.Jur.2d p. 180, § 94: "Statutory provisions providing that a decision shall be rendered within a defined period after hearing are generally construed to be directory only, and failure to reach a final determination within the prescribed period does not deprive the agency of jurisdiction." In Barry v. Contractors State License Board, 85 Cal.App. 2d 600, 193 P.2d 979, the registrar filed his decision recommending the revocation of a contractor's license after the expiration of the period required by the then section 7094, Business and Professions Code (since repealed). The court held the section to be directory only. We see no good reason for holding section 23086 other than directory.

5. Additional Issues.

[13, 14] As stated before, the Appeals Board held that the State Board had no jurisdiction to grant reconsideration and refused to consider the merits of the final decision of the State Board suspending Ledger's license. The superior court reversed the Appeal Board's finding of lack of jurisdiction, did not pass on the merits of the State Board's decision but directed the Appeals Board to determine the two other issues presented by the appeal to the Appeals Board. We are requested by respondent Koehn and by respondent State Board to determine these issues or at least to construe section 23779, Business and Professions Code, the section under which the State Board purported to act in suspending Ledger's license. Appellant opposes this request as do amici curiae representing Safeway Stores, Inc., Beverage Distributors, Inc., and respondent Ledger. The briefs of the amici curiae state that there are proceedings now pending before the State Board seeking revocation of liquor licenses of "four chains" apparently on the same grounds upon which the State Board acted in the Ledger matter. They point out that Koehn and the State Board did not appeal from the superior court judgment and that for us to disregard the portion of that judgment directing the Appeals Board to review the other issues presented to it would be, in effect, reversing pro tanto the judgment of the superior court. They also contend that the record before us is not sufficient to enable us to properly determine these other issues. The failure of parties to appeal from a judgment requires us to assume that they are satisfied with the judgment. See Kofsky v. Smart & Final Iris Co., 131 Cal. App.2d 530, 532, 281 P.2d 5. In Koehn's petition for mandamus he asked the superior court to revoke Ledger's license. The effect of our determining the merits of the appeal to the Appeals Board could possibly result in a reversal of the superior court's refusal to revoke the license from which refusal no appeal has been filed. "* * * 'it is well settled that parties who have not appealed cannot attack the findings and that the only objections thereto which can be considered are those urged by the appellant.'" Mott v. Horstmann, 1950, 36 Cal.2d 388, 393, 224 P.2d 11, 14; see also Palma v. Watson Surplus Lines Agency, 1957, 148 Cal.App.2d 879, 882, 307 P.2d 689; Phillips v. Phillips, 1953, 41 Cal.2d 869, 875, 264 P.2d 926. We see no reason for determining the questions referred by the trial court to the Appeals Board. Also, under the circumstances of this case, any construction we might give to section 23779, Business and Professions Code, would be merely dictum.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

166 Cal.App.2d 353

SOUTHERN PACIFIC COMPANY, a corporation, Plaintiff and Appellant,

v.

George M. FISH et al., Defendants and Respondents.

SOUTHERN PACIFIC COMPANY, a corporation, Plaintiff and Appellant,

v.

SEABOARD MILLS et al., Defendants and Respondents.

SOUTHERN PACIFIC COMPANY, a corporation, Plaintiff and Appellant,

v.

SEABOARD MILLS et al., Defendants and Respondents.

Civ. 22933.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1958.

Actions to recover money paid under mistake as to availability of transit privileges or service at defendants' Santa Barbara processing plant with respect to several carloads of dried beans and peas shipped from points in Idaho and Washington by way of Portland, thence to Santa Barbara and finally to eastern destinations. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., rendered summary judgments for defendants, and plaintiff appealed. The District Court of Appeal, Lillie, J., held that even though plaintiff had not filed affidavit in opposition to defendants' motion for summary judgment, court was entitled to accept as true facts alleged in defendants' affidavit only if such facts were within affiant's personal knowledge and were facts to which he could competently testify.

Judgment reversed and cause remanded for further proceedings.

1. Carriers ⇐189

"Transit privilege" enables commodities to be shipped from point A to point B, there to be stored, marketed or processed, and later reshipped to point C at a rate less than combined separate rates from A to B and B to C.

See publication Words and Phrases, for other judicial constructions and definitions of "Transit Privilege".

2. Judgment ⇐186

Issue finding, rather than issue determination, is pivot upon which summary judgment law turns; and a hearing on motion for summary judgment is not a trial on merits. West's Ann.Code Civ.Proc. §§ 53, 437c.

3. Judgment ⇐186

On motion for summary judgment, resort may not be had to pleadings. West's Ann.Code Civ.Proc. §§ 53, 437c.

4. Judgment ⇐185.2(9)

A valid answer may not be stricken on motion for summary judgment unless plaintiff, by affidavit, shows such facts as may be deemed sufficient to present a triable issue; and plaintiff failing to file counter-affidavit in opposition to defendants' motion for summary judgment and failing to file motion for summary judgment and supporting affidavit in its own behalf could not have judgment even if defendants' affidavit established beyond peradventure validity of plaintiff's claims. West's Ann. Code Civ.Proc. § 437c.

5. Judgment ⇐185.2(8)

True nature of litigation must be ascertained from allegations contained in moving affidavit, and reference may not be had to allegations of complaint in order to ascertain existence of triable fact requiring denial of motion for summary judgment. West's Ann.Code Civ.Proc. § 437c.

6. Judgment ⇐185.2(7)

Where moving affidavit was uncontroverted, trial court was entitled to accept as true, for purposes of motion for summary judgment, facts therein stated. West's Ann.Code Civ.Proc. § 437c.

7. Judgment ⇐181(4)

If there be any doubt as to propriety of motion for summary judgment, courts should, without hesitancy, deny same. West's Ann.Code Civ.Proc. § 437c.

8. Judgment ⇐185.2(7)

Even though plaintiff had not filed affidavit in opposition to defendants' motion for summary judgment, court was entitled to accept as true facts alleged in defendants' affidavit only if such facts were within affiant's personal knowledge and were facts to which he could competently testify. West's Ann.Code Civ.Proc. § 437c.

9. Judgment ⇐185.2(6)

On motion for summary judgment, affidavit of moving party must be strictly construed. West's Ann.Code Civ.Proc. § 437c.

10. Judgment ⇐185.1(4)

To meet requirement of "particularity" found in statute governing summary judgment, movant's affidavit should set forth evidentiary and not ultimate facts. West's Ann.Code Civ.Proc. § 437c.

11. Judgment ⇐185.1(3)

Averments which could not be within affiant's personal knowledge constituted hearsay, conclusion and opinion and could not be factual proof required by summary judgment statute. West's Ann.Code Civ. Proc. § 437c.

12. Judgment ⇐185.2(3)

If a party is to prevail on his motion for summary judgment, his supporting affidavit must state facts covering every element necessary to sustain judgment in his favor.

13. Evidence ⇐366(1)

Where copy of order of Interstate Commerce Commission was neither certified nor authenticated, it was incompetent as proof of its contents. West's Ann.Code Civ.Proc. §§ 437c, 1905.

14. Judgment ⇐181(4), 185(2)

Before court can dismiss complaint on motion for summary judgment, it must clearly appear that action is without merit, and every reasonable doubt must be resolved in favor of pleading. West's Ann. Code Civ.Proc. § 437c.

15. Carriers ⇐32(2¼)

Absent fraud or collusion, carrier's payment of refunds is not against public policy or sound morals. Interstate Commerce Act, § 1 et seq., 49 U.S.C.A. § 1 et seq.

16. Judgment ⇐185.1(8)

In summary judgment proceedings, there can be no waiver of right to object to matter inadmissible by virtue of its incompetency, and supporting affidavit setting forth facts to which affiant could not competently testify could not, even in absence of objection to incompetent evidence, support judgment. West's Ann.Code Civ.Proc. §§ 53, 437c.

17. Judgment ⇐185.1(8)

There first must be a sufficiently supportive affidavit before defects of any counteraffidavit, either of form or substance, need be examined on motion for summary judgment. West's Ann.Code Civ.Proc. §§ 437c, 1905.

18. Judgment ⇐185.1(3)

In order that court's discretion may properly be exercised on motion for summary judgment, moving party unable to make showing except upon information and belief should at least present affidavit by someone who states of his own knowledge that such other persons do know or claim to know facts and have refused to make affidavits, and such affidavit ought to name other persons and set forth what each one knows or claims to know. West's Ann.Code Civ.Proc. § 437c.

A. T. Suter, Frederick E. Fuhrman, San Francisco, E. D. Yeomans, Walt A. Steiger

and John H. Gordon, Los Angeles, for appellant.

Schramm, Raddue & Seed, Edw. W. Schramm, Santa Barbara, for respondents.

LILLIE, Justice.

This is an appeal by plaintiff from summary judgments in defendants' favor in each of the above actions which were consolidated for the purpose of considering defendants' motions. Hereinafter, and for the purposes of this appeal, we shall treat the motions as a single pleading.

[1] From the affidavit supporting the motion, and the entire record before us, it appears that the instant litigation had its genesis in a dispute over the availability of transit privileges or service at defendants' Santa Barbara processing plant, with respect to several carloads of dried beans and peas shipped from points in Idaho and Washington by way of Portland, thence to Santa Barbara and finally to eastern destinations. The recognized privilege of transit enables a commodity to be shipped from point A to point B, there to be stored, marketed or processed, and later reshipped to point C at a rate less than the combined separate rates from A to B and B to C.

During the time in question defendants were engaged at Santa Barbara in the processing of beans and peas to be sold in eastern markets. They arranged to do business with growers in the Pacific Northwest and accordingly made certain inquiries from a Union Pacific freight agent in Idaho, there and then alleged by defendants to be likewise acting for plaintiff, who advised them that, under the rules and regulations of the Interstate Commerce Commission, transit privileges were available at Santa Barbara in connection with transcontinental rates from Portland, Oregon, and that defendants could avail themselves of such rates and transit service by paying the local rates from Idaho origins to Portland, plus the rates from Portland to eastern destinations. Between April of 1949 and February of 1951, defendants shipped from points in Idaho and Washington, by way of Portland, numerous carloads of dried beans and peas consigned to themselves at Santa Barbara. Plaintiff, as delivering carrier, collected charges at Santa Barbara based on the combination of local rates to and from Portland with respect to the Idaho shipments, and on the basis of the joint through rates via Portland on the Washington carloads. On the outbound shipments from Santa Barbara, after the transiting operation had been completed, tariff charges based on the transcontinental rate from Portland via Santa Barbara were assessed and paid to plaintiff. Thereafter, at defendants' request, plaintiff refunded to them that portion of the charge pertaining to the movement from Portland to the transit point at Santa Barbara, less the transit charge. These refunds were made because of the belief, then allegedly adhered to by both plaintiff and defendants, that dried beans and peas were "foodstuffs" which, under applicable tariff provisions, would authorize the transit operation at Santa Barbara. Later, it developed that this belief was erroneous and that the commodities in question were not "foodstuffs" within the definition of that term by the Interstate Commerce Commission.

Plaintiff's four actions, alleging payment of money under mistake, sought recovery of a portion of the refunds paid to defendants, such portion representing the freight charges from Portland to Castle Crag, California, a point near Dunsmuir in the northern part of the state. As plaintiff points out in its brief, the total charges for the through movement would thus be based on the applicable rates from origin points to Castle Crag, plus the applicable rate from that point to final eastern destinations, plus transit charge. The selection of Castle Crag as a pivotal point may be explained by the fact that the Pacific coast territory for transit privilege purposes has been divided by the transcontinental lines, with the apparent approval of the Interstate Commerce Commission, into three zones: (1) north of Castle Crag; (2) south of Mojave and San Luis Obispo, embracing Santa Barbara, and (3) between Castle Crag and

the Mojave-San Luis Obispo line. Transit privileges, in connection with eastbound rates, are available only in that zone which embraces the point of origin.

Plaintiff's suits were held in abeyance pending a decision by the Interstate Commerce Commission on a complaint filed by the defendants in which it was initially claimed that the charges originally assessed by plaintiff and paid by defendants were applicable; subsequently the complaint was limited to the claim that plaintiff's failure to provide transit at Santa Barbara was unjust, unreasonable and unduly prejudicial and that the rates from the points of origin in Idaho and Washington destined to transcontinental destinations were unjustly and unreasonably high, particularly with respect to the Portland to Castle Crag segment or factor. Both contentions were rejected by the Commission, which concluded: "We find that the defendant's (Southern Pacific Company) failure to provide transit service at Santa Barbara on dried beans and peas originating in Idaho and Washington, in connection with transcontinental rates from Portland, is not shown to have been or to be unjust, unreasonable, or unduly prejudicial, and that the assailed rates on this traffic are not shown to have been or to be unjust or unreasonable. The complaint will be dismissed."

Following the rendition of this decision, defendants answered the complaints on file and denied the existence of any mutual mistake of fact. Shortly thereafter, they moved the court below for summary judgment based on a single affidavit executed by George M. Fish, as an individual defendant in one of the actions and as President of Seaboard Mills, a corporation, a defendant in each of the remaining suits, to which affidavit there was attached an unauthenticated copy of the Commission's report and order. A memorandum of authorities accompanied the motion. No counteraffidavit was executed by plaintiff, although it also filed a memorandum of points and authorities in opposition thereto. The trial court granted the motion for summary judgment, setting forth its reasons in a memorandum which has been made part of the record. It adopted the argument of defendants (1) that if the plaintiff made the refunds by mistake, the mistake was one of law and no recovery could be had; and (2) assuming that there was no mistake of law, then the contract was an illegal one and plaintiff could not recover since the courts will not assist any party to an illegal contract.

Appellant argues herein that it is suing to recover lawful tariff charges which it has the right and the obligation to collect under applicable provisions of the Interstate Commerce Act, regardless of any circumstances that may be involved; and therefore it is immaterial whether the refund to defendants resulted from a mistake of law or pursuant to an illegal contract. Because, contends appellant, the issue here is purely one of law, it additionally requests this appellate court to exercise the powers conferred by section 53, Code of Civil Procedure, and not only reverse the lower court's judgment, but direct the entry of judgment for appellant. Respondents, on the other hand, submit that their uncontroverted affidavit is sufficient to support their judgment.

[2] With respect to appellant's contentions, it is necessary at the outset to observe, since the point is not once touched upon by appellant, that we are not here confronted with an appeal from a judgment after trial on the merits. To the contrary, the proceeding in the court below was a summary one, authorized and governed by section 437c. Code of Civil Procedure, which insofar as then pertinent read as follows: "In superior courts * * * when an answer is filed in any kind of action if it is claimed that * * * the action has no merit, on motion * * * supported by affidavit * * the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact."

"By an unbroken line of decision in this state since the date of the original enactment of section 437c, the principle has be-

come well established that issue finding rather than issue determination is the pivot upon which the summary judgment law turns" (Walsh v. Walsh, 18 Cal.2d 439, 441, 116 P.2d 62; Poochigian v. Layne, 120 Cal. App.2d 757, 760, 261 P.2d 738); hence, a hearing on motion for summary judgment is not a trial on the merits (Luders v. Pummer, 152 Cal.App.2d 276, 279, 313 P.2d 38; Shea v. Leonis, 29 Cal.App.2d 184, 187, 84 P.2d 277).

[3, 4] We first dispose of appellant's contention that it is entitled to an entry of judgment in its favor upon a reversal herein, by reason of the asserted undisputed facts set forth in defendants' affidavit and the applicable law, notwithstanding appellant's failure to file a counteraffidavit on its own behalf. Actually, appellant herein seeks to rely upon respondents' affidavit supporting respondents' motion for summary judgment in the lower court. As section 437c clearly indicates, a complaint may be dismissed or answer stricken "unless the other party, by affidavit or affidavits shall show such facts as may be deemed * * * sufficient to present a triable issue of fact." Resort may not be had to the pleadings since "(i)t is not the purpose of the procedure under section 437c to test the sufficiency of the pleadings" (Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 560, 122 P.2d 264, 268). Having failed to file a counteraffidavit in opposition to defendants' motion or a motion for summary judgment and supporting affidavit in its own behalf, appellant is thus limited to defendants' affidavit, and in effect is here asking this court to hold that the requirements of section 437c may be satisfied by its reliance on defendants' motion and affidavit and its failure to present even a supporting affidavit. A similar contention was rejected in Coyne v. Krempels, 36 Cal.2d 257, 262, 223 P.2d 244, 247, when the court said, "So construed, section 437c would be meaningless." To the same effect is Cone v. Union Oil Co., 129 Cal. App.2d 558, 563, 277 P.2d 464. In the Coyne case, supra, the defendant failed to file an affidavit and futilely argued that the allegations of fact in the affidavit supporting the motion were controverted by the denials in his answer. The situation here seems parallel albeit in reverse. Since a valid answer may not be stricken "unless the *other party, by affidavit* * * * shall show such facts as may be deemed * * * sufficient to present a triable issue" (Emphasis added), appellant may not prevail even if it be assumed that the respondents' affidavit established beyond peradventure the validity of appellant's claims. Furthermore, the relief here sought by appellant must be "on motion" duly made as provided by section 437c, and no such motion admittedly was ever presented on appellant's behalf. Absent any authority in the applicable statute, unlike the situation in other jurisdictions (48 A.L.R.2d 1188, 1197) we are powerless to enter any judgment against respondents since they are the sole moving parties; additionally, we are likewise not empowered to avail ourselves of the authority granted by section 53, Code of Civil Procedure, summary judgment being a proceeding governed exclusively by the provisions of section 437c.

[5, 6] We turn now to respondents' claim that their uncontroverted affidavit is sufficient to support the judgment appealed from. They correctly point out that reference may not be had to the allegations of the complaint in order to ascertain the existence of a triable fact, but that the true nature of the litigation must be ascertained from the allegations contained in the moving affidavit. Here such affidavit was uncontroverted, and the trial court was entitled to accept as true the facts therein stated (Cone v. Union Oil Co., supra, 129 Cal. App.2d 562, 277 P.2d 467). Certain portions therefrom have heretofore been mentioned, and it is respondents' position that the facts therein alleged make it manifest that appellant is not seeking to collect tariff charges but that the complaint is one for money paid by mistake of law. They lay stress on the error arising from the mistaken belief that dried peas and beans were "foodstuffs" within the rules and regulations of the Interstate Commerce Commission and argue that the voluntary payment

of money by mistake in connection therewith, or as incidental to payments between shipper and carrier, does not convert an action for recovery of that money into one to enforce payment of shipping charges under the Interstate Commerce Act, 49 U.S. C.A. § 1 et seq. A line of decisions, beginning with Michigan Cent. R. Co. v. T. M. Partridge Lumber Co., D.C.Minn., 17 F. 2d 657, appears to generally support respondents' position. In the Partridge case, supra, the defendant shipped a carload of cedar poles and paid the plaintiff carrier a sum in excess of the proper charge; later the plaintiff made a refund mistakenly in excess of the proper sum and sued to recover such excess. The court held that the action was not one to recover part of the carrier's charges but a suit on implied contract to refund money paid through mistake. In the recent case of St. Louis-San Francisco Ry. Co. v. Willard Mirror Co., D.C.1958, 160 F.Supp. 895, involving a summary judgment proceeding, the court adopted the reasoning of the Partridge case, stating that it was required to follow the appellate decisions of that circuit "regardless of what the trial court might think the law should be on a particular matter." 160 F. Supp. at page 899. Respondents point out that the Partridge case has never been overruled or modified, although it has been distinguished in later decisions, both federal and state. Respondents then assert, since appellant cannot recover on the theory that it is suing to collect tariff charges, it likewise cannot prevail on the claim of mistake because such mistake was one of law and not of fact. They cite the following from People v. Kelly, 35 Cal.App.2d 571, 574, 96 P.2d 372, 373: "A mistake of fact is where a person understands the facts to be other than they are; whereas a 'mistake of law' is where a person knows the facts as they really are, but has a mistaken belief as to the legal consequences of those facts." It is argued that appellant knew all the facts in the situation at bar, namely, the identity of the shipper, the identity of the goods and their consignees, except that appellant did not know that the shipments were "foodstuffs" within contemplation of the rules and regulations of the Interstate Commerce Commission. The mistake being assertedly one of law, respondents contend that appellant cannot recover, under the rule or policy of the law against reopening settled transactions where the transferee has made an honest claim and payment has been made without coercion or mistake of fact. Cooley v. County of Calaveras, 121 Cal. 482, 53 P. 1075. They cite a Washington decision, Southern Pacific Co. v. Frye & Bruhn, 82 Wash. 9, 143 P. 163, which they contend involves problems practically parallel to the instant situation, where the carrier's claims were rejected. We also take note of the extended argument supporting respondents' claims for an affirmance of the judgment on the alternative theory that the contract sued upon was an illegal one and neither party is entitled to recover. For reasons hereinafter appearing, extended comment on the substance of such argument is deemed unnecessary.

Opposed to the foregoing points asserted by respondents, appellant has listed an imposing list of authorities, mostly federal cases, dealing almost exclusively with their main contention that a common carrier is obligated and has a right to collect lawful tariff charges under the provisions of the Interstate Commerce Act. It traces the development of case law construing the Act, the purpose and intent of Congress in enacting the pertinent legislation and the various refinements which assertedly are now settled and determinative of the problem at hand. Emphasized is the finding of the Interstate Commerce Commission with respect to respondents' complaint and which, it is argued, supports appellant's claim that the tariff charges were and are reasonable and should be paid in full. The case of Michigan Cent. R. Co. v. T. M. Partridge Lumber Co., supra, relied on by respondents, they seek to distinguish; similar efforts are directed to another of respondents' main authorities, Southern Pacific Co. v. Frye & Bruhn, supra. We hesitate to say that these efforts have not been successful, but observe, particularly with respect to the

Partridge case, supra, that there are divergent views as to the proper solution of the problem (See St. Louis-San Francisco Ry. Co. v. Willard Mirror Co., D.C., 160 F. Supp. 895, supra.)

[7–10] In the last analysis, however, this is a proceeding for summary judgment and we are bound by settled principles to be observed in the application of, and procedure under, section 437c. The procedure has been said to be "drastic and should be used with caution * * *." Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 556, 122 P.2d 264, 265. Accordingly, if there be any "doubt as to the propriety of the motion, courts should, without hesitancy, deny the same." Whaley v. Fowler, 152 Cal.App.2d 379, 385, 313 P.2d 97, 100. Since appellant failed to file an affidavit in opposition, the lower court was entitled to accept as true the facts alleged in respondents' affidavit (Cone v. Union Oil Co., supra, 129 Cal.App.2d 562, 277 P.2d 467), provided such facts are within the affiant's personal knowledge and to which he could competently testify (Coyne v. Krempels, supra, 36 Cal.2d 261–262, 223 P.2d 246–247; Cone v. Union Oil Co., supra, 129 Cal.App.2d 562, 277 P.2d 467). In this latter respect, the crucial portions of section 437c read as follows: "The affidavit * * * in support of the motion must contain *facts* sufficient to entitle * * * defendant to a judgment * * * and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, *if sworn as a witness, can testify competently thereto*" (Emphasis added.) Also, the procedure being a drastic one, the affidavit of the moving party must be strictly construed (Eagle Oil & Refining Co. v. Prentice, supra, 19 Cal.2d 556, 122 P.2d 265) and to meet the requirement of "particularity" found in the statute, the movant's affidavit should set forth evidentiary and not ultimate facts. Murphy v. Kelly, 137 Cal.App.2d 21, 30–31, 289 P.2d 565.

[11] With the foregoing principles in mind, an examination of respondents' affidavit discloses a lack of legitimate compliance with the statute's strict requirements. Thus, there is a claim therein that affiant Fish would be a competent witness, but no showing that he would be. True, he states that he is "one of the defendants" in one of the four actions and "an officer, to wit, the President of the defendant Seaboard Mills," the defendant in the remaining three actions, and that "the facts hereinafter set forth. * * * are within the personal knowledge of the affiant" and "that affiant, if sworn, can testify competently to such facts. * * *" However, there follows a series of averments, many of which could not be within affiant's personal knowledge and hence constitute hearsay, conclusion and opinion; and could not be factual proof required by the statute (Weichman v. Vetri, 100 Cal.App.2d 177, 179, 223 P.2d 288; Murphy v. Kelly, 137 Cal.App.2d 21, 28, 289 P.2d 565; Schessler v. Keck, 138 Cal.App.2d 663, 669, 292 P.2d 314). For example, after reference to the shipments from the points of origin to Santa Barbara, the affidavit states that prior thereto (no date being given) "defendants were informed by the freight agent of the Union Pacific Railroad Company at Nampa, Idaho, then and there acting as the servant, agent and employee of the plaintiff and in the ordinary and regular course of his duties as such agent of plaintiff, that under the rules of the Interstate Commerce Commission * * * dried beans, peas and lentils from Idaho and other northwestern points could be shipped at local rates to Portland, Oregon, and that beyond Portland, Oregon, through rates east would apply on beans, peas and lentils stopped in transit in Santa Barbara * * *" The statement that the Union Pacific agent was also the agent for plaintiff was a pure conclusion on affiant's part and, if sworn, affiant could not competently testify that such a relationship existed. Further conclusional in character, and also lacking in particularity, is the declaration attributed to the alleged agent that the shipments in question were subject to transit privileges; thus, it cannot be ascertained

when and in what manner the representation was made, and there is no showing that the representation was within the scope of the agent's authority or that affiant could competently testify as to the extent of such authority. The affidavit continues: "* * that defendant believed said representation of said agent of plaintiff that defendants were legally entitled to transit privileges * * * and affiant is informed and believes, and upon such information and belief alleges, that the said plaintiff at the said time and place and thereafter, until it was otherwise informed by one of its connecting carriers, so believed." Such an averment on its face is hearsay insofar as it seeks to establish the opinion or belief then adhered to by plaintiff. The affidavit then recites: "that at the time said representations were made by plaintiff to defendants as to the lawful tariff charges for the shipments then contemplated, and thereafter made * * * and at all times thereafter * * * both plaintiff and defendants knew that under the rules and regulations of the said Interstate Commerce Commission, transit charges at Santa Barbara * * * were available on 'foodstuffs' and at said time and thereafter during the entire period when said refunds were being made * * * both plaintiff and defendants believed that the said beans * * * were foodstuffs within the legal definition of the term as the same is used in the rules and regulations of the Interstate Commerce Commission * * * that plaintiff and defendants, at a time subsequent to the last of said refunds * * * ascertained that their legal conclusion that the said beans * * * were 'foodstuffs' was erroneous and they had, in that respect, mistaken the law." The foregoing matter is obviously so replete with conclusions and personal opinions and beliefs as to make it wholly deficient as a basis for a summary judgment. Allegations which follow, and need not be summarized or quoted, also depart from the strict requirements of the statute.

[12, 13] The cornerstone of respondents' defense was the mistake of law assertedly adhered to by appellant; absent an exposition of any evidentiary facts sufficient to establish the existence of such mistake, there is nothing upon which a summary judgment for respondents on that ground could validly be based. It is well settled that if a party is to prevail on his motion for summary judgment, his supporting affidavit must state facts covering every element necessary to sustain a judgment in his favor (Kimber v. Jones, 122 Cal.App.2d 914, 919, 265 P.2d 922). This, the respondents have not done by facts to which the affiant could competently testify. In this respect we also point out that the copy of the order of the Interstate Commerce Commission, attached to the affidavit, was neither certified nor authenticated and was therefore incompetent as proof of its contents (section 1905, Code of Civil Procedure; Low v. Woodward Oil Co., Ltd., 133 Cal.App.2d 116, 122, 283 P.2d 720).

[14, 15] The same conclusion must also be reached regarding the alternative finding of the trial court that the contract was an illegal one and recovery thereby barred. While affiant could well have testified, if sworn, to the payment of refunds by appellant, the averment to that effect, standing alone, does not warrant a finding, especially in proceedings of this kind, that appellant had thereby broken the law and was barred from recovery. Before a court can dismiss a complaint under section 437c it must clearly appear that the action is without merit, and every reasonable doubt must be resolved in favor of the pleading (Arnold v. Hibernia Savings & Loan Soc., 23 Cal.2d 741, 744, 146 P.2d 684). The specific statute whose mandate has been violated is not referred to, and it cannot be said that the payment of refunds by a carrier, absent an allegation of fraud or collusion, is against public policy or sound morals. Indeed, authority exists that a carrier has a duty, as well as a right, to collect refunds paid by mistake or even by collusion (Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 730, 158 P.2d 23; Butler v. Bell Oil & Refining Co., 70 Cal. App.2d 728, 730, 161 P.2d 559).

[16–18] As pointed out earlier in this opinion, no affidavit was presented by appellant in opposition to the motion. Upon oral argument, however, appellant indicated that it elected to take advantage of the defects in the moving affidavit if this court should find that the record did not justify a reversal for other reasons. Respondents, on the other hand, orally argued that incompetent evidence, unless objected to, will support a judgment. They further contended that some of the allegations necessarily had to be set forth upon information and belief because they were peculiarly and solely within the knowledge of the appellant. It is the rule in California that in summary judgment proceedings there can be no waiver of the right to object to matter inadmissible by virtue of its incompetency. In Gardenswartz v. Equitable Life Assur. Soc., 23 Cal.App.2d Supp. 745, 751, 68 P.2d 322, 325, it is declared: "Under this provision, summary judgment for plaintiff cannot be ordered, *even though affidavits for the defendant be insufficient or absent,* unless the plaintiff presents affidavits in support of his motion which comply with the section and show that he is entitled to judgment." (Emphasis added.) Cited as support for this conclusion is the Michigan case of MacClure v. Noble, 259 Mich. 601, 244 N.W. 174, where notice of the motion for summary judgment was served on the defendant's attorney and he did not appear. The affidavit having been found to be deficient, the court stated: "The failure of the defendants' attorney to appear and contest the motion was not a waiver of the necessity of plaintiff's compliance with the statute and rule." The Maryland case of Power v. Allied Asphalt Products Corporation, 162 Md. 175, 159 A. 251, involved a similar situation, it thus being claimed that defendant's failure to object to the faulty affidavit waived all errors therein contained. At page 253 of 159 A. the court said: "Referring to the objection last stated, it may be said that the doctrine of waiver has no application to the facts of this case. The plaintiff's right to a judgment under the act must depend not entirely upon the defendant's acts, but upon his own as well. The court in such cases sits in the exercise of a special, limited statutory jurisdiction, and, unless he does those things which the act prescribes as essential to jurisdiction under its terms, the plaintiff can claim none of the benefits." The Supreme Court in Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244, 246, thus reaffirmed the holding in Gardenswartz v. Equitable Life Assur. Soc., supra: "Summary judgment for plaintiff is proper only if the affidavits in support of his motion state facts that, if proved, would be sufficient to sustain judgment in his favor and defendant does not 'by affidavit or affidavits * * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.'" To the same effect are Kelliher v. Kelliher, 101 Cal.App.2d 226, 231–232, 225 P.2d 554, and Desny v. Wilder, 46 Cal.2d 715, 725–726, 299 P.2d 257. Thus, there first must be a sufficiently supportive affidavit before the defects of any counteraffidavit, either of form or substance, need be examined; and, of course, no distinction is made in the statute as to the status of the moving party, whether plaintiff or defendant. With regard to respondents' claim that this is an instance in which the movant was unable to make a showing except upon information and belief; in order that the court's discretion may properly be exercised, the moving party "should at least present an affidavit by someone who states of his own knowledge that such other persons do know or claim to know the facts and have refused to make affidavits, and such affidavit ought to name the other persons and set forth what each one knows or claims to know * * *." Gardenswartz v. Equitable Life Assur. Soc., supra, 23 Cal.App.2d Supp. 750, 68 P.2d 325. There was no such averment in the instant case.

For the foregoing reasons, the judgment is reversed and the cause remanded for further proceedings.

WHITE, P. J., and FOURT, J., concur.

166 Cal.App.2d 344

FAMILY SERVICE AGENCY OF SANTA BARBARA, Plaintiff and Respondent,

v.

Joseph J. AMES and Lucille G. Ames, One Doe, Two Doe, and Three Doe, Defendants and Appellants.

Civ. 22915.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1958.

Quiet title action. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., rendered summary judgment for plaintiff, and defendants appealed. The District Court of Appeal, Lillie, J., held that in absence of any allegations in affidavits excusing or explaining failure to attach copies of official records required by best evidence rule to establish necessary facts, deficiencies in affidavits could not be excused.

Reversed and remanded with directions.

1. Judgment ⇐186

In summary judgment proceedings, court is without authority to make findings of fact.

2. Appeal and Error ⇐134(1)

No appeal lies from an order granting summary judgment.

3. Judgment ⇐186

Propriety of granting or denying motion for summary judgment is determined by sufficiency of affidavits on file, and while pleadings serve to define issues, it is showing made by affidavits that is determinative. West's Ann.Code Civ.Proc. § 437c.

4. Judgment ⇐181(4)

If any doubt exists as to whether summary judgment should be granted, doubt should be resolved against moving party. West's Ann.Code Civ.Proc. § 437c.

5. Adverse Possession ⇐13

To acquire title by adverse possession, claimant must have been in actual and open and notorious possession of premises under color of title or claim continuously and without interruption for five years, and must have paid all taxes assessed.

6. Judgment ⇐185.2(3)

Before plaintiff can prevail on summary judgment, its affidavits must state facts covering every element necessary to sustain judgment in its favor. West's Ann.Code Civ.Proc. § 437c.

7. Evidence ⇐158(16)

That taxes had been assessed to, and paid by, plaintiff, seeking to acquire title to realty, rather than by defendants, claiming title by adverse possession, could not be proved by parol evidence and would have to be established by copies of official records. West's Ann.Code Civ.Proc. §§ 1855, 1920, 1926.

8. Judgment ⇐185.1(8)

There can be no waiver, in summary judgment proceedings, of right to object to matter inadmissible by virtue of its incompetency. West's Ann.Code Civ.Proc. § 437c.

9. Judgment ⇐185.1(8)

There must first be sufficiently supportive affidavit before any defects in counteraffidavit need be considered on motion for summary judgment. West's Ann. Code Civ.Proc. § 437c.

10. Judgment ⇐185.1(8)

In absence of any allegations in affidavits excusing or explaining failure to attach copies of official records required by best evidence rule to establish necessary facts, deficiencies in affidavits supporting motion for summary judgment could not be excused. West's Ann.Code Civ.Proc. § 1855, subds. 3–5.

11. Judgment ⇐181(4)

Any doubt as to granting of summary judgment must be resolved against moving party. West's Ann.Code Civ.Proc. § 437c.

12. Judgment ⇐185.2(7)

As defendants' counteraffidavit, denying in substance claims made by plaintiff, might defeat plaintiff's motion for summary judgment, it would have to be ac-

cepted as true. West's Ann.Code Civ.Proc. § 437c.

Lynch & Reilly, Santa Barbara, for appellants.

Price, Postel & Parma, Santa Barbara, Robert M. Jones, San Francisco, for respondent.

LILLIE, Justice.

This is an appeal by defendants from a summary judgment in a quiet title action involving a parcel of property in the city of Santa Barbara.

The complaint contained two causes of action, the first in the usual form of quiet title and the second in damages for trespass. Defendants' answer denied the material allegations of the complaint, and as affirmative defenses asserted ownership in the land by a 1947 deed from one Melendez and ownership by adverse possession since 1929 through themselves and their predecessors in interest. Plaintiff thereafter filed a motion for summary judgment based on affidavits of certain of its officers and other individuals including city and county officials and employees. A counter-affidavit was filed by one of the defendants, and following a hearing the court granted the motion, and on August 5, 1957, signed an "Order on Motion for Summary Judgment" which included findings of fact, conclusions of law and an adjudication that title be quieted in plaintiff as against defendants, making no reference to the matter of damages. Present counsel for defendants had become attorneys of record only two days prior to the order. On September 3, 1957, without vacating its previous order, the court signed new findings of fact and conclusions of law covering the issues in the first cause of action and, by stipulation of the parties, the amount of damages. A formal judgment was signed and entered on September 3, 1957. Defendants appeal from that judgment and the judgment or "order" of August 5.

[1, 2] At the outset, it should be noted that in summary judgment proceedings the court is without authority to make findings of fact (Weichman v. Vetri, 100 Cal.App. 2d 177, 180, 223 P.2d 288) and in connection with the attempted appeal from the "order" of August 5, 1957, no appeal lies from an order granting summary judgment (Cullen v. Spremo, 142 Cal.App.2d 225, 232, 298 P.2d 579). However, we shall construe the August 5 "Order" as a judgment which was superseded by the judgment of September 3, and dismiss the attempted appeal from the former.

Appellants contend that the affidavits in support of the motion for summary judgment were insufficient as a matter of law to defeat their claims to ownership either by record title or by adverse possession. It is further contended that the motion was noticed upon the "papers, pleadings, files, records and proceedings in the action," contrary to settled rules in such proceedings which limit the court's consideration to affidavits only. An additional point relating to the findings on damages has been abandoned by stipulation.

[3, 4] A motion for summary judgment is provided by section 437c, Code of Civil Procedure, the pertinent portion of which then read as follows: "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action * * * and the facts stated therein shall be * * * set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn, * * * can testify competently thereto." The general principles to be observed in such proceedings are stated in Eagle Oil and Refining Co. v. Prentice, 19 Cal.2d 553, at page 555, 122 P.2d 264, at page 265: "The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case." Stated otherwise, "issue finding rather than issue determination is the pivot

upon which the summary judgment law turns" (Walsh v. Walsh, 18 Cal.2d 439, 441, 116 P.2d 62, 64). In Eagle Oil and Refining Co. v. Prentice, 19 Cal.2d 553, at page 556, 122 P.2d 264, at page 265, the court further declared: "(t)he procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact." "For these reasons," the court continues, "the affidavits of the moving party * * * should be strictly construed and those of his opponent liberally construed." Furthermore, the propriety of granting or denying a motion for summary judgment is determined by the sufficiency of the affidavits on file (Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244). While the pleadings serve to define the issues, it is the showing made by the affidavits that is determinative since the court is thereby able to pierce the allegations of the pleadings to ascertain whether a genuine cause of action exists or a real defense has been interposed. Cone v. Union Oil Co., 129 Cal.App.2d 558, 562, 277 P.2d 464. Finally, if any doubt exists whether summary judgment be granted, it should be resolved against the moving party (Whaley v. Fowler, 152 Cal.App.2d 379, 381, 313 P.2d 97; Travelers Indemnity Co. v. McIntosh, 112 Cal.App.2d 177, 182, 245 P.2d 1065).

Appellants' answer set up an affirmative defense claiming ownership by deed and by adverse possession since 1929. Because the chief basis for this appeal concerns the insufficiency of respondent's affidavits to establish the lack of any triable issue as to adverse possession, we first consider the merits of that claim. If it is tenable, the motion should have been denied.

[5, 6] A claimant to title by adverse possession must establish five elements in connection with his occupancy: He must have been in (1) actual and (2) open and notorious possession of the premises, (3) under color of title or claim, (4) continuously and without interruption for five years and (5) must have paid all taxes assessed. West v. Evans, 29 Cal.2d 414, 417, 175 P.2d 219. For the purposes of this appeal, respondent concedes that appellants have satisfied the first four elements but claims a lack of compliance with the tax requirement. Proof thereof, then, is manifestly essential, since before plaintiff can prevail on summary judgment, its affidavits must state facts covering every element necessary to sustain a judgment in its favor (Murphy v. Kelly, 137 Cal.App.2d 21, 31, 289 P.2d 565).

The affidavit of William Moore, the city assessor, alleged that taxes were assessed on the disputed parcel to plaintiff (under its original corporate name) from 1939 to 1957, with certain immaterial exceptions, and at no time during that period was the property assessed to defendants. Contrary to the provisions of sections 1855, 1920 and 1926, Code of Civil Procedure, no copies of the tax records in question, certified or otherwise, were attached, nor did the affidavit allege any excuse or explanation for their nonproduction. The affidavit of A. M. Fanning, city tax collector, declared that all taxes against the parcel in suit between 1939 and 1957 were assessed to and paid by the plaintiff; that no overpayment was made during that period nor was payment made twice during any fiscal year. Again, no copies of the official records were attached to the affidavit, nor was any excuse or explanation for their nonproduction set forth. Jessie Loch, a deputy county tax collector, and Guy P. Sawyer, county assessor, also executed affidavits to the same general effect, as the matter involved records of their offices, but no copies of such records were attached and there was no explanation or excuse for their absence.

In opposition to the motion, a counter-affidavit of one of the appellants alleged that defendants and their predecessors in title had been in open, actual and notorious possession "in fee against the whole world" without interruption since 1939 and during that period had paid all taxes of every kind levied and assessed. Photostatic copies of tax receipts were attached to the counter-affidavit which further alleged that affiant had been informed "many times" by the

office of the city tax collector that she was paying taxes on the lot in issue even though the lot number for assessment purposes had been changed at various times; that she believed lot 13, so numbered on the attached tax receipts, was the lot in issue and that it was so numbered at one time. In reply to the foregoing averments, respondent filed an affidavit executed by an employee of the city assessor's office to the effect that the lot in question had never been misnumbered.

Appellants contend that the affidavits of Moore, Fanning, Loch and Sawyer were all incompetent to establish the facts alleged. They rely on Low v. Woodward Oil Co., Ltd., 133 Cal.App.2d 116, 283 P.2d 720, where similar allegations were characterized as mere conclusions of law as to the matters in issue, and the court held that an affiant may not give testimony concerning the contents of a document in the absence of a showing which would excuse the production of the original or authenticated copies. The court therein stated at page 121 of 133 Cal.App.2d at page 723 of 283 P.2d: "Under such circumstances, where the affidavit of a movant depends upon written instruments, his affidavit is insufficient unless there is attached thereto the original documents, or a verified or certified copy of such instrument. (Citation.)" "A proper objection to such testimony would go to its competency" (Gardenswartz v. Equitable etc. Soc., 23 Cal.App.2d Supp. 745, 750, 68 P.2d 322, 324).

[7] In this state it is firmly established that the best evidence of the contents of a writing is the writing itself (18 Cal.Jur.2d 649). However, the above rule does not apply where the original is a record or document in the custody of a public officer, or when it has been recorded and the certified copy of the record is by law made evidence, in either of which cases a copy of the original or of the record must be produced (section 1855, subds. 3 and 4, Code of Civil Procedure). Hence, matters of record cannot be proved by parol and must be established by certified copies or a transcript of the record (18 Cal.Jur.2d 666). In Allen v. McKay & Co., 139 Cal. 94, 72 P. 713, in which claims of title by adverse possession were asserted and the date of a tax assessment became a material point, the court declared: "It certainly cannot be that such an act as the assessment of real property can be established * * * by parol proof, or by anything other than an official record * * *." 139 Cal. at page 101, 72 P. at page 715. To the same effect is Murphy v. Nielsen, 132 Cal.App.2d 396, 400, 282 P.2d 126.

Subdivision 5 of section 1855, Code of Civil Procedure, provides, however, that there can be no evidence of the contents of a writing, other than the writing itself, except "(w)hen the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole." This relaxation of the rule is usually invoked where the results sought to be achieved are negative and not affirmative, that is, not that the documents do but that they do not show a certain fact (San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 86, 53 P. 410). But that case, as well as Pacific Paving Company v. Gallett, 137 Cal. 174, 69 P. 985, in which the problem was also presented, did not involve a proceeding for summary judgment; furthermore, there were before the lower court either summarizing schedules or other documents concerning which the adverse party had both the right of inspection and the opportunity to cross-examine the custodian thereof. Thus, in San Pedro Lumber Co. v. Reynolds, 121 Cal. at page 86, 53 P. at page 414, supra, the witness "was rigidly cross-examined as to the items composing his schedules, and their correctness was established"; additionally, it was there represented by the respondent that the records "would weigh a ton" and "appellant concedes that this is not far from the truth." In the instant case, respondent admits that the various statements in the affidavits "smack of hearsay" but argues on appeal that the assessment rolls could not be attached to the

affidavits, and excerpts therefrom would be inconclusive in that it would have to be shown that no pertinent facts were omitted. It is also asserted that the use of the originals would have disrupted the business of four governmental offices and the cost of substituting copies would have been prohibitive. Although respondent *now* gives this argument as a justification for presenting neither copies nor the original records in its brief on appeal, such explanation or any excuse for nonpresentation was not set forth in the controlling affidavits before the lower court. Respondent further states in its brief that appellants did not object to the nonproduction of the necessary attachments and hence waived any right to raise the point on appeal.

[8, 9] We shall first dispose of the point last mentioned, that appellants waived their right to object to the affidavit deficiencies by failing to do so in the lower court. It is the rule in California that there can be no waiver in summary judgment proceedings of the right to object to matter inadmissible by virtue of its incompetency. Thus, in Gardenswartz v. Equitable Life Assur. Soc., 23 Cal.App.2d Supp. 745, 751, 68 P.2d 322, 325, it is stated that under section 437c, Code of Civil Procedure, "summary judgment for plaintiff cannot be ordered, *even though affidavits for the defendant be insufficient or absent,* unless the plaintiff presents affidavits in support of his motion which comply with the section * * *." (Emphasis added.) To the same effect are Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244; Kelliher v. Kelliher, 101 Cal.App.2d 226, 231–232, 225 P.2d 554, and Desny v. Wilder, 46 Cal. 2d 715, 725–726, 299 P.2d 257. Under the rule of those cases, there must first be a sufficiently supportive affidavit before any defects in a counteraffidavit need be considered. For a further discussion of the general principles here involved, see our opinion filed this day in Southern Pacific Company v. Fish, Cal.App., 333 P.2d 133.

[10, 11] As previously pointed out, we are limited to the affidavits on file and the sufficiency thereof; and in the absence of any allegations therein excusing lack of compliance with the applicable subdivisions of section 1855, we cannot adopt respondent's present argument excusing the deficiencies in the affidavits. For us to do so would effect a liberal instead of a strict construction of the moving papers, wholly contrary to settled principles in proceedings of this kind (Desny v. Wilder, 46 Cal. 2d at page 725, 299 P.2d at page 261, supra). We repeat that the procedure of summary judgment has been said to be "drastic and should be used with caution" (Eagle Oil and Refining Co. v. Prentice, 19 Cal.2d 553, 556, 122 P.2d 264, 265), and any doubt as to the granting of such a judgment must be resolved against the moving party (Whaley v. Fowler, 152 Cal.App.2d 379, 381, 313 P.2d 97). Hence any seeming hardship or injustice is outweighed by policy considerations recognized in the decisions.

[12] Also, appellants' counteraffidavit has denied in substance the claims made by respondent and as they might defeat the motion must be accepted as true (Beck v. Reinholtz, 138 Cal.App.2d 719, 724, 292 P.2d 906). It appears they are seeking to bring themselves, if possible, within the rule governing acquisition of adverse possession by mistake (Sorensen v. Costa, 32 Cal.2d 453, 465, 196 P.2d 900) and while there are certain defects apparent in the counteraffidavit, it becomes unnecessary to discuss them since respondent's affidavits are not sufficient to sustain the judgment in its favor (Coyne v. Krempels, 36 Cal. 2d at page 261, 223 P.2d at page 246, supra; Gardenswartz v. Equitable Life Assur. Soc., 23 Cal.App.2d Supp. at page 751, 68 P.2d at page 325, supra).

In view of the foregoing, we deem it unnecessary to discuss other points raised by respondent, and considered by us, relating to the sufficiency of its affidavits on the question of ownership by title, and the lack of any deficiency in the motion for summary judgment, in that it was noticed upon the affidavits as well as "the papers, pleadings, files, records, and proceedings in the action." It should be understood

that we have considered the pleadings and the facts solely from the standpoint of their competency upon a summary judgment proceeding.

The attempted appeal from the judgment denominated "Order on Motion for Summary Judgment" dated August 5, 1957, is dismissed; the judgment dated September 3, 1957, from which this appeal has been taken, is reversed and the cause remanded for further proceedings.

WHITE, P. J., and FOURT, J., concur.

166 Cal.App.2d 307

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Andrew John STEINBACH, Defendant and Appellant.

Cr. 6251.

District Court of Appeal, Second District, Division 3, California.

Dec. 17, 1958.

Hearing Denied Feb. 11, 1959.

Prosecution resulting in defendant's conviction by the Superior Court of Los Angeles County, Orlando H. Rhodes, J., of manslaughter without gross negligence arising from driving of automobile and failing to stop after accident, and defendant appealed from orders denying motions in arrest of judgment and for new trial. The District Court of Appeal, Parker Wood, J., held that the offense of manslaughter without gross negligence arising from operation of automobile is not included within the offense of failing to stop at scene of automobile accident, and judgment convicting defendant of both offenses did not constitute punishment of defendant twice for a single act.

Affirmed.

1. Indictment and Information ⇐191

Offense of manslaughter, without gross negligence, arising from operation of automobile, is not included in offense of failing to stop at scene of accident for purpose of giving assistance and information. West's Ann.Pen.Code, § 192, subd. 3(a, b); West's Ann.Vehicle Code, § 480.

2. Automobiles ⇐336

An essential element of violation of statute requiring driver of vehicle involved in accident resulting in injury or death to stop immediately is failure of driver to stop immediately and furnish assistance and information. West's Ann.Vehicle Code, §§ 480, 482(a).

3. Criminal Law ⇐1209

Judgment convicting defendant of manslaughter, without gross negligence, arising from operation of automobile and of violation of statute requiring driver of automobile involved in accident to stop immediately, did not constitute punishment of defendant twice for a single act. West's Ann.Pen.Code, §§ 192, subd. 3(a), 654; West's Ann.Vehicle Code, §§ 480, 482(a).

4. Automobiles ⇐357

In prosecution for manslaughter arising from operation of automobile and for violation of statute requiring driver of automobile involved in accident to stop immediately, trial court did not err in refusing to give instructions to the effect that information charging the two separate offenses in effect charged that defendant committed one or the other of such offenses. West's Ann.Pen.Code, §§ 192, subd. 3(a), 654; West's Ann.Vehicle Code, §§ 480, 482(a).

Bodkin, Breslin & Luddy, and Robert J. Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and John M. Huntington, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged, in Count 1 of an information, with manslaughter in vio-

lation of section 192, subdivision 3(a), of the Penal Code (driving a vehicle in the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act, in an unlawful manner, with gross negligence). In Count 2, he was charged with violating section 480 of the Vehicle Code, a felony, in that he drove an automobile which was involved in an accident resulting in the death of Tom Parker, and he unlawfully failed to stop immediately and comply with statutory provisions relative to giving information and rendering aid.

In a trial by jury, he was convicted of manslaughter without gross negligence, a misdemeanor (violation of section 192, subdivision 3(b) of the Penal Code); and was convicted of violating section 480 of the Vehicle Code, a felony, as charged in Count 2. On Count 1, he was sentenced to imprisonment in the county jail for one year. On Count 2, probation was granted on condition that he serve one year in the county jail. It was ordered that the jail terms run concurrently.

Defendant's notice of appeal recites that he appeals from the order denying his motion for a new trial, and from the order denying his motion in arrest of judgment. He states in his brief that he abandons his attempted appeals from the order denying his motion in arrest of judgment, and the order denying his motion for a new trial as to the conviction of manslaughter, a misdemeanor. The appeal for consideration herein is his appeal from the order denying his motion for a new trial as to Count 2.

Appellant contends that a violation of section 192, subdivision 3(b), of the Penal Code (manslaughter, a misdemeanor) is a lesser and included offense in the offense of violation of section 480 of the Vehicle Code, a felony (referred to by him as "hit and run" driving, a felony), and that the conviction of the lesser offense (Count 1) was an acquittal of the greater offense (Count 2). Appellant contends further that if a violation of said section 192, subdivision 3(b), is not such a lesser and included offense, then the judgments herein punished twice for a single act contrary to the provisions of section 654 of the Penal Code.

On June 22, 1957, about 5:30 a. m., while Tom Parker was walking, in a southerly direction, on Pacific Avenue and near the left (east) side of a Pontiac automobile that was parked at the west curb, he was struck and killed by a Buick automobile that was being driven at a fast rate of speed, in a southerly direction, on that avenue. Before the Buick struck him, it struck the rear bumper of the Pontiac and caused a "big bang." The Buick did not stop at the scene of the accident but proceeded at an increased rate of speed, south on Pacific Avenue, about three short blocks and then turned east onto another street. When the Buick struck Mr. Parker it knocked him forward several feet and nearly into the middle of the street. After the accident, the body of decedent lay crosswise of the street with the head near the center of the street. The Buick was red, and there was chrome trimming on it. Fragments of red paint were found on the street about 50 feet north of the body and about 2 feet east of the left side of the parked Pontiac (the rear bumper of which had been struck by the Buick). A chrome strip was found on the street about 12 feet north of the body.

About two hours after the accident, defendant telephoned the police station and said that he wanted to report that his automobile had been stolen. Upon being requested to come to the station, he went there and reported that he had parked his red Buick automobile, bearing license No. MAR 729, in a certain parking lot and that the automobile had been stolen. About four hours later, police officers found the automobile, on a street, about four miles from the scene of the accident. At that time they observed that the right front fender and right door of the Buick had been damaged and that a chrome strip was missing from the right front fender.

There was evidence that particles of hair which were found on the Buick fen-

der were similar to hair which was taken from the decedent's head. Also, there was evidence that fragments of paint which were found on the street, at the scene of the accident, came from the "same batch of mixed paints" as samples of paint which were removed from the Buick. Markings on the chrome strip (which strip was found in the street near the body) and photographs of the Buick indicate that the strip was the strip which was missing from the Buick.

A police officer testified that, in the afternoon of June 22, he and another officer had a conversation with defendant, wherein defendant said (in part) as follows: about 5:30 a. m. of that day he left a certain house and drove his car in a southerly direction on Pacific Avenue for a distance of approximately 100 feet, and then he drove on other streets and across a bridge; after he crossed the bridge he felt an impact on the right front fender of his car; then he saw the man whom his fender had struck; he continued driving and looked back and saw the man lying in the street; it appeared that the man was getting up on his hands and knees. Defendant also said that the reason he did not stop was that he did not think the man was hurt "too bad," and that he (defendant) had been drinking and there was a possibility that he might be arrested for "a 502" (driving while intoxicated).

As above stated, the first contention of appellant is that a violation of section 192, subdivision 3(b), of the Penal Code is a lesser and included offense in the offense of violation of section 480 of the Vehicle Code. Stated in another way (without designating the code sections), this contention is that the crime of manslaughter, a misdemeanor, resulting from the unlawful driving of an automobile (without gross negligence), is included in the offense whereby a driver of an automobile fails to stop immediately and render aid when a person has been struck and killed by the automobile while the automobile was being driven without gross negligence. Appellant asserts that the essence of the crime charged in Count 2, that is, violation of section 480 of the Vehicle Code, "is killing and fleeing"; that said section 192, subdivision 3(b), denounces "a special type of killing, i. e., without gross negligence, and it is this type of killing which we say is always included in a violation of section 480 of the Vehicle Code under circumstances as exist in the case at bar."

In People v. Greer, 30 Cal.2d 589, at page 596, 184 P.2d 512, at page 516, it was said: "The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense."

Section 192 of the Penal Code provides in part: "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: 1. * * * 2. * * 3. In the driving of a vehicle—(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence. (b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence. This section shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner."

Section 480 of the Vehicle Code provides: "The driver of any vehicle involved in an accident resulting in injury to any person, other than himself, or death of any person shall immediately stop such vehicle at the scene of such accident and shall fulfill the requirements of Section 482(a) hereof and any person failing to stop or to comply with said requirements * * * is guilty of a public offense and * * * shall be punished by imprisonment in the state prison * * * or in

the county jail * * * or by fine * *." Section 482, subdivision (a), provides in part that a driver of any vehicle which is involved in such an accident shall render reasonable assistance to the injured person, and shall give to him certain information including the name and address of the driver, and the registration number of the vehicle he is driving.

[1, 2] Applying the above-mentioned test, regarding an included offense, it appears that the offense of violation of said section 480 can be committed without necessarily committing the offense of manslaughter. The offense of violation of said section 480 can be committed without unlawful driving or any negligence on the part of the driver of the vehicle, and without death resulting from the accident. The provision in said section, with respect to the operation of the vehicle, is that the driver of a vehicle which is "involved in an accident" resulting in an injury to another, or resulting in the death of any person, shall stop immediately. An essential element of violation of said section 480 is the failure of the driver to stop immediately and furnish assistance and information.

In a violation of said section 192, subdivision 3(b), essential elements are unlawful driving, and the death of the injured person as a proximate result of the unlawful driving. In People v. McKee, 80 Cal.App. 200, 251 P. 675, defendant was convicted of (1) manslaughter resulting from the negligent driving of an automobile, and (2) violating section 141 of the Motor Vehicle Act (failing to stop and render aid after automobile accident). It was said therein at page 203 of 80 Cal. App., at page 677 of 251 P.: "Violation of section 141 of the Motor Vehicle Act is not included within or in fact related to the offense of manslaughter. * * * The acts constituting the second offense did not really commence until after the woman had been struck [by the automobile], at which time the first offense had been completed."

The offense of violation of section 192, subdivision 3(b), of the Penal Code is not an included offense in the offense of violation of section 480 of the Vehicle Code.

[3] Appellant contends further, as above stated, that if a violation of said section 192, subdivision 3(b), is not such an included offense, then the judgments herein punished twice for a single act contrary to the provisions of section 654 of the Penal Code. Said section 654 provides in part: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." Appellant argues that the two offenses herein arose out of a single act, and that the act cannot be divided and prosecuted as separate crimes. In People v. McKee, supra (wherein the defendant had been convicted of manslaughter resulting from driving an automobile, and convicted of failing to stop after the automobile accident), the defendant contended on appeal that he was twice placed in jeopardy for the same offense, "maintaining as the foundation for his argument that the transaction upon which the two offenses are based is but a single one." It was held therein (80 Cal.App., at page 203, 251 P. 677) that he was not twice in jeopardy for the same offense. In the present case, the contention with reference to being punished twice for the same offense is not sustainable.

[4] Appellant contends that the court erred in refusing to give an instruction, requested by defendant, which was as follows: "The charges contained in count — and count — of the information do not charge two separate offenses, but in effect charge that the defendant committed one or the other of such offenses. If you find that the defendant committed an act or acts constituting one of the crimes so charged, you then must determine which of the offenses charged was thereby com-

mitted * * * and if you find the defendant guilty of one of said offenses you must find him not guilty as to the other." The court did not err in refusing to give that instruction.

The appeals (1) from the order denying defendant's motion in arrest of judgment, and (2) from the order denying defendant's motion for a new trial as to the conviction of manslaughter, a misdemeanor (Count 1), are dismissed. (Defendant stated that he abandoned those appeals.) The order denying the motion for a new trial as to Count 2 is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 378

H-R TRUCK & EQUIPMENT CO., a corporation, Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Respondent.

Civ. 9299.

District Court of Appeal, Third District, California.

Dec. 18, 1958.

Rehearing Denied Jan. 8, 1959.

Hearing Denied Feb. 11, 1959.

Action by truck company against State Board of Equalization for recovery of sales taxes paid under protest. The Superior Court, Sacramento County, Jay L. Henry, J., rendered judgment for Board, and truck company appealed. The District Court of Appeal, Van Dyke, P. J., held that under statute exempting from sales and use tax the gross receipts from sales to common carrier of property shipped by seller via purchasing carrier under bill of lading to point outside state in conduct of carrier's business, truck company, which sold trucks to out-of-state carriers under bills of lading specifying that trucks were consigned to purchasing carrier at specific destination outside state and naming truck company as shipper and providing that consignee should pay freight, was exempt from sales and use tax, notwithstanding fact that both title and possession may have passed in state or fact that one of carriers, without knowledge of truck company, hauled payloads while engaged in transporting trucks out of state.

Reversed with instructions.

1. Licenses ⇐19(3)

Under statute exempting from sales and use tax the gross receipts from sale to common carrier of property shipped by seller via purchasing carrier under bill of lading in conduct of carrier's business, truck company, which sold trucks to out-of-state carriers under bills of lading specifying that trucks were consigned to purchasing carrier at specific destination outside state and naming truck company as shipper and providing that consignee should pay freight, was exempt from sales and use tax, notwithstanding fact that both title and possession may have passed in state or fact that one of carriers, without knowledge of truck company, hauled payloads while engaged in transporting trucks out of state. West's Ann.Rev. & Tax.Code, § 6385.

2. Licenses ⇐19(3)

Under statute exempting from sales and use tax the gross receipts from sales of property to common carrier shipped by seller via purchasing carrier under bill of lading whether freight is paid in advance or shipment is made with freight charges collect to point outside state, exemption includes transaction in which goods are sold to carrier and are shipped by seller via purchasing carrier with no freight charges at all except as a matter of form. West's Ann.Rev. & Tax.Code, § 6385.

3. Licenses ⇐19(3)

If standard set up by legislature with respect to sales and use taxes are met there can be no claim that avoidance of the tax proves bad faith.

4. Statutes ⇐219

Contemporaneous and practical construction of statute by those whose duty it

is to carry it into effect, while not controlling in interpreting statute, is always given great respect.

Fitzgerald, Abbott & Beardsley, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., and Ernest P. Goodman, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Plaintiff and appellant, H-R Truck & Equipment Company, hereinafter called truck company, instituted this action against the defendant and respondent, State Board of Equalization, for the recovery of sales taxes paid under protest. Truck company now appeals from the adverse judgment of the trial court. The action was tried on a stipulation of facts, which stipulation was, by reference, adopted by the trial court as its findings of fact.

The first issue presented involves the interpretation and application of a statute exempting certain transactions from taxation under the Sales and Use Tax Act. The section is numbered 6385 of the Revenue and Taxation Code, and it reads as follows:

> "There are exempted from the computation of the amount of the sales tax the gross receipts from sales of tangible personal property to a common carrier, shipped by the seller via the purchasing carrier under a bill of lading whether the freight is paid in advance, or the shipment is made freight charges collect, to a point outside this State and the property is actually transported to the out-of-state destination for use by the carrier in the conduct of its business as a common carrier."

It is the contention of appellant that all the requirements for exemption set up by section 6385 were fully met and that, therefore, the sales were not taxable. In support of this contention the truck company points to the following findings: The appellant truck company was, at all times material here, a dealer in trucks, truck tractors and parts and accessories therefor holding a retail seller's permit under the Sales and Use Tax Law. All sales involved were at retail. The measure of the tax (or volume of sales) on which the tax was imposed arose out of sales of trucks, truck tractors and truck parts, by appellant to truck common carriers engaged in interstate commerce, hauling by means of trucks and truck tractors under certificates of public convenience and necessity issued by the Bureau of Motor Carriers, Interstate Commerce Commission of the United States. These truck common carriers maintained local offices and freight stations in California and main offices in other states. The sales were made pursuant to oral contracts and as between the seller and the purchasers the parties understood that the seller would not be required to pay freight or cost of transportation to any out-of-state destination. The total price paid by the purchasers for each item was the price uniformly charged by the seller to all purchasers who bought, accepted and took possession of such goods at plaintiff's place of business in California. Payments for the purchases were received by the seller in California, but were made by such purchasers from their out-of-state places of business. The purchasing common carriers took delivery in California. (The stipulation of fact concerning deliveries and possession merely constituted a statement as to the taking of delivery or transfer of possession of the purchased property in sequence of events and was not intended as a stipulation to resolve the issue whether the purchasing carrier took delivery or possession of the property in California in their capacity as purchasers or as carriers.) At the time of taking delivery or possession, the purchasing carrier issued and gave to the seller documents designated as bills of lading. Such documents specified that the goods described therein were consigned to the respective purchasing carriers at the respective out-of-state destinations specified therein. The trucks and truck tractors were driven under their own automotive power by the drivers of each purchasing

carrier to the specified out-of-state destinations over routes over which the purchasing carriers were authorized to transport cargo under common carrier rights, for use by each said carrier in the conduct of its business as a common carrier and were so used. No freight was in fact charged to the seller, nor collected by any of the purchasing carriers on such movement of trucks, truck tractors and truck tractor parts, equipment and accessories. Freight bills were made out by the purchasing carriers but the said freight was deadheaded. The term "deadhead" indicates that freight is not a revenue load in that the freight is carried as company business.

The documents issued and designated bills of lading showed the following: The issuing carrier acknowledged that it had "Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading" the goods described in the bill "consigned, and destined as shown below" and that the carrier "agrees to carry to its usual place of delivery at said destination, if on its own * * * highway route or routes * * *" The bills also provided "It is mutually agreed, * * * that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns." The bills specified that the described goods were consigned to the issuing carrier at a specific designation outside the state and on the route of the carrier and named appellant truck company as the shipper. The bills also provided that the consignee should pay the freight and all other lawful charges accruing on the described property.

The trial court found that title to the goods passed to the buyers at the time the carriers took possession in California. The validity of this finding is supported by the evidence.

[1, 2] Neither party hereto challenges the validity of the exemption statute. The section refers to sales of tangible personal property to a common carrier and the sales here involved were such sales. It requires that the goods be shipped by the seller via the purchasing carrier under a bill of lading, and at least on the face of the transactions here involved that requirement is specifically met. The section states that whether freight is paid in advance or the shipment is made freight charges collect, the transaction shall be exempt if the property is actually transported to the out-of-state destination for use by the carrier in the conduct of its business as such and these requirements are likewise, at least on the face of the transactions, specifically met. We think they are also met in substance. The legislature has spoken and if it has spoken clearly its mandate must be obeyed as written. Notwithstanding both title and possession may have passed in California, it was open to the parties to agree that the goods still should be shipped by the seller via the purchasing carrier under a bill of lading. This was done, as is amply evidenced by the documents executed between the buyer and the seller as heretofore related. The section says nothing about the passage of title or possession. It is clear from the language used that the legislature included within the exemption granted transactions where, though the goods were sold to a carrier, they might be shipped by the seller to that carrier, via that carrier with freight charges collect, that is to say, with no freight charges at all except as a matter of form. Such a transaction contains within it some measure of artificiality but it is the exempting statute which envisages that very artificiality. Therefore, in testing whether or not a transaction meets the requirements for exemption, the form becomes substantial. We hold that the transactions were carried out in such a way as to achieve the exemption provided for by the statute.

[3] The principal contention of respondent is that the statute requires a bona fide relationship of shipper and carrier in order for a transaction to achieve exemption from the tax and that such bona fides did not exist here. We are not impressed

with this argument. We see nothing in the way of a lack of good faith in a literal compliance with the statute. The legislature set up the standards of exemption. If they are met there can be no claim that the avoidance of the tax proves bad faith. "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits." Bullen v. Wisconsin, 240 U. S. 625, 36 S.Ct. 473, 474, 60 L.Ed. 830, 831, 835. The seller was interested in avoiding the tax if that could legally be done. The issuance of the bill of lading and the other exemption requirements were material to him for that reason. Every retailer licensed under the sales and use tax is permitted to make sales which are exempt from tax, such as sales for resale, and is required in such cases to obtain required documents in proof of the exempt nature of the sales. Section 6385 sets up formal requirements and in these cases the truck company saw to it that they were complied with. In doing this it exercised a right given it by the law.

[4] The conclusion we have come to is supported by the practical interpretation of the exemption statute adopted by those whose duty it has been to enforce the sales and use tax. The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, while not controlling, is always given great respect. Contemporaneous interpretation of a statute long acquiesced in by all persons who could possibly have an interest in the matter, has been held to be sufficient to justify a court in resolving any doubt it might have as to the meaning of ambiguous language employed by the legislature in favor of sustaining such long unquestioned interpretation. People v. Southern Pacific Company, 209 Cal. 578, 594, 290 P. 25.

The following transactions are recited in briefs of amici curiae: On November 18, 1948, and on January 27, 1949, the tax counsel for the board of equalization and the sales tax administrator respectively issued rulings holding that section 6385 applies with respect to certain sales of fuel oil to steamship companies. The rulings were issued in response to a memorandum outlining the basis upon which the transactions would be carried out and requesting a ruling thereon. It was pointed out that "It is proposed that the usual fuel oil contract used by Standard Oil Company of California be entered into between that company and any steamship company able to take advantage of the exemption. * * * The shipping company will be billed for the current price posted at the port of shipment, with freight charges to point of destination collect." A sample contract submitted with the memorandum to the Board of Equalization provided that the oil would be delivered by the seller on order of the buyer; that the price would be the seller's current price at time of each delivery for like deliveries as posted from time to time at the San Francisco Chamber of Commerce; that inspection and acceptance should take place at the time of delivery. The portion of the oil carried under the bill of lading to the out-of-state point was ruled exempt from tax under section 6385. The portion of the purchased oil which was consumed on the out-bound voyage and was not carried under the bill of lading was held taxable. On August 7, 1952, a similar ruling was made by the sales tax administrator, who wrote:

> "Under Section 6385 of the Revenue and Taxation Code the sale of fuel oil to steamship companies will be recognized as exempt from sales tax, which fuel oil is:
>
> "(a) Sold to a steamship company which is a common carrier, and which will use the fuel in the conduct of its business as a common carrier. For the purpose of establishing to the seller and the Board that the purchaser is a common carrier, and that the fuel oil will be used by the purchaser in the conduct of its business as a common carrier, purchasers will submit with

each purchase a certificate in substance as follows:

"This is to certify that the XYZ Steamship Company, the purchaser of the above-described fuel oil is a common carrier; and that the fuel oil purchased free of sales tax is to be transported to an out-of-state destination for use by the XYZ Steamship Company in the conduct of its business as a common carrier * * *

"(b) Shipped by the seller via the facilities of the purchasing carrier under a bill of lading to an out-of-state point. Freight must be paid in advance or the shipment made freight charges collect. The freight must be shown on the bill of lading or accompanying freight bill and must be bona fide and bear a reasonable relation with freight rates set forth by established tariffs when such have been published.

"Sales of fuel oil with respect to which all of these conditions exist may be taken as a deduction on Item 11 of the seller's sales and use tax return under the caption 'Sales of Fuel Oil to Steamship Companies'.

"This letter supersedes the letter on the same subject dated January 27, 1949 * * * except the last paragraph thereof."

The last paragraph so referred to in the previous letter read as follows:

"It is understood that the tax applies with respect to sales of that fuel oil which will be consumed in the voyage from the California port where the oil is taken on to the first port of call outside of California."

It appears that in the work-out under these arrangements all the fuel oil purchased was carried in the deep tanks and bottom tanks of the carrier's vessel. A bill of lading would be issued for delivery of all fuel oil not needed for use of the vessel herself in going from a given point in California to the first port of call outside the state named in the bill of lading. The balance of the oil, used by the vessel after arriving at the port of delivery named in the bill of lading, was tax free. We are unable to distinguish the transactions which were the subject of these administrative rulings from the transactions in question in this case in any substantial way. The same artificiality appears in both sets of transactions, but, as we have said before, that artificiality is permitted by the exemption statute which contemplates that it may exist.

Respondent contends that even if exempt status was achieved by the transactions involved yet as to certain of the transactions included, to wit, sales made to Navajo Freight Lines, Inc., a corporation, one of the carriers, this status was lost by reason of the actions of that carrier in using trucks and tractors it was transporting to out-of-state destinations to haul payloads on the way. We do not agree. Assuming that exempt status had been achieved by the dealings between the truck company and Navajo, the action of Navajo with respect to hauling payloads while engaged in transporting out of state the objects of sale could not affect the interest of the truck company, it not appearing that it had any knowledge, notice or responsibility for the conduct of Navajo. It is not Navajo that seeks exemption. The only evidence on the subject is that these actions of Navajo here relied upon by respondent as resulting in the truck company losing its exempt status is that the truck company did not know of these things until some four years after they occurred. Under these circumstances the truck company cannot be charged a tax by reason of this subsequent conduct of Navajo.

The judgment appealed from is reversed with instructions to the trial court to enter judgment in favor of appellant for the repayment to appellant of the sums paid under protest.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

166 Cal.App.2d 442

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Leroy HAMILTON and Othello J. Stewart, Defendants,

Othello J. Stewart, Appellant.

Cr. 6176.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1958.

Prosecution for unlawful possession of heroin. The Superior Court, Los Angeles County, Richard C. Fildew, J., entered judgment of conviction and one of the defendants appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law ⇐260(11)

On trial to the court, questions as to credibility of witnesses and weight of the evidence were for the trial judge.

2. Poisons ⇐9

Evidence sustained conviction for unlawful possession of heroin.

Bertram H. Ross, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants Stewart and Leroy Hamilton were accused of unlawfully possessing heroin. In a nonjury trial they were convicted. Stewart appeals from the judgment. (There was no motion for a new trial. Probation was denied.)

Appellant contends that the evidence was not sufficient to support the judgment.

Officer Abbot testified that on August 30, 1957, about 5 a. m., he and Officer Ward were in a police car at the intersection of Normandie Avenue and Adams Boulevard in Los Angeles; he (witness) saw Leroy Hamilton, in front of a bar, on the southeast corner of that intersection, and at that time Hamilton was "jumping around and jigging like, very similar to a jitterbug, bouncing around"; the officers stopped and asked him what he was doing; he replied that he was just standing around and had nothing to do; the officers asked him for permission to search him; Hamilton turned all his pockets inside out; they searched him, and he did not have any narcotics; then the officers went across the street to a sandwich stand on the southwest corner of the intersection; soon thereafter, he (witness) saw defendant Stewart come from the bar (on the southeast corner of the intersection) and saw him meet Hamilton; then Stewart and Hamilton started east on the sidewalk on the south side of Adams Boulevard; he (witness) watched Hamilton all the time after he first saw Hamilton, and he watched Hamilton and Stewart all the time after Stewart came out of the bar; the street was well lighted; no one else was on the south side of the street from the time Hamilton was first observed until after the arrest; after Hamilton and Stewart had walked about 50 or 60 feet, he (witness) saw Stewart pass a package to Hamilton—they grasped hands; at that time they were about 110 feet east of the place where the officers were standing; then Hamilton put his hand in his right coat pocket; the officers followed them in the police car, and when the car was about 15 feet back of them, Hamilton whirled to his right side, pulled his hand out of his right coat pocket and dropped a package (Exhibit 1) into the street gutter; the police car was stopped immediately, and Officer Abbot picked up the package and went to Hamilton and stopped him; Officer Ward stopped Stewart who was then about 15 feet farther down the street; the defendants were arrested; Officer Abbot picked up the package within half a minute after it was dropped in the gutter; the

officers searched Stewart and found that he had $124, but he did not have any narcotics.

The package which was dropped by Hamilton consisted of an envelope containing an eye dropper, a metal capsule, a hypodermic needle, and five bindles of heroin.

On cross-examination of Officer Abbot by counsel for Stewart, the officer was asked what he had heard about Stewart. The officer replied that he had heard that he was a large dealer in narcotics.

Defendant Stewart testified that he had known Hamilton for about six months—he was casually acquainted with him and knew him by the name of "Pete"; on the morning involved here, he (witness) had gone from Jefferson Avenue to a sandwich place at Normandie and Adams; while he was using the telephone at that place he saw two officers and a man across the street, and he saw that the officers were searching the man; when Stewart had finished telephoning, he walked east across the street and continued east on Adams Boulevard; Hamilton was also walking east on that boulevard, but Stewart was walking about five feet in front of him at all times; while they were walking, Hamilton picked up a little box, and then said that it was "An outfit"; thereafter they continued walking until they had gone about one and one-half blocks; at that time two police officers called Hamilton "to the car"; Hamilton went to the car; an officer called Stewart, and Stewart went to the car; he (Stewart) did not pass any narcotics to Hamilton, and he did not see anyone pick up narcotics from the gutter; he had not had regular employment for approximately three months; he won $105 in a gambling game during the evening preceding the arrest, and that money was part of the $124 which the officers took from him at the time of the arrest; he had been previously convicted of two felonies—burglary and transporting opium.

Hamilton testified that he did not receive anything from Stewart on the morning of the arrest; he (witness) did not throw any narcotics in the gutter, and did not see anyone pick up narcotics from the gutter; he had seen Stewart previously but never had any association with him.

[1, 2] The trial judge could reasonably find, among other things, from the evidence: that Hamilton did not have any narcotic on his person when the officer searched him in front of the bar (prior to the arrival of Stewart); that Officer Abbot kept Hamilton under observation after he was searched and until and after Stewart met Hamilton in front of the bar, and during the time prior to that meeting Hamilton did not obtain any narcotic from anyone or any place; that Officer Abbot kept Hamilton and Stewart under observation from the time they met in front of the bar until the arrest; that Stewart handed the package containing the heroin and narcotics injection equipment to Hamilton; and that Hamilton dropped the package into the gutter. The questions as to the credibility of the witnesses and the weight of the evidence were questions of fact for the determination of the trial judge. In People v. Belli, 127 Cal.App. 269, 15 P.2d 809, the defendant was charged with unlawful possession of morphine. In that case officers testified that they saw defendant walk westerly along the side of a street and saw him drop a package on the sidewalk; that at the same time they saw another man approaching the defendant from the opposite direction on the same side of the street and that immediately after defendant dropped the package the other man picked it up; thereafter one of the officers followed the other man, placed him under arrest, searched him, and found a package similar to the one that defendant had dropped on the sidewalk. The package contained morphine. The court said therein at page 271 of 127 Cal.App., at page 809 of 15 P.2d "[T]he truth of the matter was for the jury to decide, and it having accepted as true the testimony given by the narcotic agents, and there being nothing inherently improbable in such testimony, this

court is bound thereby on appeal." In the present case the evidence was sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 452

Joseph Dickson SINCLAIR, S. C. Sinclair, Sarah Ann Hutchison, Robert McGeah, E. J. Sinclair, Mary Hunter Glendinning, John Sinclair, James Sinclair, Sarah Fleming Daniel, Joseph Hillis Sinclair, Sarah Farquhar and Elizabeth Houston, Plaintiffs and Appellants,

v.

Sarah Frances WEBER, also known as Sarah Frances Weber Lawson, Defendant and Respondent.

No. 17836.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1958.

Hearing Denied Feb. 18, 1959.

Action to set aside deed and establish trust. The Superior Court, Alameda County, Richard H. Chamberlain, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that evidence would not sustain undue influence claim.

Affirmed.

1. Deeds ⇐211(4)

In action to set aside deed, evidence supported trial court's finding that presumption of undue influence, arising from confidential relationship between grantor and defendant, had been overcome.

2. Appeal and Error ⇐991, 1010(1)

Question as to whether presumption of undue influence upon grantor had been rebutted is a question for trier of fact, and reviewing court will not reverse if there is sufficient evidence to support finding.

3. Deeds ⇐72(3), 211(4)

Lack of independent legal advice is an important factor in determining whether presumption of undue influence upon grantor, arising from confidential relationship, has been overcome, and should be weighed by trier of fact; but independent legal advice is not an absolute essential to validity of deed.

4. Deeds ⇐72(2)

Such undue influence as will require setting aside deed can exist even where grantor is not mentally incompetent or weak-minded.

5. Trusts ⇐21(2), 59(1)

Agreement, reciting that property was transferred to defendant in joint tenancy for purpose of paying hospitalization expenses of decedent, that defendant agreed to be decedent's nurse and companion during decedent's lifetime and that property was to be preserved by defendant to use and benefit of decedent as long as she should live, was ambiguous, and did not create a trust; but even if such agreement did create a trust, it was rescinded when property was taken out of joint tenancy by decedent and put in defendant's name solely.

Kaiser & O'Neill, Jeremiah F. O'Neill, Jr., Robert A. Kaiser, Oakland, Smith & Smith, Melvin M. Belli, San Francisco, Caroline Rose, San Rafael, for appellants.

Augustin Donovan, Oakland, for respondent.

BRAY, Justice.

Plaintiffs appeal from an adverse judgment, without jury trial, in an action to set aside a deed and to establish a trust, based upon four counts: (1) nondelivery of the deed; (2) unsoundness of mind of grantor; (3) undue influence of grantee; (4) that grantee holds certain property in trust pursuant to agreement.

Contentions.

1. That the findings that the actions of the grantor were free and voluntary and not the result of the undue influence of the grantee are not supported because a presumption of undue influence arose which was not rebutted.

2. That the agreement is a trust agreement and upon the death of the beneficiary the corpus reverted to the grantor's estate.

General Facts.

The grantor, Miss Sarah Sinclair, who lived alone, employed defendant in July, 1948, as companion and housekeeper. This employment continued until the death of Miss Sinclair, May 16, 1954. Plaintiffs are first cousins of Miss Sinclair. Apparently none of them were acquainted with her, except that Miss Sinclair had on occasion sent Christmas gifts to plaintiff E. J. Sinclair in Ireland. Other than that, Miss Sinclair, during her lifetime, had no contact with her blood relatives. Miss Sinclair owned real and personal property including securities, bank and savings accounts of approximately $625,000. At her death she had left only $30,000 in a joint tenancy account with defendant. Defendant as executrix of her estate filed an inventory valuing the property in the estate at $15. All the rest of it Miss Sinclair had given defendant over the years. Starting in 1949 Miss Sinclair began making a series of wills favorable to defendant. During the years Miss Sinclair had several attorneys and many wills, some of which were holographic.[1] In 1952 and thereafter the wills left the bulk of her estate to defendant. Finally they left practically all to defendant. In September, 1949, Miss Sinclair deeded her home to defendant, and from time to time placed moneys in the bank and savings and loan association in joint tenancy with defendant. In October, 1952, she and defendant entered into the agreement hereafter discussed. By the middle of 1953 the bulk of Miss Sinclair's property, consisting of cash and securities, had been transferred to the sole name of defendant.

1. Undue Influence.[2]

The court found that Miss Sinclair "had great trust and confidence in and affection for" defendant and that defendant did not take advantage of said trust or confidence and did not make any effort to control Miss Sinclair's disposition of any property.

[1] An examination of the transcript shows that the evidence is conflicting and while there was evidence from which the court could have found undue influence, nevertheless the evidence sufficiently supports the court's finding and was sufficient to overcome the presumption of undue influence arising from the confidential relationship between Miss Sinclair and defendant.

Prior to the employment of defendant, Miss Sinclair had a number of friends who it is claimed were gradually thereafter denied access to Miss Sinclair. Attorney R. H. Cross, a schoolmate, had drawn wills for Miss Sinclair in 1927 and in 1949. He also visited her many times as a friend. In her holographic will dated December 5, 1949, and a formal one drawn by him on December 19, 1949, he was bequeathed as a friend 200 shares of Transamerica stock. (Attorney Potstada testified that the latter will gave Mr. Cross all of her Transamerica stock (2,224 shares) and all of her Bank of America stock (1,854 shares).) This will made defendant the residuary legatee. Miss Sinclair had discussed with Mr. Cross deeding her property to defendant, but on his advice, she decided to let the property go to defendant under the residuary clause. In November, 1952, Miss Sinclair wrote Attorney Cross asking him to return this will. On taking the will to her home defendant informed him that Miss Sinclair "sees no one," "her face is all gone." He gave the will to defendant who evidenced "great satisfaction and glee." For a year prior to

1. In no will did Miss Sinclair leave any money or property to any of the plaintiffs. In various wills she left sums up to $5,000 to her sister-in-law Della. In the last will she left Della $50.

2. Plaintiffs do not contest the court's findings that Miss Sinclair was of sound mind and that the deed was delivered.

that time he had phoned the Sinclair residence many times but each time had been informed by defendant that Miss Sinclair was not available.

Miss C. J. M. Jones attended college with Miss Sinclair. They were close friends. On Christmas Eve, 1951, she went to Miss Sinclair's to give her a gift. Receiving no answer at the front door, Miss Jones went to the door of the kitchen where she saw a light. Upon calling Miss Sinclair's name the light went out. Arriving home she phoned Miss Sinclair, who said that hereafter Miss Jones should send things by mail. Thereafter when she phoned, Mrs. Weber would advise her that Miss Sinclair was resting, or out in the garden, or had some other excuse why Miss Sinclair could not speak to her.

Mrs. Emma Gibson's story was similar to that of Miss Jones. Mrs. Gibson had known and visited Miss Sinclair for years. But after defendant arrived defendant would tell her that Miss Sinclair was not well enough to come to the phone. She visited Miss Sinclair after the latter's operation in 1952 and they had a good visit, nothing out of the ordinary occurring. Miss Sinclair was happy to see her.

Mr. Jules Piccardo knew Miss Sinclair since 1936 and had acted as her banker. He had visited her socially and had entertained her in his home. He knew Miss Sinclair's sister-in-law Della and the relationship between Miss Sinclair and Della was very good. Miss Sinclair was very frugal and conservative. He and she had exchanged Christmas presents up to the last couple of years before her death.

Mr. Ralph Knapp, a realtor, knew Miss Sinclair since around 1914, both socially and through business. They exchanged Christmas cards up until the last three or four years. While he had been accustomed to stop in and see Miss Sinclair when he was in her neighborhood, he could not get in to see her in the last three or four years as defendant answered the door and would state that Miss Sinclair was not at home or give some such answer. He met her on the street while she was on the way to the doctor and she acted the same as ever toward him. Although she had aged considerably she was her own cheerful self. Although at other times he had been at her home when she was sick in bed, it struck him "very funny that every time I made a trip there she was not available."

Mr. Perry Spann, a retired contracting painter, had worked for Miss Sinclair from 1914 to 1951, doing all the painting work on her residence. In 1952 he stopped several times to see her when she was ill, but defendant would tell him that Miss Sinclair was upstairs, or resting, or did not feel like meeting anyone at present. On one occasion when defendant came to the door, Miss Sinclair was sitting in the hallway, and asked if that was Mr. Spann, and said, "Will you please have him come in?" She talked rationally, seemed to be evading something, and did not seem to be herself. He felt that she did not want him there. He never got in again.

Dr. Goodwin specialized in women's gereology and gynecology. Miss Sinclair was her patient from August, 1939, to February, 1952, seeing her once a week during that period. A great friendship arose between them and in the visits she made Miss Sinclair they would visit socially from 40 to 50 minutes. In addition they visited on the phone. In April, 1951, Miss Sinclair complained of pain in her face and cheek. She was referred to Dr. Lewis Morrison a specialist. He made smears which were negative for malignancy, and advised Miss Sinclair to see him once a month, which she did for two or three times. Dr. Goodwin asked her if she was following through with the Morrison treatments. She stated that she was not because it cost $7.50 a visit and she did not feel that she could spend that and that defendant felt that it was too much. Dr. Goodwin, as time went on, advised Miss Sinclair that there was a thickening of the bone in her face to which Miss Sinclair replied that defendant said that it was just the same and was not getting any larger. Miss Sinclair did not go to Dr. Morrison about it. In June, 1951, Miss Sin-

clair came to Dr. Goodwin's office complaining about her mouth. Dr. Goodwin found a mass protruding through the upper part of her hard palate and took Miss Sinclair to Dr. Morrison, who told Miss Sinclair that she must have surgery at once. Miss Sinclair stated that she would not make a decision until she discussed the matter with defendant. Later Miss Sinclair phoned that defendant said that it was all right to go ahead with the surgery. Dr. Goodwin asked Miss Sinclair at the hospital if she liked the room she was in. Miss Sinclair said that defendant "had inspected the room, and said she guessed it would do." Both Dr. Goodwin and Dr. Morrison advised Miss Sinclair that if she did not receive x-ray treatment the malignancy would spread faster. Miss Sinclair left the hospital February 9, 1952, and was to report February 12 for x-ray treatment. On February 11 a phone call had been left for Dr. Goodwin from Miss Sinclair asking to change the appointment. Dr. Goodwin phoned Miss Sinclair but defendant stated that Miss Sinclair had her plate out and could not talk. Dr. Goodwin had previously talked to Miss Sinclair on several occasions when the latter had her plate out. Miss Sinclair indicated to Dr. Goodwin that defendant discussed with her things of a personal nature so far as her household was concerned, and had control of things going on in the household. Defendant arranged for the painting of the house inside and out, installation of a sprinkling system, new fences, new stove, removal of a palm tree, employment of somebody to assist defendant in the house, and the purchase of other items for the house. Miss Sinclair told Dr. Goodwin that she would like to listen to Fulton Lewis Jr. on the radio, but that she did not dare as defendant "was a New Dealer and would not countenance having her listen to the program." Dr. Goodwin prescribed for Miss Sinclair a tonic that included a tablespoon of sherry wine. Miss Sinclair told the doctor that defendant "would have a fit if she knew she had any sherry." After February, 1952, Dr. Goodwin wrote several letters to Miss Sinclair, telephoned the house unsuccessfully as defendant would state that Miss Sinclair was out or resting. Miss Sinclair was frugal and thrifty, even to the extent that she wore darned stockings. Prior to 1952 Dr. Goodwin and Miss Sinclair exchanged Christmas gifts but thereafter the doctor never heard from her.

On October 9, 1952, Miss Sinclair and defendant went to the office of Attorney Kindig where Miss Sinclair executed a will in which, after making a number of bequests to friends in sums from $50 to $500 and $50 to her sister-in-law Della Sinclair, she bequeathed the residue of her estate to defendant.

Attorney Kindig testified that Miss Sinclair wanted to take care of defendant if defendant would take care of her as long as she lived, that she had already made out the deed to the real property but had not as yet delivered it, that she wanted to protect defendant if there was anything left after her operation and disability, and that she wanted to open joint bank accounts with defendant and to transfer to defendant all her securities. Miss Sinclair also wanted him to serve as her attorney for the rest of her life to look after her interests and estate and wanted him to share in her estate. He told Miss Sinclair that she should be protected as she might need the money later on. She told him to prepare the necessary documents. He then prepared cross-deeds for the real property, and wills for both Miss Sinclair and defendant. Defendant's will left all of her estate to Miss Sinclair. The latter's will left her residuary estate to defendant. Kindig also prepared and the parties signed the agreement hereafter discussed.

Two days later, October 11, a most peculiar agreement was entered into between defendant and Attorney Kindig. In it defendant retained him "to represent her as her attorney at law in a cause of action * * * regarding the estate of Sarah Sinclair and agrees to pay him for his services 50% if no contest of will. 50% if there be a contest of will." Kindig testified that defendant came to his office and stated that

Miss Sinclair had instructed her to come in and wanted him to draw an agreement with the terms as embodied in the last-mentioned agreement. A few days thereafter defendant returned to his office, saying "I have proven unfaithful to Miss Sinclair," and asked that the agreement be destroyed. He destroyed it.

In November Miss Sinclair wrote Kindig a letter terminating his services. However, she engaged him again the next month. In April, 1954, he discussed with defendant the alleged trust agreement. She told him it was none of his business, as his retention had been terminated. She said, "I have put her where I want her to be, where she should be," and "The property is mine, I can do as I please." Kindig had a claim for services of over $11,000 for services from September, 1952, to the date of her death.

October 11, 1952, Miss Sinclair wrote a "Last Will and Testament," addressed "To Whom It May Concern." Besides stating that Kindig had her securities (for transfer to her and defendant as joint tenants) which he was to return, she gave her home, all moneys and "all and sundry in my possession" to defendant. May 18, 1953, she executed a holographic codicil to her formal will of October 9, 1952. She ratified the former will except that she deleted a small money gift to Charlotte Jones and substituted Attorney Potstada for Kindig as alternate executor. She also wrote, "I do hereby declare that I have previously given and transferred freely and voluntarily certain stocks and other securities to Sarah Frances Weber, which transfer I hereby confirm."

In February, 1952, prior to the retention of Kindig, Miss Sinclair had engaged Attorney Rode to prepare a will. She had noted on the copy of a prior will the changes she wanted to make. She said she had already disposed of her real property as a gift. Defendant and Miss Sinclair came to his office after he had prepared the will. He asked defendant to leave. Then Miss Sinclair read the proposed will. He and his brother witnessed it. She appeared to be a woman of intelligence, of sound mind and competent to dispose of her estate. She was very definite in her desire to have defendant as the residuary legatee. The will, dated March 3, 1952, after certain small specific bequests, bequeathed the residue to defendant absolutely. October 6, 1952, Rode saw Miss Sinclair at her home. She was concerned as to whether substantially all of her estate would go to defendant under the will. She stated that she had given a deed to her home to defendant unequivocally and without reservation. She also was concerned over interference with her affairs by Della (the sister-in-law). She stated that Della had Cross call at her home to see her and she was indignant about it. She wanted to eliminate Della as a legatee. Defendant urged her to let it stand. Miss Sinclair asked whether anyone could contest the will as defendant would rather not take anything than have trouble over it. She was dissatisfied with Dr. Morrison, who had upset her considerably by his manner and use of coarse language. This dissatisfaction was aggravated by Dr. Goodwin who merely passed off her complaint with "that is just his way."

In January or early February, 1953, Attorney Potstada became the attorney for Miss Sinclair. He estimated the value of her properties then to be around $600,000 to $700,000. She told him that she wanted to transfer her securities outright to defendant, not in trust or joint tenancy, as they had been put by Mr. Kindig. She said that she had employed Attorney Kindig to transfer her properties to defendant but instead he transferred them in joint tenancy and subsequently refused to take them out of joint tenancy. She wanted Potstada to draw a new will to replace the one in which she left stock to Mr. Cross. Miss Sinclair feared that Della or Mr. Cross would get their hands on her property. Potstada arranged the transfer of the bulk of her securities to defendant because of that fear. Miss Sinclair considered defendant as her sister and the closest person to her. The bulk of her securities was transferred to defendant by July, 1953. Miss Sinclair left

the Kindig will for minor changes. She said she would retain all the old wills. Potstada told her it was a good idea as further security, as all of the wills would have to be broken separately should the inter vivos transfers be overturned. With the view that there might be a contest of the will, Potstada had two other lawyers act as witnesses. In that will defendant was again named residuary legatee. Miss Sinclair paid him $5,000 for his services and a gift of 100 shares of Transamerica. Potstada had many conferences with Miss Sinclair in which she told him of her desire to transfer all her assets to defendant. Defendant was not present on most of these occasions. Miss Sinclair was "a very shrewd, intelligent and financially capable woman, and knew what she wanted to do." Prior to the death of Miss Sinclair he had never represented defendant. After Miss Sinclair's death defendant gave to Attorney Potstada federal bonds of approximately $40,000 value which defendant had received from Miss Sinclair.

Attorney Potstada testified that the services rendered defendant by him for which the $40,000 was paid, included representing her for a time in this particular action and also in the lawsuit brought against her by Attorney Kindig on the above mentioned agreement. He testified that in resisting a proceeding brought by Attorney Kindig to have a guardian appointed for Miss Sinclair on the ground that she was incompetent, he was acting for both Miss Sinclair and defendant.

The two lawyers who witnessed the will testified that Potstada had asked them to be particularly observant of Miss Sinclair since a contest was expected. One of them testified that he understood that the property had already been transferred and the will was a precautionary measure. Miss Sinclair seemed to be a "sharp little old lady."

As to the Kindig agreement, defendant testified that because of the condition of her eyesight she does not read and that it was not read to her. As stated above, Attorney Kindig testified that in a few days after its execution defendant came to him and demanded that the agreement be torn up.

In September, 1949, Miss Sinclair executed the deed of the home to defendant, handed it to her stating that it was a gift. Defendant kept the deed until 1953. In January of that year, upon the advice of Miss Sinclair, she gave it to Attorney Kindig to record. At that time defendant executed a deed back to Miss Sinclair and a will leaving everything to the latter. Kindig told defendant to keep them and that they were to protect Miss Sinclair in the event something happened to defendant. The same day, on Kindig's advice, since Miss Sinclair wanted to be sure that defendant got the money, defendant withdrew $47,200 from various joint accounts and put the money solely in her own name. In the same year all of the bank accounts, stocks and bonds were transferred to defendant, as Kindig had advised Miss Sinclar to do this since she was afraid someone would get her property even though she was leaving everything to defendant. After the operation in October, 1952, Miss Sinclair could not wear her false teeth and could not talk as the scar was still sore. She did not want to see anyone because of the disfigurement. Prior to the operation Emma Gibson had come to the house and on seeing the tumor on Miss Sinclair's cheek exclaimed, "Oh, Sarah, what has happened to you? How horrible you look!" She then turned and walked away. Miss Sinclair said, "Well, I must be a sight." After that Miss Sinclair did not want to see her friends, saying she was disfigured and could not talk. As to the telephone calls, defendant would ask Miss Sinclair if she wanted to talk. Miss Sinclair would always say she did not and could not because she did not have any teeth. In the summer of 1953 Cross told defendant that he had a letter from Della, and that Della was the proper one to take care of Miss Sinclair. He said that if defendant wanted to do it he would arrange for it. Defendant said she was not interested. When he left, Miss Sinclair who had heard the conversation said, "Such greed I have never heard of."

Dr. Presant saw Miss Sinclair professionally October 6, 1952. He referred her to Dr. Berkove for treatment. Her only concern at that time was whether defendant could visit her at the hospital. She was mentally alert, very intelligent, and a woman who would have her own way, very sweet but insistent that things be done as she wanted. Dr. Berkove removed a malignant tumor by cutting her cheek from the corner of the eye to the lip. He saw her daily from October 13 to 23, 1952, and thereafter until she went to the sanitarium, where he advised her to go. She impressed him as being very resourceful and mentally alert. On January 21, 1954, she, for the first time, showed memory loss by repeating several questions. Defendant said she also noticed this.

Tosh and Susumi Mitoma, brothers, came to Miss Sinclair's home once a week from 1947 until her death to do gardening. They arrived about 10:30 a. m. and remained until the middle of the afternoon. They usually spent about an hour after lunch talking to Miss Sinclair. Tosh testified that on one occasion she stated that she was going to will the home to defendant. Later she said she had done that and after 1952 she stated that she was turning the property and everything over to defendant, that she was giving defendant "The property, the house, and her business." Her business so far as the witness knew was "stocks." She said she did not have any relatives after her brother died and that defendant had been faithful to her. The relationship between defendant and Miss Sinclair was very congenial. "They were always going out together, more like sisters." Susumi, a graduate of the University of California in entomology, testified that he had "never met a sharper woman, more intelligent and capable in every way." Defendant and Miss Sinclair "seemed to hit it right off together and they became quite attached to one another. They seemed to complement each other in their personalities." "They always seemed to get along more like sisters than anything else." On one occasion Miss Sinclair told Tosh that she had turned over the house to defendant. "They were very happy, used to be quite a bit together, and laugh and joke all the time." Miss Sinclair did not like to meet people because of her scar as she was sensitive about it.

On March 22, 1953, Miss Sinclair wrote a very interesting four page statement in her own handwriting. The same day she sent to Attorney Potstada a copy of it which she also wrote out in longhand. In it she states why she has transferred and is transferring to defendant her stocks, bonds and savings account instead of placing them in trust or having them distributed under her will. She is fearful that Attorney Cross and her sister-in-law Della Sinclair, because of incidents which she relates, because of the fact that Attorney Cross is in correspondence with Della, and because of their solicitude for her health, were "planning a future for me, which would be most hateful to me and to which I shall not yield,—with God's help." She refers to the fact that Della had once sent her a gift of $10,000 but that when she learned from Della's "constant orders regulating my life" that Della "felt her gift to me, gave her the right to dominate my life" she returned the money. She also explains that Attorney Kindig had held back some of her securities when she had asked him for all of them and that she felt, upon reviewing, that the agreement she had entered into with him was "out of order * * * very unreasonable." Hence she had discharged him as her attorney. She ends the statement: "I would much prefer —as I have done and am doing now, to transfer these matters to my friend and constant companion, and to deliver them to her while I am still here, as it gives me faith to know that my wishes shall be consummated. I trust she will be spared to enjoy *all she gets—if she gets it! Heaven knows. —I don't!*"

She also wrote a note in which she stated that in April, 1953, she had given certain unnamed securities to defendant. Still another note stated that she did not want Kindig to act in any capacity as attorney for her or her estate, and "I, Sarah Sinclair, give, transfer and assign all of my negotiable bonds on this date [May 5, 1953] to Sarah

Frances Weber as her own separate property without any conditions or reservations. I further acknowledge the actual delivery of these bonds by this instrument and all the interest I have therein."

Subsequent to the Potstada drawn will Miss Sinclair executed another holographic will, probably by copying a prior formal will. In it, after certain small gifts, she left the residue to defendant.

[2] "Where the burden shifts to the defendant to show fairness and good faith in the transaction as it does under the facts in this case, it is nevertheless incumbent upon the appellant in order to prevail upon the appeal to show that no credible evidence was produced from which the reasonable inference might be drawn that the grantor acted voluntarily and with full knowledge of the facts and a complete understanding of the effect of the transaction." (O'Neill v. Dennis, 1952, 109 Cal.App.2d 210, 212, 240 P.2d 376, 377. There the trial court had found no undue influence in a suit to cancel a deed for fraud where the defendant was a frequent visitor and there was a confidential relationship.) Or, as stated another way, the question of whether the presumption of undue influence has been rebutted is a question for the trier of fact and a reviewing court will not reverse if there is sufficient evidence to support a finding. Ginn v. Podesta, 1937, 8 Cal.2d 233, 235, 64 P.2d 1090; Camperi v. Chiechi, 1955, 134 Cal.App.2d 485, 504, 286 P.2d 399. It would seem that the letter written by Miss Sinclair to Mr. Potstada in explanation of her actions, alone, would be sufficient credible evidence to support the finding.

[3] Plaintiffs contend that in order to rebut the presumption of undue influence, it is necessary to show that Miss Sinclair had received independent advice in making the gifts to defendant and that she did not receive such advice. They contend that both Attorney Kindig and Attorney Potstada were really representing defendant and not Miss Sinclair. They cite Webb v. Saunders, 1947, 79 Cal.App.2d 863, 869, 181 P.2d 43, and Webb v. Saunders, 1949, 89 Cal.App.2d 732, 735, 201 P.2d 816. There are two answers to this contention. One is that the evidence shows that at no time prior to the death of Miss Sinclair did Attorney Potstada represent defendant, and hence Miss Sinclair received independent advice from him, if not also from Attorney Kindig. Moreover, she was advised from time to time by other attorneys. The second answer is that lack of independent legal advice, while an important factor in determining whether the presumption of undue influence from a confidential relationship has been overcome, and should be weighed by the trier of fact, is not an absolute essential. O'Neill v. Dennis, supra, 109 Cal. App.2d 210, 214, 240 P.2d 376; Roeder v. Roeder, 118 Cal.App.2d 572, 580, 258 P.2d 581.

The evidence clearly shows that at all times Miss Sinclair knew what she was doing, that she had no relatives who had been close to her in any degree, that she regarded defendant as a sister, that because of the solicitude of Della and Attorney Cross for her she was convinced that they wanted to control her life and property, something she did not want them to do, that her determination to give all her property to defendant was not due to undue influence upon her by defendant, and that the presumption due to the confidential relationship was fully overcome.

[4] Plaintiffs contend that the trial court's "Announcement of Decision" shows that it believed that no undue influence can be proved in any case unless weakness in mind of the grantor is shown. This, of course, is not the law. "A person does not have to be mentally incompetent or even weak-minded to repose confidence in another when the relationship justifies it." Kloehn v. Prendiville, 154 Cal.App.2d 156, 162, 316 P.2d 17, 22. However, the findings show that the court's decision was not based upon any such theory. The findings control over any announcement of decision. See Formosa Corp. v. Rogers, 1951, 108 Cal. App.2d 397, 239 P.2d 88; Sketchley v. Lipkin, 1950, 99 Cal.App.2d 849, 222 P.2d 927. Moreover, a reading of the announcement

of decision does not support plaintiffs' contention. While the court did discuss unsoundness of mind, it must be remembered that one of the counts of the complaint upon which the court was required to find and did find, was unsoundness of mind.

2. The Agreement.

[5] The agreement drawn by Attorney Kindig and executed October 9, 1952, by Miss Sinclair and defendant states that Miss Sinclair is about to assign to defendant in joint tenancy certain bank accounts, stocks, bonds and other properties "for the purpose of paying and defraying the expenses of first party [Miss Sinclair] during the hospitalization of First Party and thereafter; And Whereas, Second Party agrees to be her dutiful constant nurse and companion during the lifetime of First Party" it is agreed "that said Second Party shall conduct, maintain and preserve said funds, property and accounts to the use and benefit of said First Party so long as said First Party shall live, unless earlier terminated in writing by said First Party." It then appoints Attorney Kindig as attorney in fact for both parties. Plaintiffs contend that this was a trust agreement wherein the property was transferred to both parties as trustees for the purposes therein stated with Miss Sinclair as the beneficiary and that upon her death the purposes were fulfilled and the corpus reverted to Miss Sinclair's estate as trustor. The agreement is ambiguous. It states that the purpose is to pay Miss Sinclair's expenses during hospitalization and thereafter. This is consistent with a trust theory. However, it next contains defendant's obligation to be Miss Sinclair's constant nurse and companion during Miss Sinclair's life. This is somewhat out of place in a trust agreement. Moreover, it seems to raise an inference that if defendant performed that obligation the property would go to her as joint tenant. The evidence clearly shows what was intended. As said by the trial judge, Honorable Richard R. Chamberlain: "Did The Agreement Of October 9, 1952, Create A Trust The Purposes Of Which Have Been Fulfilled, Resulting In An Obligation To The Defendant To Return Any Remaining Assets To Miss Sinclair's Estate?

"It would be an unnecessary elaboration of the Court's hereinabove summarized conclusions, to review the evidence bearing on the question just stated. Although Miss Sinclair by her voluntary acts placed her property either in the sole name of defendant or in the names of herself and defendant as joint tenants, she retained and exercised the power to draw checks on joint tenancy bank accounts until almost the date of her death; notwithstanding the Agreement expressed her purpose as that of paying and defraying her expenses during her hospitalization, the evidence shows that it was unnecessary for defendant to actually pay such expenses because Miss Sinclair herself attended to such payments up to three or four weeks before her death. And during the 18 months between the date of the Agreement and Miss Sinclair's death defendant continued 'to be her dutiful constant nurse and companion' as contemplated by the Agreement. It is apparent that Miss Sinclair fully understood that upon her death sole title to the property mentioned in the Agreement would vest in defendant as the surviving joint tenant."

Moreover, assuming the instrument to be a trust agreement as contended by plaintiffs, the parties clearly rescinded it. It, of course, did not purport to apply to the real property, deed to which was given defendant some time before. Subsequently to its execution Miss Sinclair had the money, stocks and bonds, with the exception of $30,000 above mentioned, taken out of joint tenancy and put in defendant's name solely. Thereafter she wrote the statement with copy to Potstada to the effect that she had transferred everything to defendant and giving the reasons; she also wrote that in April, 1953, she had given certain unnamed securities to defendant. On May 5, 1953, she wrote an assignment to defendant of all her bonds. Miss Sinclair's expressions and actions both before and after signing the agreement clearly show that the last thing she wanted was any of her property

to go into her estate or to any of her relatives.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

166 Cal.App.2d 404

Merlin A. DAVIS, Plaintiff and Appellant,

v.

Raymond A. MILLIGAN, Defendant and Respondent.

Civ. 9484.

District Court of Appeal, Third District, California.

Dec. 19, 1958.

Action by business visitor against owner of land and service station thereon for personal injuries sustained as result of alleged negligence of station operator. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment of nonsuit on all causes of action and business visitor appealed. The District Court of Appeal, Warne, J. pro tem. held that evidence was insufficient to support a finding that an employer-employee relationship existed between owner of realty and service station thereon and operator thereof who was allowed use of station on condition that he buy all his petroleum products from owner at a specified price, and evidence was insufficient to sustain a finding of a partnership between owner of realty and station operator.

Affirmed.

1. Trial ⇐142

A court can grant nonsuit only when, disregarding conflicting evidence and giving plaintiff's evidence all of the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no conflict of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.

2. Master and Servant ⇐330(3)

In action by business visitor to recover against owner of land and filling station thereon for personal injuries allegedly caused by negligence of operator who was allowed rent-free use of premises by owner upon operator's agreement to purchase all his petroleum products from owner at a specified price, evidence was insufficient to support a finding that an employer-employee relationship existed between owner of premises and operator of filling station.

3. Master and Servant ⇐1

Right to control another's work is essential to an employer-employee relationship.

4. Partnership ⇐55

In action by business visitor against owner of land and filling station thereon to recover for personal injuries sustained on premises due to alleged negligence of station operator who was allowed use of premises rent free upon oral agreement to purchase all petroleum products from owner at a specified price, there was no evidence to sustain finding of partnership between owner of station and operator. West's Ann.Corp.Code, § 15006.

5. Negligence ⇐134(3)

In action by business visitor against owner of realty and filling station thereon to recover for personal injuries allegedly caused by negligence of station operator, who occupied premises rent free in return for an oral agreement to purchase from owner all petroleum products required at a certain specified price, evidence failed to support any finding that owner was in fact operator of station.

C. Keith Lyde, Oroville, for appellant.

Raymond A. Leonard, Oroville, for respondent.

WARNE, Justice pro tem.

Appellant appeals from the judgment of nonsuit rendered in favor of the respondent in an action for personal injuries.

Plaintiff while an invitee and business visitor at a service station operated by Myrle Stephens was thrown from a horse when the horse shied as the result of noise caused by Myrle Stephens kicking an iron device upon the grease lifting rack. Appellant received a severe back injury. Respondent Milligan was the owner of the real property, including the service station, where the accident occurred. Appellant filed his action against both Stephens and the respondent Milligan, but a few days prior to the trial he dismissed the action against Stephens.

Appellant's complaint was in four counts. The first cause of action alleged that Stephens was in control of and working on the premises of the service station, that the accident was caused by his negligence, and that such negligence was a proximate cause of appellant's injuries.

The second cause of action alleged that respondent was the owner and operator of the service station, and that Stephens was the employee and agent of respondent Milligan at the time of the alleged injury.

The third cause of action alleges that Stephens and Milligan were partners doing business on said premises at the time of the injury; and the fourth cause of action alleges that Milligan was the sole and exclusive owner in fee simple of the premises upon which the service station was situated, and was in possession and control of the premises at the time of the accident. The defendant Stephens answered, denying negligence on his part as alleged in Count I, and entered a general denial as to each of the remaining counts. He pleaded two defenses: (1) Contributory negligence on the part of the appellant, and (2) assumption of risk by the appellant.

Respondent Milligan answered Counts II, III and IV of the complaint, admitting that Stephens was in control of the service station, but denying the remaining allegation in each of said counts.

After appellant had presented his case and rested, respondent moved for a nonsuit on all causes of action. The motion was granted, and this appeal followed.

The questions presented upon this appeal are (1) whether Stephens was at the time of the accident the agent or employee of Milligan, (2) whether a partnership existed between Milligan and Stephens, and (3) whether Milligan was in sole possession and control of the premises.

[1] As stated in Robinson v. George, 16 Cal.2d 238, 241, 105 P.2d 914, 916: "In reviewing a judgment of nonsuit, it must always be borne in mind that a court can grant a nonsuit only when, disregarding conflicting evidence and giving plaintiff's evidence all of the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. (Citing cases.)"

In the light of these rules, we shall consider plaintiff's case.

The evidence shows that Stephens was in possession of the premises under an oral agreement. However, Stephens testified that Milligan promised him a written agreement, but wanted him to first try out the station and then they would contract; that he rented it for two months before he asked Milligan for a contract; that Milligan was the distributor for the Norwalk people in that area and that Stephens had to buy his gasoline and oil from Milligan; that Milligan owned the station; that when they made the "deal", as he called it, Milligan figured the gasoline out and showed him what the gasoline cost him and what he could sell it for, that he would make a profit for his work, that Milligan would make a profit on the gasoline and oil which he sold to Stephens and that would be the rent, and "that way he didn't have to pay any rent on the place, that was the deal"; that he agreed upon a price he

would pay Milligan for the gasoline delivered to him; that what he sold it for was his own business; that at the time he was questioned about "this affair which was within two weeks after the accident", he made and signed the following statement: "I have no written agreement with Ekonomy Oil Company, I have a verbal agreement with Ekonomy Oil Company, that is, A. B. Milligan, that I am to buy my gasoline and three kinds of oil that he handles. Any other accessories that I may choose to handle I can buy where I please. I pay no rent for the service station property at Brown and Midway in Durham. The only consideration for my use of the above service station property is that I buy my gasoline and the oil Mr. Milligan sells from him. I pay Mr. Milligan for the products he delivers to me and sell to my customers, I buy at the dealer price. If I give credit to any of my customers that is on my own. It is none of Mr. Milligan's business what I do or how I sell. Mr. Milligan exercises no supervision over my station"; that he did not share his profits with Milligan; that Milligan never paid him any salary of any kind, nor did he ever file any partnership income tax; that Milligan visited the station from time to time and made suggestions, but never actually ordered him "around" or told him "to do this or that" or he would fire him; that he tried to do everything Milligan wanted him to do in order to get along with him because he knew if he did not go by Milligan's suggestions he would be put out; that he wanted a contract so that he could run the service station as he wanted to; that one of the considerations for Milligan *leasing* (emphasis added) the property to him was that he was to keep open seven days a week; that he paid the sales tax on candy, soda pop, tires and things like that, and that the sales tax on the gasoline which Milligan sold him was probably paid by Milligan and included in the purchase price; that a seller's permit was issued to him personally by the State Board of Equalization; that he bought all the grease guns and everything off of Milligan and that Milligan sold him the equipment but agreed that if he ever gave up the station he, Milligan, would buy it back; that Milligan advertised the gasoline (presumably the brand which he carried) in order to stimulate the sales in all the stations which he owned. It also appears that Milligan had a key to the premises during the entire time that Stephens operated the service station. However, there is no evidence in the record that Milligan used this key other than to let Stephens into the service station when he, Stephens, had locked himself out.

Respondent Milligan testified that he was in the petroleum business; that the owned four service stations, one in Durham and three in Chico; that prior to May 3, 1956, Stephens came to his office to see about taking over the service station in Durham, and that he took it over; that Stephens did not operate it for him, but operated it for himself; that although he owned the station he had no interest in Stephens' business; that he was the exclusive dealer for Norwalk petroleum products for that district; that he made a profit per gallon of gasoline sold as a broker; that before Stephens took over the service station it was agreed that Stephens was to sell his gasoline and oil and pay no rent; that he presented a written agreement to Stephens, but Stephens did not want it; that the more gasoline Stephens was able to sell the more money he, Milligan, as a broker would make; that he was not in control of the service station so far as the "policies were concerned"; that he had a policy of insurance as an owner and operator to cover the times when he operated the station himself. As to what Milligan was to receive from Stephens for the use of the premises, we quote from the record:

"Q. So now * * * yesterday as I understood it you didn't testify that the profits that you made as a distributor * * * or broker as you put it, that that was rent on the premises. A. It was my entire income on everything.

"Q. But that wasn't rent that you charged on the premises, was it? A. No, that

was profit on the merchandise. * * * In fact, that would take in everything. * * *

"Q. It is just a profit? A. If you have a certain investment you have to get a certain amount of money out of it and they would have to sell that much products through the place.

"Q. It is an allowance on your premises? A. Yes, to take care of your overhead on the premises and your cost of operating it, it is good business."

Respondent also testified that he had agreed to furnish and maintain the pumps, hoist, compressor, one sixty gallon kerosene tank, one sixty-two gallon portable tank, or whatever tank he had, four thirty gallon Hi Boy lube tanks, and the service station building, anything that he owned. However, he did not agree to maintain anything that Stephens owned.

[2, 3] Appellant contends first that the evidence was sufficient to support a finding that an employer-employee relationship existed between Milligan and Stephens, and, therefore, the court erred in granting the nonsuit. We do not agree. The testimony is undisputed that Stephens was in possession of the premises under an oral agreement. There is not a scintilla of evidence that Stephens considered himself an employee of Milligan. Nor is the evidence sufficient to warrant such a presumption. As we view Stephen's testimony, he was a tenant from month to month expecting to get a lease for a definite period of time. While Milligan made suggestions from time to time as to what should be done, such as keeping the restrooms clean and other helpful suggestions, there is no evidence that he actually supervised Stephens. The fact that Stephens stated, "Well, I knowed if I didn't go by his suggestions he would put me out", does not mean that Milligan had the right to "fire" Stephens as contended by appellant. Putting him out or terminating the occupancy of the premises is entirely different than terminating an employment. There is nothing in the oral agreement by which Milligan retained the right to control and direct the mode or manner in which the work of operating the station was done. Nor does it appear that Milligan exercised a particular control over the details of Stephens' work. The requirement that the service station should be kept open for seven days a week was part of the consideration for the agreement. It does not appear herein that Milligan possessed the right to control Stephens' work, which is essential to an employer-employee relationship. Robinson v. George, supra. The making of suggestions and the right to order the doing of certain work are entirely different matters.

[4] Appellant contends next that there is evidence of a partnership. To the contrary, we find no evidence of a partnership relationship existing between Stephens and Milligan. Stephens did not share his profits in the operation of the service station business with Milligan, nor did Milligan share the profits which he received as a broker or distributor from the oil and gasoline which he sold to Stephens. They were two different profits entirely. Nor is there any evidence that they were co-owners of the business. A partnership is an association of two or more persons to carry on as co-owners a business for profit. Sec. 15006(1), Corporations Code.

[5] Lastly, we find no evidence in the record to support respondent's contention that Milligan was the operator of the station. What we have already stated is equally applicable to this contention.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

166 Cal.App.2d 129

Carolyn A. STEELE, Plaintiff and Appellant,

v.

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION, a local administrative board; Harry Albert, a member of said board; Hayden F. Jones, a member of said board; Winston W. Crouch, a member of said board; and Hurl H. Churchill, Clerk of the Municipal Court of the County of Los Angeles, State of California, El Monte Judicial District, Defendants and Respondents.

Civ. 23318.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1958.

Hearing Denied Feb. 11, 1959.

Mandamus proceeding brought to compel petitioner's reinstatement as deputy clerk grade IV of municipal court. The Superior Court of Los Angeles County, Otto J. Emme, J., denied the petition, and the petitioner appealed. The District Court of Appeal, Ashburn, J., held that statute blanketing deputy clerk of justice court into municipal court did not imply legislative approval of deputy clerk for all time regardless of whether she performed her duties properly, and that she had been blanketed into position subject to civil service requirements of efficiency and to its procedure for correction of inadequacy; and held that, therefore, proceeding culminating in reduction in grade involved no collateral attack upon a legislative determination.

Affirmed.

1. Officers ⇐72(1)

In proceeding under civil service rules culminating in deputy municipal court clerk's reduction in rank from grade IV to grade I, hearing officer's findings were lamentably inartful, but were not fatally so.

2. Mandamus ⇐168(4)

In mandamus proceeding brought to compel petitioner's reinstatement as deputy clerk grade IV of municipal court, evidence sustained trial judge's finding that petitioner had not in fact been tried upon an issue not alleged in reduction letter, and that hearing officer's gratuitous conclusion that petitioner was not physically or emotionally able to perform duties of grade IV rank was mere surplusage.

3. Administrative Law and Procedure ⇐484

Findings of administrative tribunals are liberally construed.

4. Administrative Law and Procedure ⇐764

Error in administrative proceeding does not vitiate ruling unless shown to have been actually prejudicial.

5. Administrative Law and Procedure ⇐753

Theory pursued by administrative agency in reaching its conclusion is not important if facts warrant action taken.

6. Administrative Law and Procedure ⇐473

Hearing officer's observing of witnesses while testifying did not constitute taking of evidence outside hearing and was not an improper or secret method of taking evidence.

7. Officers ⇐72(1)

In proceeding under civil service rules culminating in deputy municipal court clerk's reduction in rank from grade IV to grade I, wherein ultimate charge was failure to exercise diligence, intelligence or interest in pursuit of duties, it was not necessary to establish all of constituent facts alleged, and it was sufficient that evidence proved enough of them to show ultimate charge to be true.

8. Officers ⇐72(1)

In proceeding under civil service rules culminating in deputy municipal court clerk's reduction in rank from grade IV to grade I, evidence sustained finding of failure to exercise diligence, intelligence or interest in pursuit of duties of the higher rank.

9. Officers ⇐69.10

Statute blanketing deputy clerk of justice court into municipal court did not imply legislative approval of deputy clerk for all time regardless of whether she performed her duties properly, and she was

blanketed into position subject to civil service requirements of efficiency and to its procedure for correction of inadequacy; and, therefore, proceeding culminating in reduction in grade involved no collateral attack upon a legislative determination.

Guerin, Guerin & Graham, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Joel R. Bennett, Deputy County Counsel, Los Angeles, for respondents.

ASHBURN, Justice.

Appellant, as petitioner, sought in the superior court mandamus to compel respondent Los Angeles County Civil Service Commission to reinstate her as Deputy Clerk Grade IV of the Municipal Court of El Monte Judicial District, Los Angeles County. She was reduced in rank from grade IV to grade I by order of the commission and that order was affirmed by the superior court through denial of appellant's petition for mandamus; from that judgment she appeals.

Appellant was a deputy or assistant clerk of the justice court of El Monte township and as such was blanketed into the municipal court for that district by the statute which reorganized the inferior courts in 1951, thus becoming, as the parties concede, entitled to the protection of the provisions of the Los Angeles County Charter and the rules of the Los Angeles County Civil Service Commission in matters of discharge and reduction. She was acting clerk for a short period; took the examination for appointment as clerk but failed to pass. Mr. Hurl H. Churchill succeeded her when he became permanent clerk on November 1, 1954.

Pursuant to rule 19.02 of the Rules of the Civil Service Commission he undertook to reduce appellant on December 6, 1956, from grade IV deputy clerk to grade I deputy clerk. This was done by letter stating reasons for reduction as required by said rule. In due course issue was joined and a hearing held before a member of the commission who was designated as hearing officer for that purpose. Appellant's major contentions revolve around the findings made by the hearing officer. To that matter our discussion will be directed first.

The rule requires that "[s]uch reasons [for demotion] shall state the specific grounds and the particular facts upon which the * * * reduction is based * * *." Mr. Churchill's letter of reduction charged that "[y]ou have failed to exercise diligence, intelligence or interest in the pursuit of your duties, even following counseling at the time you were given your Performance Evaluation Report a year ago showing a 'Below Standard' rating * * *." It further stated that an investigation had been made and "the following specific facts were established, which constitute the grounds for the foregoing action." Then followed nine paragraphs of specific facts, some of which were admitted by appellant's answer and request for hearing.

The first of these specific paragraphs alleged that appellant on November 9, 1956, issued and delivered to the sheriff a commitment of one David Vallejo to the county jail for 90 days, although the judge had sentenced him to 60 days only. Appellant admitted this allegation and averred that the error was corrected without damage to anyone, relying upon the fact that a deputy from the Transportation Bureau called her attention to the error. At his request she checked the memorandum made by the judge and found the sentence to be 60 days. According to Mr. Churchill, who was present: "On back of the file where the judge writes the order for commitment was a notation of sixty days in County Jail. Mrs. Steele said, 'Well, they won't send him to the Honor Farm.' It also showed, 'recommended to Honor Farm.' 'They won't send him for less than the ninety days.' The officer said, 'Oh, yes they will. They'll send him for just thirty days.' I said to Mrs. Steele, 'It makes no difference what jail will do

when they get the commitment according to what the judge says.' Mrs. Steele changed the wording of ninety to sixty and handed it back."

Also included in paragraph (1) of the letter of reduction was the further statement that the Vallejo commitment "followed your issuance of a commitment against defendant Clarence August Walters on January 21, 1955 in case No. M–5552 for $158.00 or 30 days in the County Jail instead of the duly pronounced and written and entered sentence of $20.00 or 4 days in the County Jail, thereby requiring the said defendant to serve 30 full days in jail instead of 4, no part of said fine having been paid." Mrs. Steele denied this but the facts were clearly proved.[1] Judge John K. Otis, presiding in that judicial district, received a letter of February 21, 1955, from Walter whom he had sentenced to pay $20 or serve four days in jail. It said: "On Jan. 21, 55, I apeared before you on a 1735½. You gave me $20 or 4 days, but in the Co. Jail they had it $150.00 or 30 days. I done the 30 days, got out Feb. 20, '55. *Why?*" Judge Otis had Churchill verify the facts and then talked with appellant. After she had read the letter at the judge's request the following occurred, according to Judge Otis' testimony: "When she did, and I said, 'Carolyn, this man has served thirty days when I only sentenced him to spend four days in the County Jail'; she said, 'Yes, I know. I made a mistake.' I said, 'Well, it's a very serious mistake. The man has been deprived of his liberty for twenty-six extra days.' She said, 'Well, Judge, look at his drunk arrest record. He's had a lot of drunk arrests. He had it coming to him.' I said, 'Carolyn, I'm amazed that you would make that statement. It isn't a question of whether you think the man should be serving thirty days or whether he has a long record and therefore should serve thirty days. The point is the Court sentenced him to four days in the County Jail, and it isn't for you to say whether he should serve thirty days or four days. I felt that he should serve four days. I am surprised that you should make that statement. It's a very tragic error.' She made no comments with that, and that was the end of the conversation." The hearing officer and the commission found this specification to be true and the trial judge properly held the finding is supported by substantial evidence.

Appellant admitted the statement of paragraph 3(b) of the reduction letter, namely, that she in the case of Prunty v. Pascoe had made an entry in the register of actions on October 25, 1956, of "'(1–Galceran)[2] Cause called'" with nothing further except the entry of the judgment; no showing of appearances or fact of rendition of judgment; but appellant alleged that this was done in accordance with Churchill's instructions. This he refuted. The commission's finding was contrary to appellant's contention and the trial judge properly held that substantial evidence supported that finding.

Appellant also admitted the specification that she on October 10, 1956, failed to inform the bailiff in charge of jurors to notify prospective jurors not to appear for trial of a certain case on October 18, the defendant having entered a plea of guilty; that it was her duty so to do, and, as a result thereof, a large number of jurors appeared and were paid $3 each, plus mileage.

Appellant denied, but the commission found to be true, the specification of the letter that she had presented to the judge nine orders for appearance of prospective jurors which were signed by him and ready for mailing, but that not one of them "had the time of day inserted in the place of the time court convened, nor the name of the judge. One (M–9601) had the name

1. The Superior Court judge found that there was no allegation of proximate cause in the reducing letter but we consider this immaterial. Moreover, the fact of proximate cause plainly appears from the record.

2. The name of the judge presiding.

of the defendant where the case number should be, and vice versa. You had rubber-stamped on each order the date of 'October 21, 1956' as the date the judge signed each order, whereas the actual date he made and signed each order was November 21, 1956, many of such cases not having even been filed by October 21, 1956." The trial judge found the evidence sufficient to sustain the commission's finding in this regard and was justified in so doing.

The letter charged that appellant told the defendant in People v. Kulyas that his cash bail of $27 would be returned in three weeks because he had been found not guilty. Not having received the money, Kulyas made inquiries and it developed that, although it was appellant's duty to make a "calendar memo" for the bookkeeper which would initiate the return of the bail, she failed to do so. Although it was found below that the evidence did not substantiate the claim that appellant told Kulyas he would receive his bail money the other facts were found against her by the commission and the finding is supported by substantial evidence as found by the trial judge.

[1] Written findings were made by the hearing officer, adopted by the commission and construed by the superior court to be findings "that all of the particular facts charged in the letter of reduction served on petitioner were true." The hearing officer's findings were lamentably inartful but not fatally so. Before referring to the letter of reduction they say: "That said employee under proper conditions and supervision can adequately fill the duties of Deputy Clerk I, but is not physically or emotionally able to perform the regular duties of a Deputy Clerk IV." No specification of physical or emotional inability to perform the duties of a deputy clerk IV was included in the letter of reduction, either in general or specific terms. The findings proceed as follows: "That said employee by letter of reduction dated December 6, 1956, was charged with failing to exercise diligence, intelligence, or interest in the pursuit of her duties. That certain specific facts were alleged constituting the grounds for the reduction as stated in nine charges or five pages of specific acts all of which were in the nature of clerical errors, some of them with serious consequences to the individual defendant involved in the case, but taken as a whole or as a small group of charges, are sufficient to show said employee was not physically or emotionally capable of performing properly the duties of a Deputy Clerk IV." By way of conclusion: "The Hearing Officer therefore concludes that there was sufficient substantial evidence to support the charges alleged in the letters of reduction, but that no charge standing alone is sufficient to support the reduction, but that when the charges are considered in groups of three or four or more the pattern is clearly shown that said employee is not physically or emotionally able to perform the duties of a Deputy Clerk IV."

Civil Service rule 5.11 provides: "Formal findings of fact are not required. If such hearing is not before the full Commission, written findings shall be submitted to the Commission for its approval. If the Commission accepts such findings, it need not read the record of the hearing; if it declines to accept such findings, it must read the record or hold a hearing *de novo*. After which it may adopt the findings made by the Hearing Board or make its own findings."

The trial judge concluded that, although the hearing officer's findings upon certain specific allegations were not supported by substantial evidence, "the particular facts charged in the said letter of reduction as to which there was substantial evidence are sufficient to support the findings of the Civil Service Commission that the Petitioner failed to exercise diligence, intelligence or interest in the pursuit of her duties; that the Civil Service Commission did so find that there existed specific grounds for reduction consisting of failure on the part of the Petitioner to exercise diligence, intelligence or interest in the pursuit of her duties; that said findings of particular facts and specific grounds

support the conclusion of the Civil Service Commission that the reduction of Petitioner was justified."

[2–5] Based upon the gratuitous conclusion of the hearing officer that appellant was not physically or emotionally able to perform the duties of grade IV appellant's counsel argues a denial of due process in that she has been tried upon an issue not alleged in the reduction letter and demoted upon the basis of a finding of the truth of such charge. The trial judge found that appellant was not tried upon a charge of being physically or emotionally unable to perform the duties of a grade IV clerk and the record sustains this finding. The statement of such inability as made by the hearing officer was but an additional observation superimposed upon his "conclusion" that "there was sufficient substantial evidence to support the charges alleged in the letters of reduction." The commission itself found, after reading the officer's findings and conclusions, that "good cause appearing therefor, and the Commission being fully advised in the matter, accepts the Findings and Conclusions of its duly appointed Hearing Officer, Hayden F. Jones, and determines that the facts and reasons justify the reduction of said employee, Carolyn A. Steele."

Findings of administrative tribunals are liberally construed for the reason, among others, that they are often the product of laymen operating in an unfamiliar field. Swars v. Council of City of Vallejo, 33 Cal.2d 867, 872–873, 206 P.2d 355, 358: "Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings [citations]. In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found [citations] * *. Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review by the courts possible and apprising the parties of the basis for administrative action."

Bailey v. County of Los Angeles, 46 Cal.2d 132, 136, 293 P.2d 449, 452: "'[I]n connection with the action of such commission and board, composed usually of laymen, the fact that a certain action is taken or recommendation made raises the presumption that the existence of the necessary facts had been ascertained and found. [Citations.] We cannot perceive wherein appellant has been prejudiced by the absence of formal findings under the facts here present.'" To the same effect, see also, Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, 102, 280 P.2d 1; Miller v. Planning Commission, 138 Cal. App.2d 598, 603, 292 P.2d 278; Sobo v. Board of Police Commissioners, 145 Cal. App.2d 783, 788, 303 P.2d 104.

The last sentence quoted from the Bailey case, supra, points to the criterion to be applied to findings of administrative boards,—whether appellant has been prejudiced by informalities or other inadequacies of same. In Southern California Jockey Club v. California Horse Racing Board, 36 Cal.2d 167, 176, 223 P.2d 1, 7, the court, dealing with the claim of errors in receipt of evidence, said: "In its memorandum opinion the trial court said: 'Nevertheless, eliminating from consideration testimony concerning the economic interest of the existing tracks, there is still substantial evidence upon which to sustain the Board's determination. Even if there be some error in the record, the court should follow the general principle enunciated in Article VI, section 4½ of the Constitution, to-wit, sustain the trial body where the error complained of has not resulted in a miscarriage of justice.' Thus its conclusion was that without such evidence there was sufficient evidence to support the board's decision. Moreover, it is presumed on appeal that the court, sitting without a jury, did not base its finding on irrelevant evidence where there is competent evidence to support it. [Citations.] There being competent evidence to support the judgment without such 'improper' evidence, and the court not hav-

ing based its findings on the latter, it is not important that plaintiff's offer of proof in rebuttal thereof was denied by the board." See, also, to the effect that error occurring in an administrative proceeding does not vitiate the ruling unless shown to have been actually prejudicial to the appellant, Roark v. State Bar, 5 Cal.2d 665, 668, 55 P.2d 839; Maryland Casualty Co. v. Industrial Accident Comm., 178 Cal. 491, 493, 173 P. 993; Brewer v. Railroad Commission, 190 Cal. 60, 77–78, 210 P. 511; Ocean Accident & Guarantee Corp. v. Industrial Accident Comm., 180 Cal. 389, 393, 182 P. 35; Walsh v. Industrial Accident Comm., 1 Cal.2d 747, 748, 36 P.2d 1072; Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 60, 159 P. 150; 2 Cal.Jur.2d § 223, p. 367; 42 Am.Jur., § 244, p. 686. Moreover, the theory pursued by the agency in reaching its conclusion is not important if the facts warrant the action taken. Southern California Edison Co. v. Industrial Accident Comm., 78 Cal.App. 584, 591, 248 P. 938; Liberty Mutual Ins. Co. v. Industrial Accident Comm., 73 Cal.App.2d 555, 563, 166 P.2d 908; 42 Am.Jur., § 244, p. 686.

The trial judge correctly concluded that the commission acted upon the charges made in the reduction letter and inferentially that the language concerning physical and emotional inability is to be rejected as surplusage.

[6] In the same connection appellant argues that she did not have a fair trial because evidence was taken secretly by the hearing officer. This refers to his recital that he had "seen the demeanor of the witnesses while testifying." Such observation is standard practice in administrative hearings as well as in court trials. Pratt v. County Civil Service Comm., 108 Cal.App. 2d 114, 120, 238 P.2d 3; 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control, 155 Cal.App.2d 748, 754, 318 P.2d 820. It is an aid to determination of the credibility of witnesses; in this instance substantial portions of appellant's testimony were rejected. There is no basis for the contention that the observing of witnesses while testifying was an improper or secret method of taking evidence. Nor is it a taking of evidence outside the hearing.

Appellant criticizes the language of the hearing officer's finding "that there was sufficient substantial evidence to support the charges alleged in the letters of reduction," arguing that this shows an improper placing of the burden of proof upon the one who is challenging the reduction in rank and pay. Rule 5.10 of the commission says that in such hearings "the burden of proof shall be on the appointing power." The principles of construction to which we have adverted indicate that the criticized language is but a layman's way of saying that the charges have been sustained by a preponderance of the evidence. Particularly is this clear when it is recalled that the more serious charges against appellant were admitted or proved by convincing evidence and that they are sufficient, as the trial judge indicated, to warrant appellant's reduction regardless of other relatively inconsequential specifications.

[7, 8] Because the trial court found that the evidence was insufficient to sustain the commission's finding of truth of some of the less serious specifications [3] appellant argues that the matter must be remanded to the commission for further consideration. Counsel invokes the asserted analogy of cases such as Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 252, 217 P.2d 630, 18 A.L.R.2d 593; Mast v. State Board of Optometry, 139 Cal.App.2d 78, 87, 91, 293 P.2d 148, which hold that a punitive administrative proceeding should be remanded to the agency when it appears that multiple charges have been by it sustained and have resulted in a single penalty but the evidence does not sustain some of

3. For example, entering of judgment in minute book before entering it in register of actions (Prunty vs. Storey); that appellant had the duty to enter judgment in Rowell vs. Miller but failed to do so; that she failed to square her minutes with the judge's notes on the jacket of the case of Bielec v. Evans; failure to notify bonding company when bail was exonerated.

the charges and a real doubt arises from the record as to whether the agency would have inflicted the particular penalty had it realized that the evidence was not sufficient to support certain of the charges. The supposed analogy fails to materialize. Counsel have not presented any question of excessive penalty at bar. Nor does the case actually present a series of separate charges. There is one ultimate charge, that of failure to exercise diligence, intelligence or interest in the pursuit of appellant's duties. The specific facts included in the letter of reduction, as required by rule 19.02, are actually evidentiary matter presented in support of the ultimate fact of lack of diligence, etc. It should not be necessary to establish all the constituent facts alleged if the evidence proves enough of them to show the ultimate fact to be true; and it is not necessary. Leeds v. Gray, 109 Cal.App.2d 874, 877, 242 P.2d 48. From the record at bar no doubt arises concerning the propriety of the reduction of appellant to grade I as the result of proof of the facts held by the trial judge to be established by sufficient evidence; we in turn find the trial judge's finding to be sufficiently supported.

[9] Based upon matter first elicited upon cross-examination of Mr. Churchill appellant's counsel argues that this proceeding is a collateral attack upon a legislative determination that appellant is qualified to perform the duties of grade IV. The witness was asked: "Mr. Churchill, did you make the reduction in this case bases on your opinion that the reduction was a just penalty to impose on Mrs. Steele for the errors which she committed?" and he said: "Well, my opinion is that Mrs. Steele couldn't do a Grade I's work, but she had passed originally a Grade I Examination in the Justice Court." Also:

"I thought she should be given the opportunity at least to try to do a Grade I's work, because she actually passed the Grade I Examination.

"Commissioner Jones: You opened your statement that she could not do Grade I work.

"The witness: She could not. I didn't want to go and ask for a discharge if she could be given a chance to do a Grade I's work and maybe work up from there, if it's possible to do so. She passed her Grade I work, although it was in the Justice Court, and it was rather perfunctory at the time in 1949."

Manifestly there is no merit in the argument that the blanketing-in statute implies legislative approval of Mrs. Steele for all time regardless of whether she performed her duties properly, which would attribute to the legislature astounding stupidity. Appellant was blanketed into the position subject to the civil service requirements of efficiency and to its procedures for correction of inadequacy.

But the cross-examination does not stop with eliciting Mr. Churchill's opinion that appellant was not actually qualified to do grade I work. The witness was led into expressing the further opinions that appellant does not have ability to record the minutes of all proceedings, or to prepare civil judgments ordered by the court, or to certify to the correctness of civil judgments, or to correct minutes in the minute book, or to review and certify to default judgments, or to comprehend the necessity for judgment or the type of judgment to be used, or to review and certify the work of other attachés, or to maintain statistics for judicial council reports, or to supervise destruction of over-age records, or to supervise and assist in training other clerks, or to perform docketing and calendaring functions. Pressed further, the witness said: "These things are somewhat of a confidential matter, and I would get together with Mrs. Steele and talk at her desk, trying to be out of the hearing of other Deputies, explaining why the hearings are necessary in Civil and Criminal. It didn't seem to soak in, so I'd go over it again, or I'd write it out and explain why, pointed out code sections why, and reasons for the rules. She still didn't comprehend." This evidence has a direct bearing upon the question of whether any errors in the findings or other procedural

steps of this case were prejudicial to appellant and fortifies our conclusion that they were not.

Appellant presents 25 points in support of a reversal. All have been examined and found without merit. Those not previously mentioned require no discussion.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

166 Cal.App.2d 432

Clyde Bruce AITCHISON, Jr., Plaintiff, Appellant and Respondent,

v.

FOUNDERS INSURANCE COMPANY, a corporation, Defendant, Appellant and Respondent,

and

Sun Valley Investment Co., a corporation, Defendant and Respondent.

No. 23086.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1958.

Rehearing Denied Jan. 7, 1959.

Hearing Denied Feb. 18, 1959.

Action for declaratory judgment. From a judgment of the Superior Court of Los Angeles County, Caryl M. Sheldon, J., appeals were taken. The District Court of Appeal, Nourse, J. pro tem., held that notwithstanding recital that policy was thereby amended "as respects Coverage C" and fact that Coverage C only applied to liability for injury to property, comprehensive general liability policy rider was not limited to claims by third persons for damage to their property but obligated insurer to indemnify insured against all claims arising out of his occupation as a buyer and seller of tungsten if they arose because of negligent act, error or omission of insured.

Affirmed in part and in part reversed with directions.

1. Customs Duties ⇐130(1)

The United States cannot assert a claim against an innocent purchaser for value of smuggled goods but may only seize goods and have forfeiture declared. Tariff Act of 1930, § 593, 19 U.S.C.A. § 1593.

2. Insurance ⇐430

Notwithstanding recital that policy was thereby amended "as respects Coverage C" and fact that Coverage C only applied to liability for injury to property, comprehensive general liability policy rider was not limited to claims by third persons for damage to their property but obligated insurer to indemnify insured against all claims arising out of his occupation as a buyer and seller of tungsten if they arose because of negligent act, error or omission of insured.

3. Appeal and Error ⇐171(1)

Action for declaratory judgment as to plaintiff's rights and defendant's duties under policy of insurance having been tried upon basis that policy was not ambiguous in its terms, and no evidence having been admitted as against insurer which would justify a holding that it was intent of parties to cover any risk not falling within language contained in rider or that insurer was estopped from claiming benefit of terms of policy as issued, reviewing court would have to determine insurer's liability as to each class of claims by applying language used in policy, and could not add to language of rider or omit any of language used in rider in determining its meaning.

4. Insurance ⇐430

In construing comprehensive general liability policy obligating insurer to indemnify insured against claims arising out of insured's occupation as a buyer or seller of metal ores if claims were made against insured by reason of any negligent acts, "errors" or omissions of insured, court would have to assume that insurer, in writing policy, had intended quoted word to have its ordinary meaning and that insurer had used it to cover hazard

which was not due to negligent act or omission. West's Ann.Civ.Code, § 1644.

See publication Words and Phrases, for other judicial constructions and definitions of "Errors".

5. Insurance ⇐430

Where insured had honestly but mistakenly believed that tungsten which he sold to General Services Administration was domestic, Administration's claim against insured for recovery of payments made for tungsten, which was in fact of foreign origin and had been smuggled into United States, was a claim within comprehensive general liability policy obligating insurer to indemnify the insured against claims arising out of his occupation as a buyer and seller of tungsten if such claims were made against insured by reason of any negligent acts, errors or omissions of insured.

6. Insurance ⇐430

Where government's right to forfeiture did not arise out of any negligent acts, errors or omissions of insured, and payments were not made through error but were voluntarily made by insured to induce government to waive its right to have forfeiture of goods declared, insured was not entitled to indemnity under comprehensive general liability policy obligating insurer to indemnify insured against claims arising out of his occupation as a buyer or seller of metal ores if such claims were made by reason of negligent acts, errors or omissions of insured. Tariff Act of 1930, § 593, 19 U.S.C.A. § 1593.

7. Insurance ⇐146(2)

Clear terms of policy could not be ignored.

8. Declaratory Judgment ⇐165, 385

That claim against insured had not ripened into loss did not in any wise affect his right to have his rights and liability insurer's duties judicially declared; but court should have limited its declaration to fact that claim was covered by policy, where extent of insurer's liability could not be determined upon evidence before court. West's Ann.Code Civ.Proc. § 1060.

John G. Sobieski and Zoltan A. Harasty, Los Angeles, for plaintiff and respondent.

Bolton, Groff & Dunne and Gene E. Groff, Los Angeles, for defendant, appellant and respondent Founders Ins. Co.

Anderson, McPharlin & Conners and Robert E. Jones, Los Angeles, for defendant and respondent Sun Valley.

NOURSE, Justice pro tem.

By the first cause of action of his complaint the plaintiff hereinafter called "Aitchison" sought a declaratory judgment as to his rights and the duties of defendant Founders Insurance Company, a corporation, hereinafter called "Founders," under a policy of insurance issued to him by Founders. By the second cause of action he sought a declaration that certain representations made to him by Sun Valley Investment Co., "hereinafter called Sun Valley," were "negligent, careless, reckless and erroneous and not warranted by the information available to it at the time" and that the defendants were liable for such damages as "Plaintiff may sustain by reason of his purchase of said policy of insurance in reliance on the representations by Defendants herein set forth."

The complaint does not contain any prayer for damages and the pretrial order does not include damages as an issue to be tried.

The trial court entered its judgment declaring that Founders was obligated to indemnify Aitchison against the alleged claims set forth in the first cause of action and rendered judgment in favor of Aitchison against Founders in the sum of $6,535.60 plus interest, that sum being a part of the loss claimed by Aitchison to have been sustained by him and for which he claimed indemnity. It rendered judgment in favor of the defendant Sun Valley.

Founders appeals from the declaratory judgment rendered and from the money judgment rendered against it. Aitchison appeals from the judgment in favor of Sun Valley.

Founders' Appeal.

The facts as disclosed by the evidence so far as the evidence as to them was admitted against Founders are:[1]

Effective as of November 1, 1955, Founders issued to Aitchison a policy of insurance entitled "Comprehensive General Liability Policy." By the terms of this policy, exclusive of the rider hereinafter described and which is the basis of the litigation here, Founders agreed by Coverage A to pay on behalf of Aitchison all sums which he should become legally obligated to pay as damages because of bodily injury sustained by any person and caused by accident; by Coverage B, to pay all sums which Aitchison should become legally obligated to pay as damages because of the injury to or destruction of the property of another through the ownership, maintenance or use of any automobile; by Coverage C to pay on behalf of Aitchison all sums which he should become legally obligated to pay as damages because of injury to or destruction of property caused by accident but excluding damage caused by the use of an automobile. Attached to the policy at the time of its issuance was a rider or endorsement which, so far as is pertinent here, reads as follows: "* * * [T]his policy, as respects Coverage C, * * * is amended to indemnify the insured against any claim or claims *arising out of the insured's occupation as a buyer or seller of metal ores,* * * * which may be made against the insured *by reason of any negligent acts, errors or omissions committed by the insured and/or employees of the insured* in the conduct of insured's business as stated above and providing always that such claim or claims are made against the insured during the currency of this policy." (Italics ours.) It further provided that the limits of liability of Founders were "$5,000 each occurrence, $25,000 aggregate," the insured to bear the first $100 of each loss. It is the interpretation of this endorsement which constitutes the basis of the present litigation.

Aitchison was engaged in the business of buying and selling tungsten ore and tungsten salts. Among the persons to whom he sold was an agency of the government of the United States known as the General Services Administration, hereinafter called "the Administration." This agency purchased only tungsten ores or tungsten salts of domestic origin and Aitchison was required on each sale to the agency to certify that the ores delivered by him were of domestic origin. Among the persons from whom Aitchison purchased tungsten were one Roth and one Williams. In purchasing from them Aitchison required from them a certificate that the ores were of domestic origin.

[1] Prior to the issuance of the policy in question Aitchison had purchased from Roth or Williams tungsten for which he had made a net payment of $9,175.94. After the policy became effective he made further purchases from them for which he made payments in the sum of $30,050.63. Some of these ores he mingled with ores he had acquired from other sources and in four different lots delivered them to the Administration, receiving for said lots $20,234.74. After receiving payment for these lots it was discovered that the ores purchased from Roth and Williams were of foreign origin and had been smuggled into the United States. Thereupon the United States Collector of Customs seized the four lots of tungsten sold by Aitchison to the Administration, claiming they were

1. At the trial of the action Aitchison did not assert that the provisions of the policy as to which a declaration of rights was sought were ambiguous and the evidence offered by him as to the circumstances surrounding the application for the insurance and as to oral statements made by Aitchison to Sun Valley and by its officers to him as well as evidence of statements made by the underwriter of Founders to Sun Valley were excluded as against Founders but admitted as against Sun Valley. Aitchison, cannot, therefore, here support the judgment against Founders upon a claim of ambiguity in the policy and the evidence which was received against Sun Valley only.

forfeited to the United States as smuggled property.[2] Aitchison then made application to be relieved from the forfeiture. His petition was granted upon condition that he pay the duties upon the smuggled tungsten plus the costs of seizure. These duties and costs amounted to $6,935.60.[3]

The Administration also asserted that the payments made by it to Aitchison were illegal payments and demanded the return of the monies paid Aitchison, to wit, $20,318.28 and claimed a lien upon all tungsten delivered by Aitchison to secure payment of its claim for refund.

By its decree the court declared: That each of the four payments made to the Customs Service as above noted was a claim made against Aitchison "by reason of negligent acts, errors and omissions committed by plaintiff in the conduct of his business" as a buyer of tungsten ores; that as each claim had been made during the currency of the policy in question, Founders was obligated to indemnify Aitchison against each claim for the amount thereof less, as to each, the sum of $100. It rendered judgment against Founders accordingly. It further decreed that the Administration had made claim against Aitchison on account of the tungsten ores sold by him to it in the following amounts: as to Lot 10, $3,737.39; as to Lot 13, $10,213.28; as to Lot 14, $2,000.91; as to Lot 15, $4,283.16; and that Founders was obligated to indemnify Aitchison against these claims but was entitled to offset against each claim "the fair market value of any of said four lots of tungsten ores which may be returned to plaintiff as a result of any settlement, or suit, in respect of said occurrences," that the amount of Founders' liability was subject, however, to the limitations of liability as expressed in the rider.

The payments made by Aitchison to Customs Service were made after Founders had asserted that its policy did not cover either the claims of the United States Government to the smuggled property or the claim of the Administration.

[2] Appellant Founders asserts that the rider in question constitutes liability insurance covering damages caused by Aitchison to the property of others and does not cover business losses suffered by Aitchison by reason of his "negligent acts, errors or omissions." There is not the semblance of merit in this contention.

Coverage B and Coverage C of the policy clearly covered the insured against liability to third persons for damages to their property and the rider for which Aitchison paid an additional premium of $100 would have added nothing to the coverage of property damage if it should be given the construction for which Founders contends.

It was clearly the intent of the parties, by the rider, to indemnify the insured against claims other than those against which Aitchison was indemnified under Coverage B and Coverage C and the only limitations placed upon the character of these claims by the rider were: (1) that they arise out of Aitchison's occupation as a buyer and seller of tungsten and (2) that they be made by reason of a negligent act, error or omission of Aitchison.

It is further Founders' contention that even if the policy is not limited to claims made because of damage to the property of others that still the claims asserted were not such as to fall within the coverage of the rider.

2. Under the provisions of section 1593, Title 19 U.S.C.A., smuggled goods are forfeited to the United States upon entry into the United States but the title of the United States to the goods is not perfected until the forfeiture has been judicially declared. The United States cannot assert a claim against an innocent purchaser for the value of the goods but may only seize the goods and have the forfeiture declared. National Atlas Elevator Co. v. United States, 8 Cir., 97 F.2d 940, 943–944; Caldwell v. United States, 8 How. 366, 12 L.Ed. 1115. See also 18 U.S.C.A. § 545.

3. There were four seizures and the respective amounts charged by customs for a waiver of the forfeiture were $480.60; $2,585; $1,785; and $2,085.

The claims made by the Administration and those made by Customs must be considered separately.

[3] The case having been tried in the trial court upon the basis that the policy was not ambiguous in its terms and no evidence having been admitted as against Founders which would justify a holding that it was the intent of the parties to cover any risk not falling within the language contained in the rider, or that Founders was estopped from claiming the benefit of terms of the policy as issued,[4] we must determine Founders' liability as to each class of claims by applying the language used in the policy and the trial court could not and we cannot add to the language of the rider or omit any of the language used in the rider in determining its meaning. Long v. West Coast Life Insurance Co., 16 Cal.2d 19, 24, 104 P.2d 646; Continental Cas. Co. v. Phoenix Const. Co., 46 Cal.2d 423, 432, 296 P.2d 801, 57 A.L.R.2d 914; Protex-A-Kar Co. v. Hartford Acc. & Indem. Co., 102 Cal.App.2d 408, 412, 227 P.2d 509; Carabelli v. Mountain States Life Ins. Co., 8 Cal.App.2d 115, 117, 46 P.2d 1004; Burr v. Western States Life Ins. Co., 211 Cal. 568, 576, 296 P. 273.

Claims of the Administration.

[4, 5] Applying the language of the rider to the claim of the Administration, we are convinced that the trial court correctly declared that this claim was within the coverage of the rider. The Administration's claim arose out of the error of Aitchison in selling to the Administration as tungsten of domestic origin that which in fact was foreign. Founders has not in its brief asserted that the word "error," as used in the rider, is modified by the word "negligent." We must assume that Founders in writing the policy intended the word to have its ordinary meaning and that it used it to cover a hazard which was not due to a negligent act or omission. Civ. Code, § 1644; Continental Cas. Co. v. Phoenix Const. Co., supra, 46 Cal.2d 423, 438, 296 P.2d 801. In Webster's International Dictionary, second edition, the word "error" is defined as follows: "Belief in what is untrue, * * *" and "mistake" is there given as a synonym of "error." It is undisputed here that when Aitchison sold the smuggled tungsten to the Administration he honestly but mistakenly believed it to be domestic tungsten and had he not made this error there could have been no claim on the part of the Administration. As the transaction was in the business of Aitchison and as the claim has as its foundation his error, it clearly falls within the coverage of the policy.

We believe, however, that the trial court was in error in attempting to fix the amount of Founders' liability on account of this claim. The policy being a contract of indemnity against claims, Aitchison was not entitled to payment of the indemnity until the claims had been paid (Civ.Code, § 2778, subd. 2) and would then only be entitled to the loss that he suffered by reason of such payment. The Administration claim has not been paid nor Aitchison's liability for it adjudicated and the trial court should have limited its declaration to the fact that the claim of Administration was a claim covered by the policy and not attempted to fix the amount of Founders' liability, for what its liability may eventually be could not have been determined by the trial court upon the evidence before it.[5]

Claims of the Collector of Customs.

[6] In our opinion, the court erred in decreeing that Founders was obligated to indemnify Aitchison "against the claims heretofore made by the Customs Service" and in awarding judgment against defendant in the amount of those payments. The payments made to the Customs Service were not made in the satisfaction of any

4. In neither cause of action does Aitchison attempt to plead estoppel against Founders.

5. The amount of Aitchison's loss and of Founders' eventual liability was not an issue tendered by the pleadings or within the issues defined in the pretrial order.

claim by the United States for the amount thereof. These payments were not made through error but were voluntarily made to induce the government to waive its right to have the forfeiture of the goods declared. The government's right to forfeiture did not arise out of any negligent acts, errors or omissions committed by the insured or his employees. Its right was founded on and arose solely out of the wrongful acts of Roth and Williams in smuggling the goods into this country. The payment to the United States was, therefore, not a claim which arose by reason of any negligent act, error or omission of the insured.

[7] As we have heretofore pointed out there are three conditions precedent to Founders' obligation to indemnify Aitchison. One, the claim must arise out of insured's occupation; two, it must be made by reason of, i. e. arise out of negligent acts, errors or omissions of Aitchison or his employees; and, three, it must be made during the currency of the policy. The government's claim of ownership of the property did not fall within the second of the conditions named. In order to hold that the payments made to the Customs Service constituted claims within the coverage of the policy it would be necessary to ignore the clear terms of the policy that the claims must be made by reason of a negligent act, an error or an omission committed by the insured. This we cannot do. Burr v. Western States Life Ins. Co., supra, 211 Cal. 568, 576, 296 P. 273.

Appellant Founders also contends that the first cause of action set forth in the complaint does not state sufficient facts to entitle plaintiff to declaratory relief. We see no merit in this contention. At the time the action was commenced claims had been made against Aitchison which he asserted were covered by the contract of indemnity; Founders had then asserted that none of the claims fell within the coverage of that contract and had denied any obligation to indemnify Aitchison against these claims and had refused to defend him against them.

[8] Thus, there was an actual controversy existing between the parties as to the rights of Aitchison and the duties of Founders and the fact that the claim of the Administration had not ripened into a loss and that, therefore, Aitchison could ask no more than a declaration that the policy covered claims such as those made by the Administration did not in any wise affect his right to have his rights and the duties of Founders judicially declared. The dispute was one that fell clearly within the language of section 1060 of the Code of Civil Procedure, which declares that any person interested under a contract may, in case an actual controversy exists relative to the legal rights and duties of the parties to that contract, bring an action for the declaration of his rights and the duties of the other party and that he may maintain the action even though he can claim no further relief than the declaration.

Aitchison's Appeal.

Plaintiff Aitchison appeals from the judgment rendered in favor of the defendant Sun Valley. He bases his appeal upon the ground that if the judgment as to Founders is reversed then the trial court's finding that it was untrue that Sun Valley was negligent and careless, reckless or erroneous in any of its representations and that it did not make any representations not warranted by the information which it possessed or had available was contrary to the evidence and the judgment in Sun Valley's favor must likewise be reversed.

Undoubtedly Aitchison's position on his appeal is premised upon this court sustaining the position of Founders on its appeal, that the contract in question only granted indemnity against claims by third persons for damage to their property. We have not, on Founders' appeal, sustained this position, but have only held that the policy was limited to claims against Aitchison which were founded upon his negligent acts, errors or omissions and have further held that such claims need not be founded upon injury or damage to the property of others. This holding does not have the ef-

fect of making the representations made by Sun Valley untrue for what Aitchison sought and what Sun Valley represented he had obtained was a policy which would protect him against claims arising out of his negligence, errors or omissions.[6] The policy issued did cover claims of the character as to which Aitchison requested protection.

The fact that the claim of the United States government to the right to forfeit the goods is not covered under the policy because it did not arise out of any act, error or omission of Aitchison or his employees does not make the representations untrue and the findings of the trial court above mentioned are amply sustained by the evidence.

The judgment insofar as it declares that the alleged claims of the Customs Service are within the coverage of the policy and awards a money judgment therefor and insofar as it fixes the amount of the liability of Founders on account of the claims by the General Services Administration, is reversed with directions to the trial court to enter judgment in favor of the plaintiff, declaring that the claims of General Services Administration are within the coverage of the policy and that Founders is obligated to indemnify Aitchison within the limits of the policy for any loss sustained by him by reason of said claims.

The judgment in favor of defendant Sun Valley Investment Co., a corporation, is affirmed.

Appellants Aitchison and Founders shall each bear their own costs and Sun Valley shall have judgment against Aitchison for its costs on appeal.

SHINN, P. J., and VALLEE, J., concur.

Hearing denied; SCHAUER, J., dissenting.

6. Aitchison's allegations as to the representations made to him are set forth in paragraph III of the second cause of action of the complaint which reads as follows: "During the months of October and November 1955, at times well known to the Defendants, Plaintiff advised Defendant Sun Valley Investment Co. that Plaintiff desired to secure an insurance policy that would protect Plaintiff against any and all claims against Plaintiff *arising out of negligence, errors, or omissions* by Plaintiff in the conduct of Plaintiff's business as a buyer and seller of tungsten and tungsten salts, including possible liability for purchasing materials whose title should later turn out to be cloudy. * * *" (Italics ours.)

SUNRU CHANG, Plaintiff and Respondent,

v.

CARSON ESTATE COMPANY, a corporation, Defendant and Appellant.*

Civ. 23185.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1958.

Rehearing Granted Jan. 9, 1959.

Appeal by defendant from order of Superior Court, Los Angeles County, H. Eugene Breitenbach, J., setting aside judgment of dismissal and permitting plaintiff to file a third amended complaint. The District Court of Appeal, Fox, P. J., held that where plaintiff's counsel, relying on stipulation for continuance, was not present in court when motion to dismiss was submitted, no time had been fixed within which to file his points and authorities and opposing affidavits, and without apparent knowledge that defendant's motion to dismiss had been granted, plaintiff's counsel filed points and authorities, an affidavit in opposition to motion and a proposed amended complaint, it was not an abuse of discretion for trial court to find that dismissal was taken against plaintiff as result of mistake, inadvertence, surprise or excusable neglect.

Affirmed.

Ashburn, J., dissented.

1. Dismissal and Nonsuit ⇐81(7)

Although a copy of proposed third amended complaint may not have been physically attached to notice of motion to vacate order of dismissal, where it was specifically referred to and identified, substantive requirements of statute providing

* Opinion vacated 335 P.2d 697.

that application for such relief must be accompanied by pleading proposed to be filed therein were satisfied. West's Ann. Code Civ.Proc. § 473.

2. Appeal and Error ⇐189(3), 884

Even if plaintiff's notice of motion to vacate order of dismissal was insufficient in that it did not state grounds upon which it would be made, where defendant did not raise issue in lower court and in fact filed affidavit in opposition to plaintiff's motion, defendant would be deemed to have waived any objections in that regard. West's Ann.Code Civ.Proc. § 1010.

3. Dismissal and Nonsuit ⇐81(7)

An affidavit of merits is not required where verified amended complaint is filed prior to or with the filing of the notice of motion to vacate order of dismissal.

4. Appeal and Error ⇐875

Question whether verified amended complaint stated cause of action was for trial court and would not be decided by District Court of Appeal in proceeding to review order setting aside judgment of dismissal and permitting plaintiff to file third amended complaint. West's Ann. Code Civ.Proc. § 473.

5. Appeal and Error ⇐957(1), 962
Dismissal and Nonsuit ⇐81(2)
Judgment ⇐139

A motion to set aside a default judgment or dismissal is within sound discretion of trial court and a reviewing court will not disturb trial court's determination in absence of a clear showing that trial court abused its discretion.

6. Appeal and Error ⇐957(1)
Judgment ⇐135

Whenever possible, the law favors a hearing on the merits, and therefore an appellate court listens more readily to an appeal from an order denying relief than to one granting relief.

7. Dismissal and Nonsuit ⇐81(5)

Where plaintiff's counsel, relying on stipulation for continuance, was not present in court when motion to dismiss was submitted, no time had been fixed within which to file his points and authorities and opposing affidavits, and, without apparent knowledge that defendant's motion to dismiss had been granted, plaintiff's counsel filed points and authorities, an affidavit in opposition to motion and a proposed amended complaint, it was not an abuse of discretion for trial court to find that dismissal was taken against plaintiff as result of mistake, inadvertence, surprise or excusable neglect. West's Ann.Code Civ. Proc. § 473.

8. Dismissal and Nonsuit ⇐81(7)

Where plaintiff did not file her amended complaint within time allowed and defendant's motion to dismiss was granted, there was no default entered from which plaintiff should or could have requested relief and it was sufficient for her to move to have dismissal set aside. West's Ann. Code Civ.Proc. §§ 473, 581, subd. 3, 585.

Herbert Gall, Glen A. Duke, Edward Fitzpatrick, Los Angeles, for appellant.

Aaron B. Rosenthal, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal by defendant from an order made under section 473, Code of Civil Procedure, setting aside a judgment of dismissal and permitting plaintiff to file a third amended complaint.[1]

On September 18, 1957, the court sustained defendant's demurrer to plaintiff's second amended complaint and gave ten days in which to file an amended complaint. On that same date a substitution of attorneys was executed by which plaintiff undertook to represent herself. No

1. The order inadvertently allows plaintiff to file her "Answer." This was due to the error of plaintiff's then counsel in referring in his notice of motion to the proposed pleading as an answer rather than as the third amended complaint, which designation it bore. No one was misled.

amended complaint having been filed in the time allowed, counsel for defendant served notice (together with an affidavit and points and authorities) that on November 7, 1957, he would make a motion to dismiss the action. Plaintiff thereupon employed Ven O. Fahrney, Esq., to represent her, and delivered to him the notice of motion and papers in relation thereto. According to Fahrney's affidavit, he immediately called defendant's attorney and arranged for a continuance of one week for the reason that he would be out of the county on November 7, the date set for the hearing on the motion. He further states in his affidavit that it was agreed that he (Fahrney) would prepare a stipulation for the continuance; that it would not be necessary for him to be present; and that defendant's counsel would present the stipulation to the court. Fahrney informed defendant's attorney at that time that he would "attempt to amend the complaint." He prepared the stipulation continuing the matter to November 13 and forwarded it to defendant's attorney. Fahrney relied on this arrangement and was not present on November 7 for the hearing. Upon returning to his office on November 12 Fahrney had a letter from defendant's attorney to the effect that due to the court's refusal to continue the matter unless it was to a date early in December, the matter was submitted and that an opportunity would be afforded him to take action prior to decision. No time was fixed within which he was to take such action. The court, however, on Friday, November 15, granted defendant's motion to dismiss. On Monday, November 18, Fahrney apparently without any knowledge of the court's action, filed plaintiff's third amended complaint, points and authorities, and affidavit in opposition to defendant's motion to dismiss.

Thereafter, on November 27, plaintiff filed notice of motion, pursuant to section 473, Code of Civil Procedure, which was accompanied by an affidavit and points and authorities, to set aside the order of November 15 dismissing the action. She also sought permission to file the pleading theretofore submitted, viz., the third amended complaint. The motion was not only based on the attached affidavit and points and authorities but also on the records and files in the case. On December 3 plaintiff filed an amended notice of motion. Counsel for defendant filed an affidavit in opposition to plaintiff's motion. On December 9 the court granted plaintiff's motion and allowed defendant ten days to plead. It is from the order granting plaintiff's motion that defendant appeals.

[1] Defendant argues that plaintiff's original and amended notice of motion to vacate the order of dismissal was insufficient under the provisions of sections 473 and 1010 of the Code of Civil Procedure. Section 473 provides, inter alia, that "[a]pplication for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein * * *." Although it does not appear whether a copy of the proposed third amended complaint was physically attached to the notice of motion, it was specifically referred to and identified so that the substantive requirements of section 473 were satisfied.

[2] Section 1010 states in part that a "notice of a motion * * * must state * * * the grounds upon which it will be made * * *." Assuming, without deciding, that plaintiff's notice of motion was deficient in this respect, as defendant did not raise this issue below and in fact filed an affidavit in opposition to plaintiff's motion, he is deemed to have waived any objections in this regard which he may have had. Hecq v. Conner, 203 Cal. 504, 505–506, 265 P. 180; Perez v. Perez, 111 Cal.App.2d 827, 828, 245 P.2d 344. In the Hecq case, supra, the court stated at page 506 of 203 Cal., at page 181 of 265 P., that "[s]ection 1010 of the Code of Civil Procedure, requiring a notice of motion to state 'the grounds upon which it will be made,' is for the benefit of the party upon whom the notice is served.

Being for his benefit he can, of course, waive its requirement. By failing to object to the hearing of the motion at the time it was noticed to be heard, the appellants impliedly waived this defect in the notice itself. (Citations.)"

[3, 4] Next defendant argues that the notice of motion was not accompanied by an affidavit of merits and that the plaintiff's complaints, including her proposed third amended complaint, fail to state a cause of action. An affidavit of merits is not required where a verified amended complaint is filed prior to or with the filing of the notice of motion. As stated in Waybright v. Anderson, 200 Cal. 374, 380, 253 P. 148, 150, "It is true that affidavits of merits were not filed herein, but under the doctrine of Sampanes v. Chazes, supra, [54 Cal.App. 612, 202 P. 462], the service and filing of verified amended complaints rendered unnecessary the presentation and filing of affidavits of merits." As to whether the verified amended complaint states a cause of action, this is a question to be decided by the trial court and not by this court in the present proceeding. Waybright v. Anderson, supra; Sheehan v. Pioneer Lucky Strike Gold Min. Co., 11 Cal.App.2d 530, 531–532, 54 P.2d 72.

[5, 6] Defendant further argues that plaintiff has failed to make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect. It is well settled that a motion to set aside a default judgment or dismissal rests with the sound discretion of the trial court and an appellate court will not disturb the trial court's determination in the absence of a clear showing that the trial court abused its discretion. Waybright v. Anderson, supra; In re Estate of McCrae, 133 Cal.App.2d 634, 636–638, 284 P.2d 914; Fickeisen v. Peebler, 77 Cal.App.2d 148, 151, 174 P.2d 883. Furthermore, whenever possible, the law favors a hearing on the merits. Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 407, 154 P.2d 399; Reid v. Koeslag, 106 Cal.App.2d 729, 734, 236 P.2d 192. Therefore, an appellate court listens more readily to an appeal from an order denying relief than to one granting relief. Buck v. Buck, 126 Cal.App.2d 137, 142, 271 P.2d 628; Garcia v. Garcia, 105 Cal. App.2d 289, 291, 233 P.2d 23; Hambrick v. Hambrick, 77 Cal.App.2d 372, 377, 175 P.2d 269. In this regard, the court in the Waybright case, supra, 200 Cal. at page 377, 253 P. at page 149, stated that "appellate courts are 'much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made.' (Citations.)"

[7] The affidavits in support of plaintiff's motion, noted in the statement of facts, make a sufficient showing within the purview of section 473 so that it can not be said that the trial court abused its discretion. Plaintiff's counsel, relying on the stipulation for a continuance, was not present in court when the matter was submitted and therefore did not then have an opportunity to argue the matter. Furthermore, within a reasonable time under the circumstances, as no time had been fixed within which he was to file his points and authorities and any opposing affidavits, and without apparent knowledge that defendant's motion had been granted, Fahrney filed points and authorities, an affidavit in opposition to the motion and a proposed amended complaint. Under these circumstances, it was not an abuse of discretion for the trial court to find that the dismissal was taken against plaintiff as a result of mistake, inadvertence, surprise or excusable neglect.

[8] Lastly, defendant argues that as plaintiff did not file her amended complaint within the time allowed, she was in default, and should have requested not only to have the dismissal set aside but also to be relieved of default. Defendant overlooks the distinction between a dismissal under section 581 subd. 3, and a default judgment under 585 of the Code of Civil Procedure. In the former no technical default is entered while in the latter the code

provides for the entry of both a default and then a judgment. Therefore, in the instant case, there was no default entered from which plaintiff should or could have requested relief and it was sufficient for her to move to have the dismissal set aside.

The order setting aside the judgment of dismissal is affirmed.

HERNDON, J., concurs.

ASHBURN, J., dissents.

166 Cal.App.2d 371

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Theo Boyce REDWINE, Defendant and Appellant.

Cr. 6314.

District Court of Appeal, Second District, Division 3, California.

Dec. 18, 1958.

Prosecution for assault with a deadly weapon upon defendant's stepdaughter, and for the same offense upon his wife. The Superior Court, Los Angeles County, Mark Brandler, J., entered judgment of conviction for assault upon his wife and he appealed. The District Court of Appeal, Vallée, J., held that where defendant waived his right to jury trial subject to his rights to further cross-examine two complaining witnesses, and charges against defendant arose out of an altercation between defendant and his wife, in which the stepdaughter participated, and there were numerous discrepancies and contradictions between testimony of defendant's wife and that of his stepdaughter, and further cross-examination of stepdaughter was directly pertinent to charge of assault by defendant on his wife, fact that court completely disregarded stepdaughter's testimony given at a preliminary hearing and found defendant not guilty of charge that he assaulted stepdaughter. did not remedy denial of his right to further cross-examine her in regard to charge of assault against his wife, trial court abused its discretion to defendant's prejudice in denying his motion to be relieved of his waiver of jury trial when stepdaughter was not available at date of trial for cross-examination.

Reversed.

1. Jury ⇐29(7)

Right to trial by jury in a criminal case is a sacred one and a stipulation for the waiver of the right of trial by jury should be strictly construed in favor of the preservation of the right.

2. Constitutional Law ⇐266

Privilege of a defendant in a criminal action to confrontation by the witnesses against him in the presence of the court is protected by the due process clause of the federal and state constitutions, and improper denial of the right of cross-examination is a denial of due process. U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐1163(3)

Where subject of cross-examination in a criminal action concerns the matter at issue, the refusal to permit it results in a denial of a fair hearing, and prejudice must be presumed.

4. Criminal Law ⇐1166(1)
Jury ⇐29(7)

Where defendant charged with assault of his wife and stepdaughter waived his right to jury trial subject to his rights to further cross-examine two complaining witnesses, and charges against defendant arose out of an altercation between defendant and his wife, in which the stepdaughter participated, and there were numerous discrepancies and contradictions between testimony of defendant's wife and that of his stepdaughter, and further cross-examination of stepdaughter was directly pertinent to charge of assault by defendant on his wife,

fact that court completely disregarded stepdaughter's testimony given at a preliminary hearing and found defendant not guilty of charge that he assaulted stepdaughter, did not remedy denial of his right to further cross-examine her in regard to charge of assault against his wife, and trial court abused its discretion to defendant's prejudice in denying defendant's motion to be relieved of his waiver of jury trial when stepdaughter was not available at date of trial for cross-examination.

Sam Houston Allen, Van Nuys, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was charged in count I with assault with a deadly weapon upon his stepdaughter, Janice Dizon, and in count II with the same offense upon his wife, Doris Redwine. On count I defendant was found not guilty. On count II he was convicted of assault. He appeals from the judgment.

The question is: Did the court abuse its discretion in denying defendant's motion to be relieved of his waiver of a trial by jury and thus deny him his constitutional right to a trial by jury?

On September 19, 1957 defendant pleaded not guilty to both counts of the information and trial was set for October 28, 1957. On October 28 the following occurred in department 40 of the superior court:

"The Court: The People against Theo Boyce Redwine.

"Mr. Allen [attorney for defendant]: The defendant is in Court. We're ready, and desire to waive a jury trial.

"The Court: To be submitted or tried, Mr. Allen? Mr. Allen: Tried.

"The Court: How long will it take to try it? Mr. Allen: An hour and a half.

"The Court: Mr. Redwine, do you want a Court trial or a jury trial? The Defendant: Court trial.

"The Court: Do you join in the waiver, Mr. Allen? Mr. Allen: Join in the waiver.

"The Court: Do the People join in the waiver? Mr. Busch [Deputy District Attorney]: The People join in the waiver." The cause was transferred to department 47 for immediate trial.

On October 28, 1957 the following occurred in department 47:

"The Court: People vs Theo Boyce Redwine. Mr. Allen: At the time, if your Honor please, the defendant desires to waive his right to a trial by jury. Mr. McDonald [Deputy District Attorney]: You wish to waive your right to be tried by a jury and to be tried by the Court? The Defendant: Yes, sir. Mr. Allen: Join in the waiver. Mr. McDonald: People join. At this time the People offer to stipulate that the People's case in chief may be submitted to the Court on the transcript of the preliminary hearing with the same force and effect as if the witnesses who were there called, sworn and testified were here called, sworn, and testified as set forth in the preliminary transcript. The People further stipulate that all exhibits offered and received at the time of the preliminary hearing be deemed to have been offered and received in evidence for the purposes of this hearing. Further stipulate that both the People and the defendant may put on additional testimony. Mr. Allen: So stipulated. We would like to further cross examine the complaining witness. The Court: You want those witnesses to return? Mr. Allen: Yes, Your Honor. I think as to the police officers, it will not be necessary that they return. The Court: Which witnesses do you want returned? Mr. Allen: The two who testified for the prosecution." The cause was continued for trial to No-

vember 26 in department 47 and the two witnesses were ordered to return at 9:30 a. m. on that date.

On November 26, on motion of defendant, the trial was continued to December 30. On December 30 the cause was called for trial. On motion of the People, an attachment was issued for Janice Dizon, a defaulting witness. The trial was continued to February 11, 1958. On January 14, 1958 Janice Dizon appeared in department 47. She was purged of contempt, the attachment was recalled, and she was instructed to return to department 47 on February 11, 1958 at 9 a. m.

On February 11, 1958, on motion of defendant, the trial was continued to March 17 at 9:30 a. m. and the witnesses were instructed to return at that time. Janice Dizon was not present in court on February 11. On March 14, 1958 the trial was advanced from March 17. The judge stated he had read the transcript of the proceedings before the committing magistrate. The following then occurred:

"Mr. Busch [Deputy District Attorney]: I might state for the record, if the Court please, that the witness Janice Dizon was ordered to appear, that she failed to appear, she was picked up on one attachment, another attachment was ordered; she is not here and there was reservation of the right of further cross-examination of that witness and I feel that based on her failure to appear I would have to concede that Count I of the Information would have to be set aside because of the fact that the defendant is denied the right of cross-examination of the witness her testimony would have to be stricken. I just want to make that record.

"The Court: It wouldn't necessarily mean that Count I would have to be dismissed. In other words, it may be the Court isn't indicating it does, it may be that the Count can be established by the testimony of other witnesses. However, in view of the fact that Janice Dizon is not here in the courtroom, although she was ordered to be here and at one time there was an attachment which was recalled when she appeared in Court, directed January 14th to be in Court on the 11th; and the Court was advised by Mr. Busch she was not in Court on the continued date, February 11th; that she is not here at this time; so the Court is not considering at all and deleting from its consideration of the evidence in this case all of the testimony of Janice Dizon which appears on Pages 2 to 15 of the transcript before the Committing Magistrate, which is both her direct and cross-examination.

"Mr. Allen [attorney for defendant]: Well, if your Honor please, I don't believe that that affords an answer here, in light of the reservation, because if this matter is submitted and your Honor is to pass upon the question of fact of the guilt or innocence of the defendant, the testimony of that witness would be highly material because in many respects it contradicts the testimony then of the other complaining witness; and there are contradictions—I don't know whether they have appeared to your Honor or not, but I could point them out readily here * * *"

Counsel for defendant then moved that the action be dismissed or, in lieu thereof, that defendant be relieved of his waiver of a trial by jury and that the action be set for such a trial.[1] The motion was denied.

1. In arguing the motion, counsel for defendant stated: "If your Honor please, I do not want the testimony stricken and I want the right to cross-examine Janice Dizon, or else I want to be relieved of my waiver of jury trial because it is not the kind of hearing anticipated and not the kind that was stipulated to; this becomes highly material, for the reason I feel we have a couple of versions and we have a conflict between her and the other complaining witness. These two Counts arise out of the same transaction, two witnesses to the same

In denying the motion the court stated: "[T]he Court appreciates the fact that she may be a material witness for you on further cross-examination. All this Court can do is completely ignore and disregard her testimony. Now, the mere fact that you had a witness that would be of help to you and that witness is not available doesn't authorize the Court to just continue indefinetly proceedings, in other words, the trial has to proceed in the absence of this witness." As stated, defendant was found not guilty of the charge in count I, and on count II he was found guilty of simple assault.

The charges arose out of an altercation between defendant and his wife, in which Janice Dizon participated. There were numerous discrepancies and contradictions between the testimony of defendant's wife and that of Janice Dizon. On further cross-examination Janice Dizon might have retracted the testimony she gave at the preliminary hearing which tended to prove the charge that defendant had assaulted Doris Redwine with a deadly weapon; she might have been impeached; or she might have given testimony which would have exonerated defendant. Her failure to appear notwithstanding she was under subpoena and had been arrested for prior failure to appear would lead one to the conclusion that for some reason she feared further cross-examination. Further cross-examination of Janice Dizon was directly pertinent to the charge in count II.

At the time counsel for defendant waived a trial by jury he had a right to assume that Janice would be called as a witness by the People. Immediately following the waiver in department 40 the cause was transferred from department 40 to department 47. In department 47 counsel for defendant again stated he waived a trial by jury and stipulated that the People's case in chief might be submitted on the transcript of the preliminary hearing, stating he desired to further cross-examine the two complaining witnesses and that he wanted them to return. The court ordered them to return. When Janice, one of the complaining witnesses, did not appear on the day of trial, counsel for defendant was denied his reserved right to cross-examine her. The deputy district attorney stated that defendant was denied the right of cross-examination of Janice and conceded that count I would have to be set aside and that her testimony would have to be stricken. And the court stated he appreciated the fact that Janice might be a material witness for defendant on further cross-examination. The fact that the court completely ignored and disregarded her testimony given at the

> transaction both presented by the prosecution; I submit one has given one version and another given another version. I submit probably the other cross-examination we will get a different version. It is the right of the defendant to cross-examine testimony which relates to the same Counts. * * *
>
> "May I make this one point, if your Honor please. I do not think that it is fair when a case is submitted upon an entire transcript that it be excerpted and proceed on that basis. I think this is not fair today. As I indicated to your Honor I think due process is involved here. I ask you to think about it for a moment. Perhaps I have not presented my point clearly enough. At the time of submission, I submitted the right, in the light of this record having in mind in the making of that stipulation that there were discrepancies between the testimony given in one place by this witness and in another place by this witness and that is the evidence upon which the prosecution relied at the time of the submission, or was to rely, and if I could point contradictions in that testimony—
>
> "The Court: You can do that in the argument.
>
> "Mr. Allen:—and contradictions between the testimony of the witness Dizon and the other witness, and elicit further testimony which I submit to the Court that I would have the right to show still further discrepancies—this is the whole purpose of reserving the right to cross-examine this witness again. If I'm denied that right the State is not keeping its bargain with me, your Honor. * * * I waived the jury with an agreement with the Prosecution to submit this on the transcript, reserving the right to further cross-examination of that witness."

preliminary hearing and found defendant not guilty of the charge in count I (that he assaulted Janice Dizon with a deadly weapon) did not remedy the denial of the right to further cross-examine her.

[1] The right to trial by jury in a criminal case is a sacred one. People v. Pechar, 130 Cal.App.2d 616, 617, 279 P.2d 570. A stipulation for the waiver of the right of trial by jury should be strictly construed in favor of the preservation of the right. Burnham v. North Chicago St. Ry. Co., 7 Cir., 88 F. 627, 629. "Having in mind the sanctity of the right to trial by jury in criminal cases and the evident purpose of the constitutional provision that no defendant should be deprived of that right unless he unequivocally and personally expressed his consent to such waiver in open court, we have concluded that such waiver must be expressed by the defendant in the manner which can involve no question of misinterpretation, doubt or uncertainty at the time or afterwards." People v. Pechar, 130 Cal.App.2d 616, 619, 279 P.2d 570, 572.

[2, 3] Counsel for defendant had an absolute right to further cross-examine Janice Dizon. He was denied that right. The right to cross-examine is basic in our judicial system and has been since earliest times. The privilege of a defendant in a criminal action to confrontation by the witnesses against him in the presence of the court is protected by the due process clause of the federal and state Constitutions, U.S.Const. Amend. 14; Const. art. 1, § 13. Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674, 678, 90 A.L.R. 575. The improper denial of the right of cross-examination is a denial of due process. Olive Proration Program Committee For Olive Proration Zone No. 1 v. Agricultural etc. Committee, 17 Cal.2d 204, 210, 109 P.2d 918; People v. Valdez, 82 Cal.App.2d 744, 749, 187 P.2d 74; Langendorf United Bakeries v. Ind. Acc. Com., 87 Cal.App.2d 103, 104, 195 P. 2d 887; Columbia-Geneva Steel Division, United States Steel Co. v. Ind. Acc. Comm., 115 Cal.App.2d 862, 865, 253 P.2d 45; In re Shackelford, 116 Cal.App.2d 864, 867, 254 P.2d 610; Argonaut Ins. Exch. v. Ind. Acc. Comm., 120 Cal.App.2d 145, 146–154, 260 P.2d 817. Where the subject of cross-examination concerns the matter at issue, the refusal to permit it results in a denial of a fair hearing. Prejudice must be presumed. People v. Manchetti, 29 Cal.2d 452, 459, 175 P.2d 533; People v. McGowan, 80 Cal.App. 293, 296–299, 251 P. 643; Langendorf United Bakeries v. Ind. Acc. Comm., 87 Cal.App.2d 103, 104–105, 195 P.2d 887; Columbia-Geneva Steel Div. v. Ind. Acc. Comm., 115 Cal.App.2d 862, 865, 253 P.2d 45; Argonaut Ins. Exch. v. Ind. Acc. Comm., 120 Cal.App.2d 145, 152–153, 260 P.2d 817.

[4] We conclude that under the circumstances of this case the court abused its discretion to defendant's prejudice in denying his motion to be relieved of his waiver of a trial by jury.

Reversed.

SHINN, P. J., and PATROSSO, J. pro tem., concur.

166 Cal.App.2d 532

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Wayne Herbert OLSON, Defendant and Appellant.

Cr. 6264.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1958.

Defendant was convicted of unlawful possession of marijuana. The Superior Court, Los Angeles County, Mark Brandler, J., rendered judgment, and defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that officers

had reasonable cause to believe that defendant had committed a felony sufficient to justify his arrest without a warrant and that search of his truck without a warrant incident to such arrest was not illegal.

Judgment affirmed.

1. Poisons ⇐9

In prosecution for possession of marijuana, evidence was sufficient to raise question for trial court as to whether defendant knew cigarettes in his possession contained marijuana.

2. Arrest ⇐63(4), 71
Searches and Seizures ⇐7(27)

Where accused admitted to officers that he had had possession of marijuana cigarette, part of which had been found in his sock while he was in hospital for treatment, officers had reasonable cause to believe that accused had committed felony of possessing marijuana sufficient to justify his arrest without a warrant, and search of accused's truck without a warrant incidental to such arrest and seizure of other marijuana cigarettes found in truck were not illegal, particularly where accused consented to inspection of truck and made no objection to introduction of marijuana cigarettes found therein in evidence in prosecution for possession of marijuana.

3. Criminal Law ⇐1031(5)

Where accused did not object to trial in a department of superior court to which case had been transferred after he had agreed to trial in another department upon transcript of the evidence received at preliminary examination and he did not ask to be relieved from stipulation that case be tried upon such transcript, accused could not contend for the first time on appeal from conviction that such procedure constituted an irregularity warranting reversal of conviction.

Wayne Herbert Olson, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant was convicted of the possession of marijuana, was placed on probation for five years upon condition that he serve 90 days in jail and he appeals from the judgment.

Appellant was represented by counsel at the trial; thereafter other counsel was substituted and later at his request appellant was substituted and he prosecutes the appeal in propria persona. Pursuant to stipulation, the action was tried upon the transcript of the evidence received at the preliminary examination. Appellant did not testify.

[1] Appellant's first contention is that there was insufficient evidence to prove that he had knowledge that the cigarettes which were in his possession contained marijuana. The contention is not sustainable. There was ample evidence from which the court could infer that he had such knowledge.

It was shown by the evidence that the police received information that a part of a marijuana cigarette had been discovered in the sock of Olson while he was in the Tweedy Industrial Hospital for treatment. Police went to the hotel where appellant was staying; at their request appellant opened the door of his room; the officers entered and informed appellant that a physician at the hospital had informed them that a part of a marijuana cigarette had been found in his sock. Appellant then gave to the officers an account of the events that had led him into trouble: His home was in Washington; he had driven south in his Mack truck with a load of shingles; he met a man named George Juerek who sold him 12 marijuana cigarettes for $10; he and Juerek each smoked one and he, appellant, put the remaining 10 in the ash tray of his truck; he went to dinner at Juerek's home; he was bitten by Juerek's dog and went to the hospital for treatment; he had smoked a part of a

cigarette to give him a "lift" and had put the remainder in his sock; he had previously smoked marijuana cigarettes. Appellant went with the officers to his truck, gave them the keys, they entered the truck and found 10 marijuana cigarettes in the ash tray. It is obvious that there was no reason to doubt upon this evidence that appellant knew the cigarettes contained marijuana.

[2] The next contention is that appellant's arrest was unlawful and the search which unearthed the 10 cigarettes was illegal. The arrest was made not solely upon the information that had come from the physician but upon the additional information furnished by appellant by which he admitted having had possession of the cigarette, the remains of which had been discovered while he was in the hospital. The officers had reasonable cause to believe that appellant had committed a felony, namely, possession of marijuana. The search was closely related to and incidental to the arrest. People v. Smith, 141 Cal.App.2d 399, 296 P.2d 913; People v. Cicchello, 157 Cal. App.2d 158, 320 P.2d 528. Moreover, appellant consented to the inspection of his truck without any compulsion or insistence on the part of the officers. And no objection was made to the introduction in evidence of the cigarettes that were found in the truck.

[3] Defendant's final contention is that he agreed that the case be tried upon the evidence elicited at the preliminary examination in one department of the court and that the case was thereafter transferred to another department, and later to a third department, where it was tried. He contends that this was an irregularity which warrants a reversal of the conviction for the reason that he may have been unwilling to waive a jury trial and to submit the case on the preliminary transcript if he had known that the case was to be tried in a department other than the one in which he had made the waiver. But he did not ask to be relieved from his stipulation in the department where he was tried nor object to a trial in that department. His objection made now for the first time cannot be considered.

The record discloses that appellant's truck in which he had invested $10,000 or more had been confiscated by the State. One cannot read the record without observing that the ends of justice would have been served better by utilizing the assistance of appellant to obtain evidence against the purveyor, Juerek. Little is accomplished by visiting the penalties of the law upon small offenders while the big ones are allowed to escape.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

166 Cal.App.2d 211

ATLAS FLOOR COVERING, Plaintiff and Respondent,

v.

CRESCENT HOUSE & GARDEN, INC., The Tobin Companies, Dayton House & Garden, Inc., Formal House & Garden, Inc., Elite House & Garden, Inc., Edward House & Garden, Inc., Herbert House & Garden, Inc., Fred House & Garden, Inc., Atlas House & Garden, Inc., Bill House & Garden, Inc., David House & Garden, Inc., Cornish House & Garden, Inc., White House & Garden, Inc., Bounty House & Garden, Inc., Defendants and Appellants.

Civ. 23207.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1958.

Rehearing Denied Jan. 7, 1959.

Hearing Denied Feb. 11, 1959.

Arbitrators rendered a decision in favor of the plaintiff, and the defendants appealed. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment confirming the arbitration award, and the defendants appealed. The District

Court of Appeal, Lillie, J., held that the arbitrators did not abuse their discretion in refusing to hear certain evidence.

Judgment affirmed.

1. Arbitration and Award ⇐66

On review of arbitration award by Superior Court and District Court of Appeal, every intendment of validity must be given the award, and the burden is on one claiming error to support his contention.

2. Arbitration and Award ⇐29

Where submission to arbitration was an unlimited one to be expressly conducted under rules of American Arbitration Association, and there was no limiting clause requiring that arbitrators act in conformity with rules of law, arbitrators could base their decision on broad principles of justice and equity, and, in doing so, could expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. West's Ann.Code Civ.Proc. § 1288(c, d).

3. Arbitration and Award ⇐34

In arbitration proceeding, arbitrators were not guilty of misconduct in refusing to admit cumulative evidence.

4. Arbitration and Award ⇐66

On judicial review of arbitration award, it must be assumed that arbitrators were experienced men, capable of weighing the evidence and giving consideration to opposing inferences.

5. Contracts ⇐280(3)

Strict performance in the case of a building contract is not required.

6. Contracts ⇐323(3)

Question whether defects and omissions in performance of a building contract are substantial or unimportant is generally a question of fact.

7. Arbitration and Award ⇐73

Merits of controversy whether defects and omissions in performance of building contracts were substantial or unimportant were not subject to judicial review in proceeding to review arbitration award.

8. Arbitration and Award ⇐34

Arbitrators properly excluded defendants' proffered testimony respecting alleged defects in certain houses, on which plaintiff performed some work, where there was no showing of time when inspection disclosed alleged defects, since rights of defendants, as rescinding parties, were controlled by conditions existing when rescission was made.

9. Arbitration and Award ⇐34

In arbitration proceeding, arbitrators did not abuse their discretion in refusing to receive testimony of defendants' witness, who was in same business as plaintiff, that plaintiff's profits, had contract been fully performed, would have been certain amount, where opinion of witness was based on profits realized by him on similar, but not identical houses, which were different in design and had different floor plans.

10. Arbitration and Award ⇐34

In arbitration proceeding, wherein it was preliminarily established by defendants on cross-examination of plaintiff's president that cost of certain work in each of two instances amounted to about $1.20, arbitrators did not abuse their discretion in precluding any further cross-examination when defendants' counsel indicated that he proposed to cross-examine plaintiff's president as to each of the 175 work orders.

11. Arbitration and Award ⇐31

Proceedings in arbitration are of a summary character and are not subject to dilatory tactics.

12. Arbitration and Award ⇐34

In arbitration proceeding under American Arbitration Association rules, one of which provides that the arbitrator shall be the judge of the relevancy and materiality of evidence offered, refusal of arbitrators to issue a subpoena duces tecum for plaintiff's income tax statements, invoices, statements for materials and supplies, delivery tickets, time sheets, and other statements bearing on plaintiff's operation of its business, for purpose of impeaching

testimony of plaintiff's principal witness and further minimize or mitigate amount of damages was not reversible error, where request for issuance of subpoena was orally made by defendants' counsel near conclusion of hearing, and defendants conceded that certain of the documents may have been privileged.

13. Arbitration and Award ⇐76

Determination of an unsubmitted issue by arbitrators requires a vacation of award of arbitrators as being in excess of their powers.

14. Arbitration and Award ⇐57

Where submission to arbitration of controversy between plaintiff and two of the defendants provided for a determination whether those defendants were justified in rescinding contract, and, if no such justification existed, amount of plaintiff's damages, and, as an alternative to a finding on questions of justification and damages, arbitrators were called on to decide whether plaintiff was entitled to recover from those defendants a stated sum or any other sum on account of materials furnished and work performed, arbitrators did not act in excess of their powers in awarding plaintiff certain sums for materials furnished those defendants, in addition to assessing damages against them.

15. Damages ⇐124(3)

Primary measure of damages available to a party to a contract who, without fault, is willing to perform, but is prevented from doing so by the other party, is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and anticipated profits which he would have derived from performance.

Edward Mosk, Norman G. Rudman, Hollywood, for appellants.

Hill, Farrer & Burrill, Leon S. Angvire, William McD. Miller, Los Angeles, for respondent.

LILLIE, Justice.

This is an appeal by defendants from a judgment confirming an arbitration award of money damages to plaintiff.

The dispute between the parties arose out of separate written agreements entered into on October 19, 1955, between plaintiff and 13 defendant corporations for the installation of asphalt floor tiling in tract houses to be constructed on land owned by defendants. The remaining defendant, the Tobin Companies (hereinafter referred to as Tobin) was a licensed building contractor and held an exclusive agency agreement with all the other defendants for the management of their properties and the construction of improvements thereon. Approximately four months after the execution of the October 19 agreements, defendant Tobin delivered to plaintiff a purported letter of rescission based upon plaintiff's asserted failure to properly attend to work orders. Plaintiff then instituted damage actions for anticipatory breach against the 13 defendants represented by Tobin, and against Crescent House & Garden, Inc., and Dayton House & Garden, Inc., for labor and materials in addition to damages. Plaintiff also sued Tobin for work and labor performed at the latter's request on different tracts owned by other corporations not here involved. A counterclaim was filed by Tobin for the cost of correcting defective materials and workmanship on 11 houses covered by defendants' letter of rescission.

Subsequently the entire dispute was submitted to arbitration on the following issues: (1) justification for defendants' rescission and (2) absent justification, the amount of plaintiff's damages. As to defendants Crescent House & Garden, Inc. and Dayton House & Garden, Inc., a further "alternative" issue whether defendants were obligated to plaintiff for a certain sum "or any other sum" as and for labor and materials furnished at the request of the two defendants was submitted.

The hearing was held on July 19 and August 1, 1957. Thereafter, the arbitra-

tors rendered their decision awarding plaintiff money damages against each of 11 defendants for breach of contract, and in the case of Crescent House & Garden, Inc. and Dayton House & Garden, Inc. an award for labor and materials furnished, in addition to damages. With respect to Tobin, an award to plaintiff was offset by the allowance of Tobin's counterclaim for the cost of correcting defective materials and workmanship. A motion was then made by plaintiff in the lower court to confirm the award. Defendants countered with a motion to vacate and set it aside. The award was confirmed in all respects and the motion to vacate in effect denied. It is from the judgment confirming the arbitration award defendants appeal.

Appellants contend that the award should have been vacated because the arbitrators were guilty of misconduct "in refusing to hear evidence, pertinent and material to the controversy" (subd. (c) of section 1288, Code of Civil Procedure). Thus, it is claimed that the arbitrators refused to hear (1) proffered evidence with respect to respondent's assertedly defective work on other tracts owned by companies not parties to these proceedings, it being claimed that such evidence was material on the question of appellants' justification for terminating their contract; (2) proffered testimony of an appellants' witness regarding asserted defects on 11 houses upon which respondent had performed some work, this likewise bearing on the question of justification; (3) testimony of an expert witness on the issue of damages, specifically with respect to the profit made by said witness on similar though not identical houses; and (4) further cross-examination of a respondent's witness regarding work orders for repair work on tracts owned by companies not parties to this controversy, this also being assertedly material to the issue of damages; and refused to issue a subpoena duces tecum at appellants' oral request for all of respondent's business records in order that damages might thus be minimized, it being further claimed that the arbitrators thereby "exceeded their powers" (subd. (d) of section 1288). On oral argument, it was additionally contended by appellants that the arbitrators exceeded their powers, contrary to subd. (d), supra, as well as the terms of submission, by awarding to plaintiff in the case of Crescent House & Garden, Inc. and Dayton House & Garden, Inc. both damages for breach of contract and reimbursement for labor and materials furnished.

At the outset, we point out that the record of the arbitration proceedings presented to the trial court, and to this court on appeal, is incomplete, no reporter's transcript of the first of the two-day hearing having been filed. Too, the partial transcript relied upon by appellants, although certified to by the reporter, does not reflect any certification of the arbitrators. While respondent has asked that the appeal be dismissed for these deficiencies, we shall dispose of the matter on its merits.

[1, 2] In connection with the review of arbitration awards, "it is well settled that both before the superior and appellate courts every intendment of validity must be given the award and that the burden is upon the one claiming error to support his contention." Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 185, 260 P.2d 156, 171. Where, as here, the submission to arbitration was an unlimited one to be expressly conducted under the rules of the American Arbitration Association and in the absence of some limiting clause requiring that they act in conformity with rules of law, arbitrators may "base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." Sapp v. Barenfeld, 34 Cal. 2d 515, 523, 212 P.2d 233, 239.

[3–7] Appellants' first contention of asserted misconduct relates to the arbitrators' refusal to admit evidence of respondent's failure to repair defective and defectively installed floor tiling in homes constructed

by associated companies not parties to these proceedings. Appellants' theory is that Tobin, as agent for such companies, had knowledge of respondent's defective work on those units and that the proffered evidence went directly to appellants' defense of justification for their termination of the contract. This claim is without merit. It appears from the partial record of the proceedings that direct evidence *was* received from Tobin's principal witness, H. D. Tobin, bearing upon the reasons for appellants' letter of rescission, including the asserted defects on work orders relating to other companies. Any additional proffered testimony would have been cumulative. Had this been a judicial proceeding the rejection of such testimony would have been within the court's inherent discretionary power. (18 Cal.Jur.2d 563). Also, appellants' theory of admissibility, for which no California authority is cited, overlooks the fact that in arbitration proceedings an award may be predicated on "broad principles of justice and equity" (Sapp v. Barenfeld, supra, 34 Cal.2d at page 523, 212 P.2d at page 239), and even they in their brief concede that "arbitrators have fairly wide-sweeping powers of determining the materiality of evidence." Finally, and particularly in view of the partial record at hand, it must be assumed that the arbitrators were experienced men, capable of weighing the evidence and giving consideration to opposing inferences. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 241, 174 P.2d 441. One such inference opposed to appellants' contention is the settled principle relaxing the rule requiring strict performance in the case of building contracts; thus, whether defects and omissions are substantial or unimportant is generally a question of fact (Martin v. Karsh, 142 Cal.App.2d 468, 470, 298 P.2d 635) and, of course, the merits of this controversy are not subject to judicial review. Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 184, 185, 260 P.2d 156.

[8] Next, appellants complain of the refusal of the arbitrators to hear the testimony of their witness, one Reese, respecting defects in 11 houses upon which respondent performed some work. Here again, evidence of the fact in question was elicited from their witness, H. D. Tobin, and the additional testimony here sought to be received would have been cumulative. Also, from the partial record before us, it appears that Reese was unable to state that his inspection of the 11 houses occurred on any specific occasion prior to appellants' termination of the contract, and therefore the arbitrators properly excluded such proffered testimony because the rights of rescinding parties are controlled by the conditions which existed when the rescission was made, and are fixed and determined by the rescission. Spicer v. Hurley, 161 Cal. 1, 7, 118 P. 249.

[9] Appellants' third point relates to the question of damages and the arbitrators' refusal to receive the testimony of their witness, one Diller, which was assertedly material on the question of mitigation. Specifically, appellants offered to prove through Diller, who was likewise in the floor covering business, that respondent's expected profits, had the contract been fully performed, would have been two-fifths of the amount claimed as reflected by the testimony of respondent's president. The proffered proof was based on the profits realized by Diller on similar, but not identical, houses, said houses being different in design and consequently having different floor plans. No abuse of discretion appears; as the chairman of the panel well observed: "* * * the fact that one company makes one profit is, in my opinion, not a proof of what the other company might have made."

[10, 11] Also, on the question of mitigation of damages, appellants claim misconduct on the arbitrators' part in refusing to permit extended cross-examination of respondent's president Goland. This field of interrogation would have related to respondent's cost of making accommodation pickup work, or repairs, and appellants' counsel sought to refer to 175 work orders for pickup repairs on tracts owned by as-

sociated companies not parties to those proceedings. It was preliminarily established upon such cross-examination that the cost of such work in each of two instances amounted to approximately $1.20; however, when appellants' counsel indicated that he proposed to cross-examine him as to each of said 175 work orders, the arbitrators precluded any further cross-examination. Here again, the evidence was merely cumulative and its admissibility came within the discretionary powers of the arbitrators; furthermore, "proceedings in arbitration are of a summary character and are not subject to dilatory tactics" (Glesby v. Balfour, Guthrie & Co., Ltd., 63 Cal.App.2d 414, 417, 147 P.2d 60, 61).

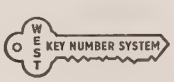
[12] Appellants next complain of the arbitrators' refusal to issue a subpoena duces tecum for respondent's income tax statements, invoices, statements for materials and supplies, delivery tickets, time sheets, and other statements bearing upon respondent's operation of its business. The request of the panel was orally made by appellants' counsel near the conclusion of the hearing and called for the production of documents which assertedly would tend to impeach the testimony of respondent's principal witness and further minimize or mitigate the amount of damages. While appellants in their brief concede that certain of the documents may have been privileged, they claim that others were material to the issues before the arbitrators. The request may not have been an afterthought, but it does not appear why application for the documents was not made by affidavit in the usual course and form; in that event, it would not have been open to respondent's criticism of being too broad in character (Embassy Realty Associates v. Southwest Products Co., 126 Cal.App.2d 725, 732, 272 P.2d 899) and lacking in a sufficiently clear showing as to its materiality. Too, in their submission to arbitration, appellants bound themselves by the rules of the American Arbitration Association, one of which provides that the arbitrator "shall be the judge of the relevancy and materiality of the evidence offered * * *" No reversible error appears in the ruling complained of.

[13–15] Finally, on oral argument it was urged for the first time that the arbitrators acted in excess of their powers by awarding respondent certain sums for materials furnished appellants Crescent House & Garden, Inc. and Dayton House & Garden, Inc., in addition to assessing damages against them. In the case of these two appellants, the submission to arbitration provided for a determination of appellants' justification for rescission and, if no such justification existed, the amount of respondent's damages. "As an alternative" to a finding on the questions of justification and damages, the arbitrators were called upon to decide whether respondent was entitled to recover from both appellants a stated sum "or any other sum" on account of materials furnished and work performed. The first sentence of the arbitration agreement provided for submission of "the following controversies and any and all controversies or questions between the parties which exist," after which there were listed the specific questions involving respondent and each of the 14 appellants. While it is true that the determination of an unsubmitted issue requires a vacation of the award as being in excess of the arbitrators' powers (Bierlein v. Johnson, 73 Cal.App.2d 728, 733–735, 166 P.2d 644), it does not follow that the disregard by the arbitrators of the "alternative" proviso in the specific question in the instant case constituted a decision of an issue not submitted. The "primary measure of damages" available to a party to a contract who, without fault, is willing to perform but is prevented from doing so by the other party, "is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and the anticipated profits which he would have derived from performance." Buxbom v. Smith, 23 Cal.2d 535, 541, 145 P.2d 305, 307. Inherent in the award at bar is a finding of freedom from fault on respondent's part; hence, there being no justification for the rescission, respondent was entitled to both damages and reimbursement (Buxbom v.

Smith, supra). Furthermore, the arbitrators here did not create and decide a new cause of action, as was unsuccessfully argued in Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 187, 260 P.2d 156, since separate and distinct items of damage arose from appellants' unjustified rescission. Lastly, in view of the fact that "any and all other controversies or questions" were submitted to arbitration, it seems to us that the instant contention "is a strained and unnatural one and violates the obvious spirit of the contract." Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d at page 186, 260 P.2d at page 172.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



166 Cal.App.2d 282

In the Matter of the ESTATE of Robert Valentino ABATE, Deceased.

Pearl P. MARLOW, Appellant,

v.

Daniel A. KIRSCH, as Guardian ad litem of Robert V. Abate, Jr., a Minor, Petitioner and Respondent.

Civ. 23384.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1958.

Rehearing Denied Jan. 7, 1959.

Hearing Denied Feb. 11, 1959.

Proceeding in the matter of an estate wherein upon admission to probate of decedent's will a minor through his guardian ad litem filed a petition and statement of claim of interest purporting to be his legitimate son and entitled to the entire estate, and executrix likewise filed a petition in her individual capacity claiming to be the surviving wife. From a judgment of the Superior Court, Los Angeles County, Newcomb Condee, J., the executrix appealed. The District Court of Appeal, Lillie, J., held, inter alia, that under the record all requirements of statute providing that an element of adoption of illegitimate child by his father is public acknowledgment of paternity had been complied with, sustaining finding that minor was legitimate from time of his birth, and that under record there was no valid marriage between decedent and executrix and that his estate was his separate property.

Affirmed.

1. Appeal and Error ⇦1011(1)

In determining public acknowledgment of paternity, one of elements of adoption of illegitimate child by his father, it was for trial judge to resolve any conflict in the evidence and where trial judge accepted child's mother's version of what had occurred appellate court would assume that trial judge rejected conflicting evidence. West's Ann.Civ.Code, § 230.

2. Bastards ⇦13

In determining existence of public acknowledgment of paternity, one of elements of adoption of illegitimate child by his father, each case depends upon its own circumstances. West's Ann.Civ.Code, § 230.

3. Bastards ⇦13

Evidence, including showing that father was suffering from incurable cancer, that he lived some 15 days after birth of child, that he had every intention and desire to treat the child as his own, that he assumed responsibility for his maintenance, care, and support, that he rented apartment as a home for himself, the child, and child's mother, and lived in it as his home, returned to it as his home, and died in it, that he had supported the child and its mother, and that he referred to child as his "son" and had talked about "the baby" to his doctor, was sufficient to sustain finding that there was "public acknowledgment" of paternity which is an element of adoption of illegitimate child by his father. West's Ann.Civ. Code, § 230.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Acknowledgment".

4. Bastards ⇐13

Where father was suffering from incurable cancer, he lived some 15 days after child was born, he expressed desire to treat child as his own, rented an apartment as a home for himself, child and child's mother, and referred to baby as "his son" and talked about "the baby" to his doctor, any lack of mention of child in his conversation with an employee or his sister who had never seen him, at times when he was not called upon to discuss the child, did not support a purposeful concealment or willful misrepresentation of paternity so as to preclude finding of "public acknowledgment" of paternity, one of elements of adoption of illegitimate child by his father. West's Ann.Civ.Code, § 230.

5. Bastards ⇐13

Where evidence was insufficient for trial court to have found that executrix was the legal wife of decedent and it was clear from record that the only "family" decedent had consisted of mother of his illegitimate child, for whom he maintained the only home he had, decedent did not fail to receive child into his family with consent of his wife within statute providing that as element of adoption of illegitimate child by his father, he must receive it as his own into his family with consent of the wife, since under circumstances executrix' consent was not necessary. West's Ann.Civ. Code, § 230.

6. Bastards ⇐10

The public policy of the state favors legitimation of illegitimate child. West's Ann.Civ.Code, § 230.

7. Marriage ⇐50(1)

Alleged marriage between executrix and decedent was rebutted by evidence showing that no marriage license or any record of marriage was produced, that executrix had not lived with decedent as man and wife prior to their purported marriage, that executrix could not locate the "chaplain" who allegedly had performed marriage ceremony and that she could not find marriage license, although she had described it in detail. West's Ann.Civ.Code, §§ 55, 68–70, 72–74.

8. Marriage ⇐26, 27

Unless a solemnization is performed as authorized by statute and performed by one mentioned in statute there can be no valid marriage. West's Ann.Civ.Code, § 70.

9. Husband and Wife ⇐264

Evidence, including showing that pursuant to property agreement decedent paid alleged wife a certain sum for her interest in certain property and that agreement recited "whereas they desire to divide between themselves the property which they have accumulated" and provided for mutual release of all claims upon the property of the other was sufficient to sustain finding that estate was the separate property of decedent, and hence no issue arose as to succession of community property under Probate Code or as to rights of a putative spouse in property which would have been community property had there been a valid marriage. West's Ann.Prob.Code, §§ 201–203.

Henry Merton, Los Angeles, for appellant.

Charles E. Taintor, Scott Weller, Daniel A. Kirsch, Raymond A. Nelson, Los Angeles, for respondent.

LILLIE, Justice.

Upon the admission to probate of decedent's will, Robert V. Abate, Jr., a minor, through his guardian ad litem, filed a petition and statement of claim of interest, purporting to be his legitimate son and entitled to the entire estate. Appellant Pearl P. Marlow, executrix under the will, likewise filed a petition in her individual capacity, claiming to be the surviving wife. After a four-day hearing on both petitions, the trial court rendered judgment declaring Robert V. Abate, Jr., to be the son of decedent, his legitimate son for all purposes from the time of his birth, his pretermitted child and entitled to distribution of one-half of the estate; and Pearl P. Marlow to be

the putative wife of decedent, entitled to one-half of the estate under the will, and that all of the estate constituted decedent's separate property. From this judgment Pearl P. Marlow appeals, contending that it lacks support in the evidence.

Robert V. Abate died testate August 25, 1956, in Los Angeles, possessed of estate in Orange and Los Angeles Counties. Appellant claims she was married to decedent on July 21, 1945, at San Diego. They lived together as husband and wife until their separation September 26, 1955. During this time decedent accumulated a sizeable estate including a home in Balboa which was held in joint tenancy. Upon their separation, and pursuant to an agreement, appellant transferred to decedent her interest in the Balboa property, for which he paid her $10,000. On September 26, 1955, he executed the instant will. Appellant thereafter resided apart from decedent, obtained separate employment and resumed her maiden name of Marlow. No divorce action was ever filed.

In August of 1955, decedent, then 43 years of age, met Thelma Stober. In October they engaged in intimacies and thereafter, in December, Thelma became pregnant. Upon learning of this, and in February of 1956, decedent rented an apartment on Bonnie Brae Avenue in Los Angeles, where he and Thelma, although never married, resided together as husband and wife until decedent's death on August 25, 1956. The child was born fifteen days before, on August 10, 1956.

On the issue of adoption by legitimation, respondent relied upon Section 230, Civil Code, which provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth."

Uncontradicted is the testimony of Thelma Stober that she had intimate relations with decedent commencing in October, 1955, and had not been intimate with any other man since then. Her testimony further shows that when she told decedent she was pregnant, he told her he "always wanted a child with the woman he loved," and established a home for them both by renting an apartment on Bonnie Brae Avenue where they lived together until his death. He bought her a ring, placed it on her finger telling her that "in the sight of God's eyes we are married," and opened up a joint bank account in their names. They sent out printed "wedding announcements," (Exhibit A), to all their friends and relatives, thereafter purported themselves as husband and wife, and Thelma took the name of Mrs. Abate. They travelled together in the performance of his duties arising out of certain of his health lecture tours and made a visit to her family in Washington.

Appellant testified decedent had told her he was sterile. Thelma, however, testified that she and decedent had discussed the matter of his sterility because he knew how she felt about children, and how much she loved him; and he told her he had become sterile after a plane accident, but that the doctors had assured him it was nothing permanent. Photographs of decedent were received in evidence for the court's comparison of his features with those of the child, as were the child's blood tests which were compared with decedent's hospital records showing the blood types were such as not to preclude paternity. There is nothing improbable about Thelma's story and the trial judge, as he had a right to do, after determining the credibility of the witnesses and weighing the evidence, accepted her testimony and that of her witnesses as true.

Conceding that if the trial court believed Thelma Stober's testimony, it was justified in finding decedent was the father of the minor, appellant claims decedent did not publicly acknowledge the child as his own as he is required to do under Section 230, Civil Code. She argues that his only statements acknowledging the child were

made by decedent to Thelma, her sister Marcella and a friend, Pearl Campbell, at times he was ill and under the "influence of sedation," and at most they were only private admissions of paternity, which are insufficient to constitute public acknowledgment. She submits that no such statements were made outside the family circle and decedent at no time acknowledged paternity to his friends, family, relatives or associates; that although decedent introduced the child's mother at the hospital to Mrs. Bressert, manager of an apartment house he owned in Balboa, as "Thelma," he did not disclose who she was or his relations with her; that he did not tell his sister Celeste about Thelma, referring to her on one occasion outside of her presence as his nurse; and that he told appellant when she took him to the Hoxy Clinic in Texas, several days before his death, he was not the father of Thelma's baby.

On the other hand, the record discloses that upon learning of her pregnancy, decedent made his home with Thelma in Los Angeles where he lived with her as her husband, leaving only occasionally to visit his property in Balboa and to continue his lecture tours on which Thelma accompanied him; and that twice he returned from the hospital to his home with Thelma and finally from the clinic in Texas to die there. Of significance is the fact that the child was born August 10, 1956, and decedent lived only fifteen days thereafter. During this time he was incurably ill with cancer, struggling to keep alive. There is no evidence that during that time he was under the "influence of sedation" or under "heavy sedation" as claimed by appellant in her brief, although the record does show that he took sedation upon retiring and after eating. While decedent lived with Thelma from February, 1956, to his death, he was in the hospital on two occasions, from June 23 to July 28, and from August 11 to August 16; and after the child's birth, from August 21 to August 24, he was in the Hoxy Clinic in Texas. During this time he was critically ill, which left him little opportunity to declare to anyone outside his family circle that he was the father of the child. There was little reason to declare the same to Thelma, her sister, and her friend, for in providing and maintaining a home for her, and living with her in a normal "husband and wife" relationship, he set up as against the world a "legitimate household." As to their friends and relatives, he and Thelma had previously declared they were married by sending "wedding announcements" which would leave no reason for decedent to make any declaration to them that the child was his. Obviously anyone having been told of the "marriage" would naturally assume that the child was "legitimate." As any proud father, when he first saw the child in their home upon his arrival from the hospital, he walked over to the crib and said, "so this is my son." He referred on numerous occasions to the boy as "my son" to those around him—Thelma and her friend and sister, apparently the only visitors they had. At one time after watching Thelma turn the baby on his stomach, he said, "I wish I was well enough to enjoy him." In a telephone call to one of his doctors in the hospital, decedent told him immediately after the birth of the child "the baby was grand." Decedent participated in making a list of things the baby needed, gave Marcella money to buy them and the keys to his car and sent her shopping for the items, saying: "I want the best for him." The evidence further shows that when Thelma went to the hospital for the birth of the child, only fifteen days before decedent died, there was no one in the apartment to care for the decedent and she called his sister to take him to the City of Hope where he could be cared for until she could return from the hospital and do so herself. His sister took decedent to the City of Hope and he returned to the apartment on the same day Thelma returned from the hospital after the birth of the child. His treatment and care at the hospital at that time is a reasonable explanation why Thelma alone gave information concerning the child and his name as Robert V. Abate, Jr., for the birth certificate, and why he did not visit her in the hospital or

contact the hospital or her doctors. On the very day Thelma brought the baby home, decedent arranged to and did return there from the City of Hope. It is obvious from the trial judge's findings he accepted Thelma's testimony and that of her witnesses and believed, under the unusual circumstances, that decedent's acts and conduct toward the child and his statements to those near him were sufficient to constitute public acknowledgment.

As to decedent's relatives, friends and associates, considering the very serious illness of decedent, his extended hospital visits and the short time he lived after the baby's birth, decedent would have gone out little on business or socially, there would have been few visitors in the household, little opportunity to have made any declaration concerning the child and little interest in much outside of decedent's health. Excluding for the moment appellant's testimony that decedent on his trip to the Hoxy Clinic several days before his death told her he was not the child's father, appellant produced no evidence that decedent ever denied paternity. Even giving credence to the testimony of Mrs. Bressert, the manager of decedent's property in Balboa, that decedent introduced Thelma only by name and made no explanation of their relationship or that they were expecting a child, we see no reason under the circumstances why he should, or would, have made any explanation to an employee, absent any inquiry concerning the matter. The fact, if it be so, that decedent did not tell his sister about Thelma, or mention the child, means little on the issue under the circumstances. The evidence does not show that either Celeste or Mrs. Bressert asked decedent about his relations with Thelma, who she was, or anything concerning the child. Omissions alone, under these circumstances, do not seem to us to support a purposeful concealment, or wilful misrepresentation of paternity. In re Estate of Baird, 193 Cal. 225, 223 P. 974. The court in In re Estate of Gird, 157 Cal. 534, at pages 542, 543, 108 P. 499, at page 503, stated along this line: "The language of Section 230, Civ.Code, is simply 'by publicly acknowledging it as his own.' There is no provision as to what shall constitute 'a public acknowledgment,' and the words of the statute must be taken in their ordinary sense. * * * In the face of circumstances which might well be accepted as calling for explanation as to the true situation if he was not the father of these children, he never expressly denied that he was such * * * Nor is the fact that he did not say anything about the matter to his brother when he visited his home shortly before his death of such importance, under the circumstances, as to forbid the conclusion of public acknowledgment."

Reference is made to appellant's testimony that when she escorted defendant to the Hoxy Clinic in Texas, several days before his death, he told her for the first time about Thelma, of having had an altercation with her, that he was not the father of her child, that she was in the family way when he met her, and wanted to return to Los Angeles immediately to prevent her from drawing the money out of their joint bank accounts; and that when he arrived in Los Angeles, he went to the bank and drew out $1,200. Appellant contends that this conversation and his action in drawing funds from his account prove decedent denied paternity, did not receive the child into "his family" and did not have his wife's consent therefor, and that he intended to make no provision for the child. On this point, Thelma's testimony discloses that on June 20, 1956, before he went to the City of Hope for surgery, decedent made out four pink cards and had her sign them for joint accounts in the bank, stating to her at the time that they represented $50,000 cash, and instructed her that upon his death she was to immediately take the bankbooks to the bank and get the money, that he put the cards into his briefcase where he kept them at all times, that he took his briefcase with him when he left with appellant for Texas, but when he returned the cards were no longer in the case. The controversy concerning the missing bankbooks speaks for itself, and this may have been one of the factors considered by the trial judge in

determining credibility of the witnesses and weighing the evidence.

[1–4] In the instant case the issue of legitimation is primarily factual. It was for the trial judge to resolve any conflict in the evidence. In re Estate of Gird, 157 Cal. 534, 544, 108 P. 499. He obviously accepted the respondent's version of what occurred and this court may assume that he rejected appellant's conflicting evidence. Each case depends upon its own circumstances. In re Estate of Baird, 193 Cal. 225, 223 P. 974. Those in the instant case are unusual, but we conclude in consideration of decedent's serious illness, the short time he lived after the birth of the child and from his conduct and treatment of the child, that he had every intention and desire to treat him as his own, that he felt the natural affection of a father for his child and that he desired to, and did, care for and assume responsibility for his maintenance, care and support. He rented the apartment as a home for the three of them and lived in it as his home, returned to it as his home and died in it. After Thelma was no longer able to work, he supported her and the child, providing all the necessities for both, and on occasion did the shopping himself. He referred to the baby as "his son" to members of Thelma's family, Thelma and her friend, and talked about "the baby" to his doctor. Any lack of mention of the child in his conversation with an employee, or his sister who had never seen him, at times when he was not called upon to discuss the child, even if the trial court attached credence to their testimony, we do not believe to be sufficient to overbalance the weight of his deliberate admissions and his acts and conduct toward the boy and his mother.

[5] Appellant contends that decedent did not receive the child into his family with the consent of his wife. The evidence before us is insufficient for the trial court to have found appellant was the legal wife of decedent. Therefore, her consent was not necessary and as such, she could not constitute the "family" referred to in the code section. It is clear from the record that the only "family" decedent had consisted of Thelma, for whom he maintained the only home he had. Under these circumstances, it is clear that the case of Laugenour v. Fogg, 48 Cal.App.2d 848, 120 P.2d 690, relied upon by appellant is inapplicable. In that case, the father of the child was married, left his legal wife and lived with the mother of the illegitimate child without the consent of his wife. In holding that the establishment of the "home" with the mother of the child did not satisfy the requirement of section 230, the court said, at page 852, of 48 Cal.App.2d at page 692 of 120 P.2d: "It is true that it has been held, and it may be conceded to be the present rule, that a single man may establish a home with his paramour and there rear the offspring without the sanctity or formality of a marriage. The reasoning of these cases is that every man can lawfully claim a home; if married the home is where the wife and family reside and if single he may still provide this home for whomsoever he chooses to establish the marital relation, even without the conventions." Referring again to the In re Estate of Baird, 193 Cal. 225, at page 278, 223 P. 974 at page 996, the court stated: "In respect to the issue of receipt into family we will adopt the definition of 'family' given in [In re] Estate of Gird, supra, as stated at page 545, [of 157 Cal., 108 P. at page 504] 'As used in this section, the word "family," in our opinion, means no more at most than that the father must have a "home," *a settled place of habitation of which he is the head,* into which he must receive the child.'" And at page 279, of 193 Cal., at page 996 of 223 P., the court said: "It has been held that where the father of an illegitimate child lives in a home alone, such home may constitute a 'family' into which he may receive the child, or where the father and mother of an illegitimate child live in a home or habitation of which the former is the head, although they are not married, the father has a 'family' within the meaning of section 230, into which the illegitimate child may be received."

[6] The record before us contains ample evidence that all requirements of section 230, Civil Code, have been complied with and by reason thereof and the public policy of this state, favoring legitimation we deem the minor, for all purposes, to be legitimate from the time of his birth. Blythe v. Ayres, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40; In re Estate of Lund, 26 Cal.2d 472, 159 P.2d 643, 162 A.L.R. 606.

[7] On the issue of marriage, the trial court found that appellant was not the legal wife of decedent and at most the relationship established a putative marriage. To reverse this portion of the judgment, appellant relies upon a "ceremony" performed July 21, 1945, in San Diego by a "naval chaplain" wherein wedding bands were exchanged; cohabitation for ten years as husband and wife; the joint acquisition of property and conduct of his business; and their devotion to each other. She submits this evidence establishes a presumption of the existence of a legal marriage. We conclude that any such claimed presumption was rebutted by the evidence. No marriage license or any record of their marriage was produced and appellant testified that they had not lived together as man and wife prior to their purported marriage. She further testified that decedent had told her he had made all arrangements for the marriage and she relied upon him; that she could not locate the "chaplain" who performed the ceremony but that it took place in an aircraft factory; that she could not find the marriage license although she had described it as a white, green-embossed document; that upon their separation, and prior to signing the property agreement on September 26, 1955, the decedent, in order to keep control of the property, told her she could not prove they were married; that they were not really married and only the two of them knew of the marriage ceremony; and that a lawyer prepared the property agreement which she executed, after which she resided apart from decedent, found separate employment and assumed her maiden name of Marlow.

Significant is the fact that appellant did not sue for a divorce although she testified "she wanted a divorce," did not consult with counsel to determine her rights, did not attempt to have the validity of the marriage determined and declared by the court, and the September 26, 1955, agreement between her and decedent was one drawn between Robert V. Abate and Pearl P. Marlow, also known as Mrs. Robert V. Abate, which she signed as "Pearl P. Marlow." The agreement declares, among other things, "Whereas, the parties hereto have lived together as husband and wife." From appellant's own evidence and the fact no marriage license or other record of a legal marriage was produced, the trial court found that a valid marriage did not exist.

It appears to this court that if, in California, any record of the marriage existed as required by law, the fact of a legal marriage would not have been difficult to prove, for appellant knew the exact date and place of the purported "ceremony." On July 21, 1945, the Civil Code in this state required for a valid marriage a solemnization (section 55); that a marriage must be licensed, solemnized, authenticated, and recorded (section 68); and that the parties "must" first obtain a license therefor from the county clerk of the county in which the marriage is to be celebrated (section 69) and "must" obtain from the same clerk, in addition, a certificate of registry (section 69a). Civil Code sections 72, 73 and 74 provide that the person solemnizing a marriage "must" require presentation of the marriage license, "must" make, sign and endorse upon the license a certification showing the solemnization, names of witnesses and his official position, and file the license and certification with the county recorder within thirty days.

[8] The evidence does not disclose if the so-called "naval chaplain" was actually a navy chaplain and a person authorized by statute (section 70, Civil Code) to solemnize marriages in California. Unless a solemnization is performed as authorized under the code and performed by one men-

tioned in section 70, there can be no valid marriage (Norman v. Thomson, 121 Cal. 620, 54 P. 143, 42 L.R.A. 343). The court in that case also held that noncompliance of the parties to a marriage with the provisions of section 68 invalidates the marriage and the court finding there was no license and no solemnization by any person authorized by law to perform the ceremony, held there was no valid marriage. Solemnization is essential to a valid marriage in California (In re Estate of Shipp, 168 Cal. 640, 144 P. 143; Temescal Rock Co. v. Industrial Accident Commission, 180 Cal. 637, 182 P. 447, 13 A.L.R. 683).

[9] On appellant's last point concerning the status of the decedent's property, she submits that with the exception of $15,000 his estate was acquired as the result of the earnings of appellant and decedent during the time they lived together and was not his separate property. She recites testimony that they were engaged in business together from July 21, 1945, to September 26, 1956, that she worked hard in their joint interest, lived with decedent under frugal circumstances and that their average income was approximately $2,000 per month.

The record before us does not disclose the actual estate of decedent as of July 21, 1945, the date of the purported marriage, other than the statement of appellant that he said he had $15,000 which was his separate property. Appellant took care of decedent's books, but she offered no substantial evidence from the books or otherwise concerning if, or in what manner, the $15,000 was invested, whether his subsequent income was the result of his efforts, or from investments and accumulation of this sum over the eleven-year period, and none from the books concerning the amount of income of decedent from July, 1945, to September, 1956.

Pursuant to the property agreement of September 26, 1955, decedent paid appellant $10,000 for her interest in the Balboa property. What other estate he owned we do not know. In addition, the agreement of September 26, 1955, executed by the parties recited "Whereas they desire to divide between themselves the property which they have accumulated," and provided for mutual release of all claims upon the property of the other. As to whether the agreement was the result of any fraud or fraudulent conduct on the part of decedent and not binding, the trial court found from the evidence it was valid and that no fraud was practiced on appellant, and her consent was not induced as the result of any fraud or imposition.

Weighing the evidence and resolving any and all conflicts in the evidence, the trial court found that all of the property in the name of decedent at the date of his death was his separate property. There was no evidence that any property existed that would have been community had there been a valid marriage.

We conclude that the evidence was sufficient to sustain the trial judge's finding that the estate is the separate property of decedent. Therefore, no issue arises as to succession of community property under sections 201–203, Probate Code, or as to the rights of a putative spouse in property which would have been community property had there been a valid marriage. Since the will contains no provision for the child, no disinheritance clause and no provision was made for him by settlement, or otherwise, it appears that the minor is a pretermitted heir of the decedent (section 90, Probate Code).

Judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

166 Cal.App.2d 302

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Eugene SMITH, Defendant and Appellant.

Cr. 6313.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1958.

Defendant was convicted of possession of marijuana. The Superior Court, Los Angeles County, J. Howard Ziemann, J., rendered judgment and imposed sentence and defendant appealed. The District Court of Appeal, Herndon, J., held that where police officers arrested defendant after they overheard him indicate that he was in possession of marijuana but officers failed to uncover marijuana in search of defendant's person and his apartment, it was entirely reasonable for officers to infer that defendant probably had access to and might utilize garage on premises of apartment building as hiding place since he owned automobile, and search of garage in which marijuana was found was reasonably incident to arrest and evidence so obtained was admissible.

Appeal from sentence dismissed and judgment affirmed.

1. Arrest ⇐71

Criminal Law ⇐394.4(9)

Where police officers arrested defendant after they overheard him indicate that he was in possession of marijuana but officers failed to uncover marijuana in search of defendant's person and his apartment, it was entirely reasonable for officers to infer that defendant probably had access to and might utilize garage on premises of apartment building as hiding place since he owned automobile, and search of garage in which marijuana was found was reasonably incident to arrest and evidence so obtained was admissible in prosecution for possession of marijuana. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⇐419(3), 698(1)

In prosecution for possession of marijuana, accusatory information which arresting officer received from an unidentified informant whose reliability was never established was admissible to show what led officers to defendant's residence where they overheard defendant indicate he was in possession of marijuana and thereupon arrested him, especially in view of fact that defendant did not object to officer's testimony or move that it be stricken. West's Ann.Health & Safety Code, § 11500.

3. Witnesses ⇐216

In prosecution for possession of marijuana, wherein defendant conceded that officers had probable cause to arrest him on basis of independent investigation subsequent to receipt of unidentified informant's statement that defendant had marijuana in his possession, reliability of informant was irrelevant and request for disclosure of name of informant was properly denied. West's Ann.Health & Safety Code, § 11500.

Elinor Chandler Katz, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

After conviction of possession of marijuana (Health and Safety Code, § 11500) defendant appeals from the judgment and sentence contending: (1) that the evidence upon which conviction was based was illegally obtained and improperly admitted over objection, and (2) that the lower court erred in admitting the arresting officer's testimony as to statements made to him by an unidentified informant.

On November 20, 1957, an unidentified informant gave Pasadena police officer Peter Ellena, Jr., a physical description and name which corresponded to that of appellant, and the officer was told that "The subject has a quantity of marijuana secreted in his house." That evening at about 6 p.m.

Sergeant Hamilton and officers Cockell and Ellena proceeded to appellant's residence, described as a "two-story multiple dwelling," in which the appellant was a tenant. The two officers seated themselves in an automobile in the back yard of the building, and at about 6:10 p.m. they observed the appellant and another man come into the back yard. Officer Ellena testified that he overheard the other man say to appellant "Where is the pot?" (a slang term for marijuana) to which the appellant responded, "I have it—don't worry—it's not rolled up, but I have plenty of paper." The defendant then went into the house with the other man and came out in about ten minutes carrying something in his hand. The officers stepped from the car and placed the appellant under arrest. Finding no narcotics in appellant's hand, they requested that he take them to his room. Appellant complied and a search of the room was commenced. One of the officers asked appellant if he owned an automobile, to which appellant answered in the affirmative, describing the vehicle. Sergeant Hamilton then left the room and returned with two women and a man who had been waiting for appellant in the car. In the search of appellant's room, the officers discovered two brown cigarette papers, some seeds and certain debris which, according to the testimony of officer Ellena, the defendant later said "could have been marijuana." Then officers Ellena and Cockell went into the back yard and searched the garage where they discovered two bags containing about five ounces of marijuana. The officers testified that there was no car parked in the garage; that they had no conversation and made no investigation as to who used the garage, and that the garage was "cluttered" with furniture and storage.

Appellant denied possession of the marijuana when confronted with it in his room, but at the police station he admitted that he had purchased the contraband and taken it to his home a week previously. At the trial he testified that these self-incriminating statements to the officers were made so that the woman arrested with him would be released and on the officer's assurance that he would benefit from the admissions. The officers denied so inducing the confession. Appellant was convicted, and probation was denied.

In this proceeding appellant concedes that his arrest was legal and that the search of his person and his living quarters was a search reasonably incident to that arrest. However, he contends that the search of the *garage,* which uncovered the contraband on which his conviction is based, was not reasonably incident to the arrest, and that the evidence obtained thereby was therefore inadmissible. Stated simply, appellant's theory is that the search of the garage on the premises in which appellant, an owner of an automobile, was a tenant, was unreasonable, because there was nothing reasonably to suggest to the officers that the marijuana which was the object of their search, might be there secreted.

Appellant's position is untenable. As recently stated in People v. Winston, 46 Cal.2d 151, 162, 293 P.2d 40, 46; "While the Cahan case [People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905] held that evidence obtained by police officers in violation of federal and state constitutional prohibitions 'against *unreasonable* search and seizure is inadmissible,' it did 'not purport to inhibit the right of law enforcement officers to conduct a *reasonable* search and seizure incident to a valid arrest.' [Citations.] * * * 'It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible. [Citations.] * * * "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime * * * is not to be doubted."'" See also, People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582.

In People v. Dixon, 46 Cal.2d 456, 458–459, 296 P.2d 557, 559, police officers entered defendant's apartment and arrested

her. During the search of the apartment, the officers discovered and forcibly took from her person the key to the garage which she rented on the premises. In the garage, the officers discovered a quantity of heroin. In reversing the judgment of conviction for the failure to introduce evidence to justify the officers' entry into the apartment, the Supreme Court said: "* * * if on a new trial reasonable cause is shown for the entry of defendant's apartment and her arrest [citations], the contemporaneous search of the garage, would be a lawful search as an incident to that arrest since the garage was on the premises and under defendant's control."

In the instant case, no question is raised as to the sufficiency of the evidence to support appellant's conviction of possession of narcotics. It should be emphasized that the sole question here presented is whether it was reasonable for the officers to search the garage after the search of the appellant's person and living quarters had failed to uncover the narcotics for which they were searching. In the appellant's room the officers had found cigarette papers, debris, and seeds which naturally would have tended to confirm the suspicions raised by the conversation they had overheard. It was entirely reasonable for the officers to infer that appellant probably had access to and might utilize the garage as a hiding place, since he owned an automobile and was a tenant in the building. The officers were not conducting an exploratory search for what might be uncovered (cf. People v. Mills, 148 Cal.App. 2d 392, 306 P.2d 1005; Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399) but were searching for marijuana which they had good reason to believe was hidden somewhere on the premises, in the appellant's room or in an outbuilding to which he had access. Cf. Sayers v. United States, 9 Cir., 2 F.2d 146.

In People v. Wasco, 153 Cal.App.2d 485, 487, 314 P.2d 558, the officers arrested the defendant in his rented room. Thereafter, the officers searched for and discovered contraband in a washroom at the end of the hallway on which the defendant's room faced, and such a search was held reasonably incident to a lawful arrest. In the instant case, as in Wasco, supra, the reasonableness of the search of an area beyond the immediate living quarters of the defendant rests on the fair inference that his control and activities extended to areas to which, as a tenant, he had the rights of access and use. See: Trowbridge v. Superior Court, 144 Cal.App.2d 13, 18, 300 P.2d 222 [search of a garage located beneath defendant's apartment held reasonably incident to a lawful arrest made in the apartment in which defendant resided]; People v. Lawrence, 149 Cal.App.2d 435, 445, 308 P.2d 821 [where the defendant was arrested in the entry hall to his apartment, a search of the apartment for contraband held reasonable]; People v. Montes, 146 Cal.App.2d 530, 534, 303 P.2d 1064 [where search of an area twenty feet from the house in which defendant was arrested disclosed a vial of narcotics, the evidence was admissible].

[1] We hold that the search of the garage, which uncovered the contraband on which appellant's conviction rests, was reasonably incident to a concededly valid arrest, and the evidence so obtained was admissible.

[2, 3] We must also reject appellant's contention that the trial court erred to his prejudice in permitting officer Ellena to disclose the accusatory information which the officer received in statements from an unidentified informant whose reliability was never established. The information was admissible when offered to show what led the officers to appellant's residence, where they overheard appellant indicate he was in possession of contraband and thereupon arrested him. People v. Fischer, 49 Cal.2d 442, 446, 317 P.2d 967; Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36. Moreover, appellant did not object to the officer's testimony or move that it be stricken. Appellant concedes that the officers had probable cause to arrest him on the basis of their independent investiga-

tion subsequent to the receipt of the informant's statement. Therefore the reliability of the informant is irrelevant. Cf. People v. Fischer, supra, 49 Cal.2d 442, 447, 317 P.2d 967; Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39. During the course of the trial counsel for appellant unsuccessfully sought disclosure of the name of officer Ellena's informant. The request was properly denied. The informant was not a material witness on the issue of guilt, nor were his statements necessary to establish the validity of the arrest or the search which followed. Priestly v. Superior Court, supra, People v. McShann, 50 Cal.2d 802, 330 P.2d 33.

The appeal from the sentence is dismissed (People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29) and the judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

BELLFLOWER CITY SCHOOL DISTRICT OF LOS ANGELES COUNTY, Plaintiff and Appellant,

v.

Carl E. SKAGGS et al., Defendants and Respondents. *

Civ. 23257.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1958.

Hearing Granted Feb. 11, 1959.

Condemnation case. The Superior Court of Los Angeles County, William E. Fox., J., entered an order allowing interest upon award from date of entry of interlocutory judgment, and an appeal was taken. The District Court of Appeal, Fourt, J., held that even when condemnor has not sought or obtained possession of property prior to vesting of title in condemnor, interest commences to accrue on date of entry of judgment and runs until date of payment.

Affirmed.

1. Eminent Domain ⇐247(2)

Even when condemnor has not sought or obtained possession of property prior to vesting of title in condemnor, interest commences to accrue on date of entry of judgment and runs until date of payment. West's Ann.Code Civ.Proc. § 1255a.

2. Eminent Domain ⇐148

The allowance of interest, under proper circumstances, is an essential element in "just compensation" required by constitution to be paid to owner for property taken. West's Ann.Const. art. 1, § 14; art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Just Compensation".

3. Eminent Domain ⇐71

Whatever is an essential element of the "just compensation" required by constitution to be paid to owner for property taken cannot be excluded by legislative enactments and should not be excluded by interpretation of legislative enactments. West's Ann.Const. art. 20, § 22.

Harold W. Kennedy, County Counsel of Los Angeles County, Richard A. Del Guercio, Deputy County Counsel, Los Angeles, for appellant.

Holbrook Tarr & O'Neill, W. Sumner Holbrook, Jr., Leslie R. Tarr, Richard L. Huxtable, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from an order allowing interest upon an award from the date of entry of the interlocutory judgment in a condemnation proceeding.

The School District filed an action to condemn portions of thirteen one-half acre

* Opinion vacated 339 P.2d 848.

residential lots for the expansion of an existing school site. After a jury trial an interlocutory judgment in condemnation was entered on February 18, 1957. The plaintiff made no motion for a new trial, did not appeal, and took no steps to vacate or modify the judgment. At various times thereafter the plaintiff tendered its warrants for the principal amounts awarded for each parcel, together with costs, but without interest. The time lapse ran all of the way from one month and two days to six months and five days, with varying times in between. There is set forth in a footnote hereto a general itemization showing the respective parcel numbers, the defendant's amount of award or judgment, the day of payment, the time which elapsed from the entry of judgment to the date of payment, the interest which the trial court granted and which respondents contend is the correct amount, the interest which the appellant contended was the right amount due when it argued against the granting of the motion for a supplementary judgment for interest, and the interest which the appellant now contends is the proper amount to be paid.[1]

The tenders were refused because of the failure to include interest upon the principal awards. Apparently an agreement was then reached between the parties whereby the amount of the warrants was accepted conditionally and without waiver of the respondents' rights to the accrued interest, if any, to the date of tender and conditional acceptance.

In the latter part of November, 1957, the respondents made a motion for a supplemental order fixing liability for interest on the judgment in condemnation, and the court granted such motion and decreed that the amounts demanded by the respondents, as set forth in the footnote, were proper. The order, in effect, decreed that interest was due from the date of entry of the judgment in condemnation until the date of payment. A final judgment of condemnation was made and filed on February 14, 1958. The appellant has appealed from the supplemental order.

[1] Each side asserts that the sole question involved is: When does interest commence to accrue upon a judgment in condemnation, when the condemner has not sought nor obtained possession of the property prior to the vesting of title in the condemner? The appellant contends that interest does not accrue on a judgment in condemnation until thirty days after

1. Parcel No. | Judgment | Date of Payment (1957) | Time lapse from entry of Judgment | (Respondents' Contention) From date of entry of Jdgmt. Interest accrued at 7% | (Appellant's Contention at time of Motion) From date 30 days following entry of Jdgmt. Interest at 7% | (Appellant's Present Contention) Liability from date Jdgmt. became final (90 days after entry of Jdgmt. at 7%)

1	$7500.00	3/20	1 mo. 2 days	$ 46.66	$ 2.91	None
2	3985.00	6/4	3 " 16 "	82.13	58.89	17 days
3	7200.00	6/4	3 " 16 "	148.40	106.40	17 days
4	3360.00	6/4	3 " 16 "	69.25	49.65	17 days
5	6600.00	6/4	3 " 16 "	136.04	97.53	17 days
6	2800.00	6/4	3 " 16 "	57.71	41.38	17 days
8	5105.00	6/4	3 " 16 "	105.22	75.44	17 days
10	3640.00	6/24	4 " 6 "	89.18	67.95	37 days
12	4714.00	3/20	1 " 2 "	29.33	1.83	None
14	3500.00	6/24	4 " 6 "	85.78	65.33	37 days
15	3410.00	8/9	5 " 21 "	113.38	123.63	83 days
	1000.00	3/23	6 " 5 "	35.97		97 "
16	4760.00	6/4	3 " 16 "	98.11	70.34	17 days
17	4160.00	6/4	3 " 16 "	85.74	61.48	17 days

all possibility of direct attack thereon has been exhausted whether by way of appeal, motion for new trial, or motion to vacate; and that in the present case the appellant should not be liable for any interest until the judgment was final. The appellant relies almost entirely upon the case of County of Los Angeles v. Lorbeer, 1958, 158 Cal.App.2d 804, 323 P.2d 542.

The respondents assert that they are entitled to interest on the amount of the condemnation award from the date of entry of judgment to the date of payment to the property owner, and they rely mainly upon the rulings set forth in the case of People v. Superior Court, 145 Cal.App. 2d 683, 303 P.2d 628.

We are of the opinion that the respondents are correct in their contentions.

[2] The right to interest in this state in a controversy such as is before us does not depend exclusively upon statutory enactments. The Constitution provides, in Article I, section 14, in part as follows:

"Private property *shall not be taken or damaged* for public use *without just compensation* having first been made to, or paid into court for, the owner * * *." (Emphasis added.)

And Article XX, section 22, of the Constitution, in part, is as follows:

"*The rate of interest upon* the loan or forebearance of any money, goods or things in action, or on accounts after demand or *judgment rendered* in any court of the State, *shall be 7 percent per annum* * * *." (Emphasis added.)

The allowance of interest, under proper circumstances, is an essential element in "just compensation." As said in Heimann v. City of Los Angeles, 30 Cal.2d 746, at pages 758–759, 185 P.2d 597, at page 604:

"In most jurisdictions interest is allowable in condemnation cases on the same theory that supports the award of costs in those cases, that is, interest is allowable as part of the just compensation required by the Constitution to be paid to the owner for property taken. 96 A.L.R., cases collected in note pp. 150–206; 111 A.L.R. 1304. In this state there is not only a recognition of the majority rule and of the reasoning which supports it (citing cases), but there is also a provision by statute that if the condemnor is put in possession by court order prior to the conclusion of the litigation, the compensation and damages awarded shall draw lawful interest from the date of the order. Code Civ.Proc., sec. 1249. (Citing cases and authority.)

"In the Metropolitan Water District case, Metropolitan Water Dist. v. Adams, supra, 16 Cal.2d 676, at page 681, 107 P.2d 618, it is said, quoting from Seaboard Air Line R. Co. v. United States, supra, 261 U.S. 299, at page 306, 43 S.Ct. 354, 67 L.Ed. 664: 'It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. * * * The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. * * *' See also Shoshone Tribe v. United States, 299 U.S. 476, 496, 57 S.Ct. 244, 81 L.Ed. 360, and cases there cited."

In the Heimann case, supra, where the political subdivision had already damaged the property, the court further said (30 Cal.2d at page 759, 185 P.2d at page 605):

"The authorities are by no means uniform in their holdings with regard to the time from which interest should be computed. See 18 Am.Jur., sec. 272, et seq., pp. 912 et seq.; 29 C.J.S. Eminent Domain § 176, pages 1056–1059; 96 A.L.R., supra, pp. 150–206; 111 A.L.R. 1304; 2 Lewis on Eminent Domain, sec. 742, pp. 1319–1326. But if the property owner is to be compensated in the full amount to which he is justly entitled, it seems apparent that as to a taking of property the same rule should obtain as in condemnation cases, and as to a damaging of property, interest should run from the date the damage is inflicted or at least from the commencement of suit. As said in Taylor v. Bay City St. Ry. Co., 101 Mich. 140, 59 N.W. 447, 449: 'Complaint is made of the instruc-

tion to the jury to add interest from the date of the commencement of suit. The authorities are not uniform upon this subject. The old rule undoubtedly was that interest could not be allowed upon unliquidated damages, and, in actions of tort, damages are of course unliquidated. The tendency of courts has been, however, to set this rule aside, and adopt the more reasonable one, in cases of injury to property, that the jury must first determine the actual damage sustained, and allow interest upon that sum from its date. (Citing cases.)'"

[3] It would seem clear that whatever is an essential element of "just compensation" cannot be excluded by legislative enactments, and should not be excluded by the interpretation of legislative enactments which do not, on their face, purport to determine when or what interest shall be allowed.

In the case of People v. Superior Court, supra, 145 Cal.App.2d 683, 303 P.2d 628 (petition for re-hearing denied; petition for hearing before the Supreme Court denied), the Department of Public Works prosecuted a condemnation action in which judgment of condemnation was entered on or about February 7, 1955. As to one of the parcels involved, the condemner took an appeal. People ex rel. Dept. of Public Works v. S. & E. Homebuilders, Inc., 142 Cal.App.2d 105, 298 P.2d 53. The judgment was affirmed, and a petition for a rehearing was denied, and a petition for a hearing by the Supreme Court was denied. When the remittitur was received by the Superior Court the condemner deposited the principal sum of the condemnation judgment, but without any interest. There was no taking of the physical possession of the property by the condemner at the time of the entry of judgment.

There was a notice and demand by the owner for payment of interest on the principal sum of the award from and after thirty days after entry of the original judgment under the provisions of Article XX, section 22 of the Constitution. It may be noted here that the real party in interest in that case did not demand interest from the date of entry of the judgment, but from thirty days after the entry of the judgment. The condemner refused to pay the interest upon the judgment. The trial court refused to sign the final judgment, apparently prepared by the condemner, solely upon the ground that the amount deposited was insufficient inasmuch as it did not include interest upon the amount awarded in the judgment. Proceedings were then instituted in this Court by the Department of Public Works for a writ of mandate to compel the trial court to sign the final order of condemnation which did not provide for interest.

The arguments of the condemner in that case were summarized by this Court on page 686 of 145 Cal.App.2d, at page 630, of 303 P.2d of the opinion, wherein it is said:

"While petitioner states its reason for the contention that the judgment does not bear interest in several different ways, the gist of its argument is that the judgmen in condemnation is not a personal judgment for the payment of money but only a judgment fixing a price at which the condemner may acquire the property, and therefore fixes no principal sum to which interest can be an incident. Petitioner grounds its contention on sections 1251, 1255a, and 1264.7 of the Code of Civil Procedure."

This court then discussed the effect of each of the sections mentioned, and as to section 1264.7, said in 145 Cal.App.2d at page 687, 303 P.2d at page 630, "Section 1264.7 defines the words *judgment* and *final judgment*. It defines *judgment* as meaning the judgment determining the right to condemn and fixing the amount of compensation to be paid; and the term *final judgment* as 'such judgment when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted.'"

The court further stated in 145 Cal.App. 2d at pages 687–688, 303 P.2d at page 630,

after referring to Southern Pacific Utility Dist. v. Silva, 47 Cal.2d 163, 301 P.2d 841: "It does not follow, however, that the judgment does not have the characteristics of a money judgment to which the right to interest will attach. A judgment in condemnation is a final judgment within the meaning of section 963, Code of Civil Procedure, from which either party may take an appeal. (Citing cases.) It lacks finality, however, in the sense that when an appeal is taken the action remains pending, Code Civ.Proc., sec. 1049, and its effect as a judgment suspended until the appeal is disposed of by the filing of the remittitur from the Appellate Court. When it is affirmed on appeal it is the judgment as entered in the trial court which fixes and determines the rights of the parties.

"The provisions of section 1251, Code of Civil Procedure, do not affect the finality of the judgment. The effect of its provisions are merely to grant a statutory stay of execution, for upon the expiration of the periods of time fixed by the section the defendant may have execution. Code Civ.Proc., sec. 1252; citing cases. The obligation on the part of the condemner to pay the amount of the award is fixed by the judgment and 'is not subject to diminution or modification by the lapse of time,' whether that period of time be the 30-day period or the one-year period mentioned in the section, Southern Public Utility Dist. v. Silva, supra, 47 Cal.2d at page [166], 301 P.2d 841.

"When the judgment entered on February 7, 1955, was affirmed and the remittitur of the Appellate Court filed, that judgment finally determined the rights of the parties to the subject action. It was by the provisions of that judgment that petitioner attained the right to take the property in question, and it was by that judgment that the Bank had the right to receive its compensation for the property taken. It is true that the defendant's right to receive its fruits from the judgment were subject to be defeated by the occurrence of a condition subsequent—that is, the exercise by the plaintiff of its right to abandon the proceeding under the provisions of section 1255a. But when the time within which that privilege might be exercised elapsed, or the right to exercise the privilege was waived by the plaintiff's asserting the rights granted it by the judgment, the defendant's right became absolute and sprang not from the failure of the plaintiff to exercise its privilege but from the judgment. *In other words, the judgment from its inception gave the defendant the right to receive the amount awarded to it and the plaintiff in the action the right to take the property, and to this judgment the right to receive interest and the obligation to pay interest attached as it would attach to any other money judgment;* and it was the obligation of this judgment—that is, the obligation to pay principal plus interest—that the plaintiff, petitioner here, was given the right to avoid and to assume a new and different obligation, by section 1255a of the Code of Civil Procedure. When petitioner waived the right or privilege granted to it by section 1255a, that section ceased to have any effect and the situation then was no different than if the right or privilege had never existed." (Emphasis added.)

It was appropriately pointed out in Southern Public Utility Dist. v. Silva, supra, 47 Cal.2d at pages 165–166, 301 P.2d at page 842:

"Plaintiff's main argument is that sections 1251 and 1255a are to be read together, with the result, it claims, that extension of the time within which to pay (by filing the affidavit sanctioned by § 1251) extends the time within which to abandon (by filing the affidavit prescribed by § 1255a).

"There is no such interlacing of the provisions of these two sections. They deal with different subjects (payment and abandonment, respectively) and have different purposes and objectives. Section 1251 has been in the code ever since 1872 Originally, it prescribed 30 days after final judgment as the period of time within which the condemnor must pay the sum of money assessed, without any provision

for extension of that period. Commencing in 1911 (Stats.1911, ch. 80, p. 92) the section has been amended from time to time to provide, as it now does, that this 30-day period may be extended to enable the raising of money by issuing bonds if the state or a public corporation is the condemnor."

Even though People v. Superior Court, supra, did not actually hold or state that interest was due and owing from the date of entry of judgment (for the reason that the real party in interest did not ask for it from such date) it is clear and unquestioned that the decision does provide that interest shall be payable upon the award during the entire time of the delay in making payment, to and including the time consumed in taking an appeal.

The Department of Public Works argued extensively in their petition for a hearing before the Supreme Court that "this new concept represents a perilous extension of liability of public bodies, since if the *filing of judgment* is a damaging or taking because of an interference with the property owner's disposal power, then, the same reasoning should logically apply to every step in the condemnation proceeding." The Supreme Court apparently rejected any such argument.

In the present case the plaintiff asserted, " 'the rights granted it by the judgment,' the right to empower itself to take title by the payment of the award, and at that time, section 1255a 'ceased to have any effect and the situation then was no different than if the right or privilege had never existed.' The defendants here had a right to receive the payment of the judgment 'from its inception,' and it is to that 'judgment' that 'the right to receive interest and the obligation to pay interest attached as it would attach to any other money judgment.' "

Further in People v. Superior Court, supra, this Court set forth the background of the basis for interest on judgments, and said in 145 Cal.App.2d at page 690, 303 P.2d at page 632: "Under the Practice Act and prior to the adoption of the codes, interest was allowed upon judgments although not allowed at common law. From 1874 until the adoption, through the initiative, of the Usury Act, Deering's General Laws, Act 3757, section 1290 of the Civil Code provided for the payment of interest on judgments at the rate of 7 per cent per annum. This section was repealed by the Usury Act, and the first section of *that* act provides that 'The rate of interest upon the loan or forbearance of any money * * * or judgments * * * shall be seven dollars upon the one hundred dollars for one year' but that the parties may contract for a rate not to exceed 12 per cent per annum. In 1934 section 22 of article XX was adopted. The effect of this section was not to repeal the Usury Act except insofar as that act was in conflict with the provisions of section 22. (Citing cases.) The first paragraph of this section deals with the same subject-matter as does section 1 of the Usury Act, and its only effect upon section 1 was to reduce the rate of interest that may be fixed by contract from 12 to 10 per cent. Otherwise the provisions of section 1 of the act and the first paragraph of the constitutional provision are wholly consistent (citing case.) The Bank's right to interest upon the judgment, therefore, is granted not only by the provisions of the Constitution but by those of the Usury Act."

And continuing, 145 Cal.App.2d at pages 691–692, 303 P.2d at page 633:

"Petitioner was not entitled to take the defendant's property except upon the payment of just compensation.

"The judgment fixed the just compensation to which the Bank was entitled as of the time of the entry of judgment, and the amount awarded by it did not include compensation for any further damage that might be sustained. While the entry of the judgment did not, in and of itself, operate to vest title in petitioner or give it the right to immediate entry, it effectually took from the Bank many elements

which gave value to the land. After the entry of the judgment the Bank could not rent or sell the land except subject to the right of petitioner to take it at will; it could not improve it without in effect dedicating the improvement made to petitioner. The result is that payment being delayed, the bank had neither use of the money to which it was entitled nor full use of the property which petitioner, under the judgment, had the right to take. To hold that petitioner would have the right, by an appeal, to delay the payment of the price fixed for the land and then exercise its right to take without compensating the bank for the damage suffered by it through the delay, would be to deprive the Bank of the right granted to it by article I, section 14 of the state Constitution. To paraphrase the language of Mr. Justice Frankfurter in United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789, 1794, section 14 of article I of our state Constitution, as well as the Fifth Amendment to the federal Constitution, express a principle of fairness and not a technical rule of procedure; yet if we support petitioner's contention here we deprive the Bank of just compensation by slavish adherence to technical rules of procedure."

True it is that in the present case, as in People v. Superior Court, supra, the owner retained the possession of his land following the entry of the judgment, but possession, as heretofore pointed out, is only one of the elements of value in ownership. The owners here suffered a loss for which there was no "just compensation." The right to sell or rent the property was practically cut off. In the present case the owners apparently received no rents, their possession was precarious, to say the least, liable as it was to be terminated at any moment. They could not safely make any improvements or repairs or alterations. Certainly there was no evidence to demonstrate that the value of the legal right to possession was equivalent to interest on the award, and we should not make any such assumption. The loss of some of the rights of full ownership (as above mentioned) are not merely incidental rights, but in our opinion constitute the loss of valuable rights and constitute a distinct damage. If payment therefor is not made then the property owner has not received "just compensation."

The property owner was not placed in the position in which he found himself by any act of his own, that is, he was not a wrongdoer, nor was he under any contract relating to possession with a political subdivision, nor was he responsible for any delay in the payment of the judgment. He was simply in possession at the whim of the representatives of the condemner. In this case the record would seem to disclose that the condemner accepted the award and indicated no desire to cogitate on whether to abandon or to go ahead or to appeal. The appellant simply delayed in making the payments.

Usually interest is allowed on judgments upon the theory, among others, that the successful litigant acquires an immediate right or claim to the award as soon as the judgment is entered. Some states hold that interest commences from the date of filing the report of the award (Minnesota —Warren v. First Div. St. Paul & Pacific R. R. Co., 21 Minn. 424); or from the date of trial (Ohio—Miami Conservancy Dist. v. Bowers, 100 Ohio St. 317, 125 N.E. 876); or from the date of the issuance of the summons (Brown v. United States, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171; Idaho Code Ann., §§ 13–712), and in some instances, at the time condemnation proceedings are first ordered. Nichols, Eminent Domain, p. 105.

It has been stated, with reference to condemnation awards, that the "ideal method would be to award the damages at the same moment that the taking was made, but the necessity of a judicial ascertainment of the amount of damages makes this impossible." Nichols, Law of Eminent Domain, p. 108, § 863. Or as said in Parks v. Boston, 15 Pick., Mass., 198, at page 208:

"The true rule would be as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; and this delay must be compensated by interest."

When the amount of the award was determined, and the judgment entered and not paid, realism dictates that the blight of that judgment caused the owner damage for which he was not otherwise compensated. The amount was determined and fixed in the judgment, and practicality dictates that the money must, in effect, be regarded as due to him as of the date of the entry of that judgment, even though under our system of condemnation the condemner may think over whether it wants to abandon, or whether it wants to appeal or take some other course, and the judgment may not become final (in the sense that it is defined in section 1049 of the Code of Civil Procedure) for some time.

Under the circumstances of the instant case, we are of the opinion that it was neither unfair nor improper to award interest to the owner for the period of delay in paying the amounts of the various awards.

Furthermore, although it is not a reason for the determination at which we have arrived in this case, to so hold may have the wholesome effect of stimulating the condemner to prompt action in condemnation actions, and doing away with the anomalous situation of engrafting a suit for interest onto many condemnation actions.

The order of the trial court awarding interest is affirmed.

WHITE, P. J., and LILLIE, J., concur.

166 Cal.App.2d 145

Application of John SOLARI, for an Order Directing Arbitration.

John SOLARI, Petitioner and Respondent,

v.

Giacomo ONETO, Administrator of the Estate of Andrea Daniele Oneto, Deceased, Respondent and Appellant.

Civ. 9458.

District Court of Appeal, Third District, California.

Dec. 15, 1958.

Rehearing Denied Jan. 8, 1959.

Proceeding in the matter of the application of surviving partner for an order directing arbitration to determine inventory value of assets of partnership in accordance with partnership agreement for purpose of the purchase by surviving partner of interest of deceased partner. The Superior Court, Tuolumne County, Ross A. Carkeet, J., entered judgment affirming award of arbitrator, and administrator of deceased partner appealed. The District Court of Appeal, Schottky, J., held that where books of partnership were not adequate to enable arbitrator to determine inventory value of assets of partnership, it was proper for arbitator to hear and consider other evidence, and that award was sufficiently definite.

Judgment affirmed.

1. Partnership ⇐312

Where partnership agreement provided that surviving partner should have exclusive right to purchase deceased partner's interest for "inventory value," and that in event of any dispute as to "inventory value," matter of dispute should be referred to arbitration as prescribed and set forth in Code of Civil Procedure, and that decision of arbitrator should be conclusive, surviving partner elected to purchase interest of deceased partner, and dispute arose as to "inventory value," arbitrator was required to afford the parties a hearing and opportunity to offer evidence, and arbitrator was then to adjudge inventory value on consideration of such evidence, as well as on con-

sideration of the arbitrator's own opinion. West's Ann.Code Civ.Proc. §§ 1280–1293.

2. Partnership ⇐312

Where partnership agreement provided that surviving partner should have exclusive right to purchase deceased partner's interest for "inventory value," and that in event of any dispute as to "inventory value," matter of dispute should be referred to arbitration as prescribed and set forth in Code of Civil Procedure, and that decision of arbitrator should be conclusive, and surviving partner elected to purchase deceased partner's interest, and dispute arose as to "inventory value," arbitrator was required to hold such hearings as were necessary in order to reach a decision. West's Ann. Code Civ.Proc. §§ 1280–1293.

3. Partnership ⇐312

Fact that complete books and records of business of partnership were not kept did not defeat operation of clause in partnership agreement that in event of any dispute as to "inventory value" when surviving partner elects to purchase interest of deceased partner, matter of such dispute shall be referred to arbitration. West's Ann.Code Civ.Proc. §§ 1280–1293.

4. Partnership ⇐312

Fact that partnership agreement specifically mentioned "arbitration as prescribed in the Code of Civil Procedure" in the event of any dispute as to "inventory value" when surviving partner elects to purchase deceased partner's interest, indicated clearly that parties intended that dispute should be settled by arbitration. West's Ann.Code Civ.Proc. §§ 1280–1293.

5. Contracts ⇐284(1)

Statutes enacted by the Legislature to set up a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate were designed to encourage resort to arbitration and abolish many of the doctrines applicable to a common-law arbitration. West's Ann.Code Civ.Proc. §§ 1280–1293.

6. Contracts ⇐284(1)

It should be the policy of the law to encourage settlement of business disputes by arbitration, and agreements, which provide for arbitration, should be given a liberal construction in furtherance of such policy. West's Ann.Code Civ.Proc. §§ 1280–1293.

7. Partnership ⇐312

Where books of partnership were not adequate to enable arbitrator to determine inventory value when surviving partner elected to purchase interest of deceased partner, it was proper for arbitrator to hear and consider other evidence. West's Ann. Code Civ.Proc. §§ 1280–1293.

8. Arbitration and Award ⇐71

When award of arbitrator is set aside, entire matter is reopened and issues are undetermined, and there should be a retrial of the issues on rehearing with an opportunity of parties to be heard. West's Ann. Code Civ.Proc. §§ 1280–1293.

9. Arbitration and Award ⇐73

Where award of arbitrator was vacated because arbitrator made an error in his computation, and all that was required of arbitrator on resubmission to arbitrator by court was a mechanical recomputation, and parties had had opportunity to present all of their evidence at original hearing, any error on part of arbitrator in not providing a rehearing was not prejudicial. West's Ann.Code Civ.Proc. §§ 1280–1293.

10. Partnership ⇐312

Where award of arbitrator, in fixing value of partnership property to determine price surviving partner was to pay for deceased partner's share, determined value of assets of partnership, and judgment related assets as land, improvements, stock in trade, business, fixtures, equipment and furniture, on-sale and off-sale general liquor licenses of the business, the award was sufficiently definite. West's Ann.Code Civ. Proc. §§ 1280–1293.

Huberty & Huberty, San Andreas, for appellant.

William C. Coffill, Sonora, for respondent.

SCHOTTKY, Justice.

This is an appeal by Giacomo Oneto, as Administrator of the Estate of Andrea Daniele Oneto, deceased, from a judgment affirming the award of an arbitrator which determined the value of a partnership in which the deceased had a one-half interest.

In 1952, John Solari and the deceased Andrea Oneto formed a partnership which operated a tavern known as "Steve's Place." The articles of copartnership provided, among other things:

1. That proper books of account would be kept.

2. That an account of the stock, equipment, and other personal property of the business and of book debts would be taken and a statement of the affairs would be made yearly; and that the sums drawn by the partners would be charged to their share of the profits. It was also provided that each partner would sign duplicates of the statement of affairs, one copy of which would be written in the partnership books; that the accounts, as reflected in the statement of affairs, would not be reopened unless some manifest error would be found within six months; and that such statement would be conclusive evidence between the partners.

3. That the partnership would be dissolved in case of the death of a partner.

4. That in the event of the death of any partner, the surviving partner would have the exclusive right to purchase and buy out the deceased partner's interest for the "inventory value" at the time of the deceased partner's death, within ninety days of the date of the death. "Inventory value" was defined to mean the book value of the partnership, plus or minus a reasonable amount or value allowing for inflation or deflation. It was further provided that in the event of any dispute as to "inventory value" the matter of such dispute would be referred to arbitration as prescribed and set forth in the Code of Civil Procedure, and that the decision of the arbitrators would be conclusive. Code Civ.Proc. §§ 1280–1293.

Following the death of Andrea Daniele Oneto, appellant Giacomo Oneto qualified as administrator of Andrea's estate. Solari had the books examined, determined that his deceased partner's interest in the business was worth $14,968.43, and then made an offer to the administrator to purchase the decedent's interest for that sum. The offer was refused, and after some negotiations Solari filed an application with the superior court for an order referring the dispute to arbitration. The application was opposed on the ground that there was no controversy between the parties which was the subject of arbitration; the answer denied that there was a refusal to perform under the terms of the agreement for arbitration, and also denied that any proper partnership books or statement of affairs existed which would provide a basis for establishing the book value as provided in the partnership agreement. The answer further stated that the agreement was vague as to the meaning of the term "inventory value," unless it was interpreted as fair market value, and it was alleged that the fair market value was $25,000. It was further stated that the only controversy was the proper interpretation of the articles of partnership which it was alleged was not the subject of arbitration.

The trial court, after a summary hearing, found that the "inventory value" of the partnership assets was a matter for arbitration. The court was of the opinion that more than a mere appraisal was involved since there would have to be a determination of the completeness of the partnership books of account. The court ordered arbitration and appointed an arbitrator who was instructed to settle by arbitration the "inventory value" of the assets, the book value plus or minus a reasonable amount for inflation, and that hearings be held in the matter.

The arbitrator had an impartial examination of the accounts made by a certified public accountant, held a hearing at which each of the parties and their respective

counsel participated, received testimony, and made an award that the value of the assets and property of the partnership as of the date of death of the deceased partner was $18,167.63. Solari then sought an order affirming the award. The administrator sought an order vacating the award because of alleged error and evident miscalculation on the part of the arbitrator. The arbitrator filed an affidavit in which he asserted that through an error on his part the amount found as the value of the partnership assets was one-half of the value found, and actually represented only the deceased partner's interest. The award was vacated and the matter resubmitted to the arbitrator, who was directed to set a time and place of hearing at which he should take such testimony, under oath, as appeared reasonably necessary to carry out the purpose of the order. The concluding paragraph of the order directed the arbitrator, after conducting such hearing as he deemed necessary, to prepare and submit his award to the court.

Thereafter, without conducting any further hearing, the arbitrator filed his Award on Rehearing as follows: "The book value of all of the assets and property of the partnership known as "Steve's Place," the partners of which consisting of John Solari and Andrea Daniele Oneto, as of the date of death of the said Andrea Oneto on January 21, 1957, be, and the same is hereby fixed and settled at the sum of Thirty-six Thousand Three Hundred Thirty-five and 45/100 ($36,335.45) Dollars, which sum includes plus or minus for inflation or deflation."

Petitioner John Solari made a motion to confirm the award on rehearing, and after a hearing the court made its order confirming the award and allowing the costs and expenses of said arbitration. The administrator's motion for a new trial was denied and this appeal followed.

Appellant's first contention is that "There was no valid operative agreement to arbitrate a controversy."

The language of the partnership agreement, as it relates specifically to the matter of arbitration, is as follows: "In the event of any dispute as to such value 'Inventory Value', the matter of such dispute shall be referred to arbitration as prescribed and set forth in the Code of Civil Procedure of California, and the decision of such arbitrators is conclusive."

Appellant contends that this was a mere agreement to fix the value of the partnership property and relies heavily on Bewick v. Mecham, 26 Cal.2d 92, 156 P.2d 757, 157 A.L.R. 1277. In that case a provision in a lease gave the lessee the option to purchase the land upon the expiration of the lease, at a price and terms then to be agreed upon between the parties, and if not agreed upon then to be fixed by arbitration. Each of the parties to select one arbitrator and the two selecting a third, which said arbitrators should fix such purchase price and the terms under which the purchase might be made. Ultimately, the defendant therein refused to appoint an arbitrator, and on such refusal the plaintiff therein brought an action to have the court fix the purchase price and to decree specific performance of the contract. That defendant argued that the statutory remedies provided in the arbitration section of the Code of Civil Procedure had not been followed, and specifically, he pointed out that section 1283 of the Code of Civil Procedure allows the court to appoint an arbitrator if one party has failed to make an appointment upon demand of the other. The trial court held that this was not an agreement for arbitration but instead was an agreement for an appraisal, and, therefore, the statutory procedure did not apply.

In affirming the judgment, the Supreme Court said at page 97 of 26 Cal.2d, at page 760 of 156 P.2d:

> "* * * It was not contemplated by the option agreement in the present case that the arbitrators should decide any controversy arising out of the option agreement or the refusal of the parties to perform. Their sole task was to determine the value of the land and to fix the purchase price accordingly and the installments for the pay-

ment of the credited part of the price. 'A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration.' Palmer v. Clark, 106 Mass. 373, 389; see, also, Luedinghaus Lumber Co. v. Luedinghaus, 9 Cir., 299 F. 111, 113. There is nothing in the agreement to indicate that the arbitrators were to take evidence in a formal proceeding as a basis for their decision rather than their own opinion and judgment. * * *"

Appellant contends that the court erred in submitting the controversy to arbitration. Appellant states: "* * * The parties had not, by their agreement, directed that the arbitrator was to come in and test their books for adequacy. Their agreement contemplated that they would keep adequate and complete records. All that the arbitrator was to do was to fix the value revealed by these records as such was affected by the factors of inflation or deflation. The application of these factors of inflation or deflation do not present anything other than problems in valuation that any competent appraiser could take care of. Thus, in order to find some added task which might qualify this agreement for arbitration, the Court had to assume powers and duties for the arbitrator which had not been granted to him by the parties."

[1, 2] We do not regard the Bewick case as requiring a holding that the court erred in submitting the matter to arbitration. For the Bewick case also stated at page 97 of 26 Cal.2d, at page 760 of 156 P.2d:

"* * * 'Submissions to determine values are of two kinds: First, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing and an opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion. In cases of the first class, it is usually held that the agreement is not properly a submission to arbitration, and is not subject to the rules which govern arbitrators * * *.'"

We believe that the court properly construed the agreement in the instant case as falling within the second class. We believe also that when the agreement provided that "In the event of any dispute as to such value 'Inventory Value', the matter of such dispute shall be referred to arbitration," it meant exactly what it said and implied, that the arbitrator or arbitrators should hold such hearings as were necessary in order to reach a decision.

For as stated by this court in Downer Corporation v. Union Paving Co., 146 Cal. App.2d 708, at page 711, 304 P.2d 756, at page 758:

"It should be noted that it is now well established '* * * by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished.' Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 260 P.2d 156, 169. This same question was discussed in 38 Cal.L. Rev. 799. The author notes that while the common law may be applicable to oral contracts, he suggests that it is not applicable to agreements in writing. The writer further states that no special language is required but that the arbitration clause should provide that parties agree to accept the award as final and binding. 'It is reasonable that parties who voluntarily agree in writing to arbitrate should be bound by the statute and should not as an afterthought be permitted to escape from their contract through the portals of the common law.' (38 Cal.L.Rev.,

p. 809.) Thus, in Snyder v. Superior Court, 24 Cal.App.2d 263, 74 P.2d 782, it was agreed that in the event of a dispute between the parties, such dispute would be submitted to a named arbitrator 'for determination.' This court there held that to submit a dispute for determination is a tacit agreement to abide by that agreement. For as was there noted, there would be no reason to submit the dispute to an arbitrator other than for determination. Hence it necessarily follows that while the paragraph in question could probably have been drafted with more precision, there can be little question but that as the trial court found, the words 'any matter arising therefrom' relate back to the word 'Agreement,' and that thereby the arbitrators were authorized to decide any question concerning the joint venture agreements or arising therefrom, as well as the interpretation of the agreements; and that by the words, 'the decision of any two arbitrators shall be binding upon both parties,' the parties agreed to accept the award as final and binding on them. In this regard the court specifically found that in using the quoted phrases, it was the intent of the parties that any dispute arising under the agreements should be determined by arbitration, and that all of the matters and disputes which were submitted to and determined by the board of arbitrators arose out of said agreements and the performance thereof. * * *"

Appellant also contends that the arbitration clause could only be invoked if proper books of account and statement of affairs had been kept. It is alleged, and apparently not denied, that this was not done.

The court in its Order of Submission to Arbitrator stated that:

"The said arbitrator shall settle by arbitration the book value of the properties of the partnership the subject matter of said agreement as of the date of death of Andrea Daniele Oneto on January 21, 1957, as determined by the books of said partnership, if any there be, 'plus or minus a reasonable amount or value allowing for inflation or deflation' as set forth in paragraph 12 of said Partnership Agreement.

* * * * * *

"The said arbitrator shall set a time and place of hearing convenient to himself and the parties and shall subpoena such witnesses and take such testimony under oath as appears reasonably necessary to him in order to carry out the purposes of this Order and the intention of the parties under said agreement * * *"

[3, 4] It is evident that complete books and records of the business of the partnership were not kept, but we do not believe that this fact would defeat the operation of the clause in the partnership agreement that "In the event of any dispute as to such value 'Inventory value', the matter of such dispute shall be referred to arbitration." We think that there is ample support for the trial court's finding that the partnership agreement was "a valid written agreement to settle a disputed matter by arbitration, and that the controversy referred to in petitioner's application has arisen and does now exist as to the computation or determination of value referred to and defined as 'inventory value' in said 'Articles of Copartnership.'" We believe that the fact that the agreement specifically mentioned "arbitration as prescribed in the Code of Civil Procedure" indicates clearly that the parties intended that the dispute should be settled by arbitration.

[5, 6] The 1927 statute (Code Civ.Proc. §§ 1280–1293) was enacted by the Legislature to set up a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate. It was designed to encourage resort to arbitration and abolished many of the doctrines applicable to a common-law arbitration. It should be the policy of the law to encourage the settlement of business disputes by arbitration, and agreements which provide for arbitra-

tion should be given a liberal construction in furtherance of such policy.

Appellant contends also that the arbitrator exceeded his powers because he fixed the value according to such partnership records as he could find, plus oral and documentary evidence. We do not agree. The arbitrator in his award stated that "your Arbitrator having examined and considered all of the evidence submitted, both oral and documentary, the records of said partnership and personal examination of the premises, and having further considered the matter of inflation or deflation, and being fully satisfied, now renders herewith in accordance with said Order of Submission, his award."

[7] Appellant contends that the arbitrator was limited to the value as set forth on the books of the partnership; but where, as in the instant case, the books were not adequate to enable the arbitrator to determine the value, it was proper for him to hear and consider other evidence. For it was the duty of the arbitrator to settle by arbitration the dispute over the "inventory value" of the property of the partnership, and we are satisfied that it was the intention of the parties to the copartnership agreement that any such dispute should be settled by arbitration.

[8, 9] Appellant contends further that the arbitrator erred in determining the value of the partnership after the vacation of the original award and resubmission by the court because he failed to hold a hearing after resubmission. He relies on the rule that when an award is set aside the entire matter is reopened and the issues undetermined (Film Technicians of Motion Picture Industry, Local 683 v. Color Corporation of America, 141 Cal.App.2d 553, 297 P.2d 86), and that a rehearing is a retrial of the issues, and it presumes notice and an opportunity to be heard. Yee v. State Board of Equalization, 16 Cal.App.2d 417, 60 P.2d 322. The rule stated is correct, but in the instant case the award was vacated because the arbitrator made an error in his computations. All that was required was a mechanical recomputation. Any error in not providing a rehearing could hardly have been prejudicial to the appellant since he had an opportunity to present apparently all the evidence he had at the first hearing. Furthermore, appellant does not assert that he was prejudiced by the failure of the arbitrator to hold a second hearing.

[10] Appellant's final contention is that the award is vague because it did not describe the partnership assets. The award determined the value of the assets of the partnership. The judgment related these as land, improvements, stock in trade, business, fixtures, equipment, furniture and furnishings, on-sale and off-sale general liquor licenses of the business and property known as "Steve's Place." It must be borne in mind that the arbitrator was to value the property to determine the price the surviving partner was to pay for the deceased partner's share. While the award might have been more detailed, we believe it was sufficiently definite.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

166 Cal.App.2d 577

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Herman KLEIN, Defendant and Appellant (two cases).

Cr. 2817, 2819.

District Court of Appeal, Third District, California.

Dec. 24, 1958.

Defendant was convicted of perjury and second degree burglary. The Superior Court, Placer County, Leland J. Propp, J., entered judgment, and the defendant ap-

pealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained burglary conviction, and that, in burglary prosecution, jury was entitled to give credence to testimony of defendant's employee that he introduced alleged accomplices of defendant to defendant for purpose of planning burglary, which defendant wanted perpetrated in order to put out of business proprietor of shop, which was to be burglarized, because of ill feeling between defendant and proprietor of the shop, incredible as such testimony might appear, and jury was entitled to disregard defendant's conflicting version as to reason for his meeting with alleged accomplices.

Judgment in each case affirmed.

1. Burglary ⇐45

In burglary prosecution, jury was entitled to give credence to testimony of defendant's employee that he introduced alleged accomplices of defendant to defendant for purpose of planning burglary, which defendant wanted perpetrated in order to put out of business proprietor of shop, which was to be burglarized, because of ill feeling between defendant and proprietor of the shop, incredible as such testimony might appear, and jury was entitled to disregard defendant's conflicting versions as to reason for his meeting with alleged accomplices.

2. Burglary ⇐41(1)

Evidence sustained second degree burglary conviction.

James B. Thompson, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

These are appeals from, (1) a judgment of conviction of perjury entered by the trial court sitting without a jury, and (2) from a judgment entered upon a jury's verdict which found appellant guilty of burglary of the second degree. Since the perjury for which appellant was indicted occurred at a former trial on the charge of burglary of which he stands convicted, both appeals will be disposed of by this one opinion.

Upon appellant's request for counsel this court appointed James B. Thompson, Esq., an attorney at law, to represent appellant on both appeals. Mr. Thompson has reported that he finds no merit in either. Nevertheless, we have made an independent review of the records.

It appears that in each case appellant was represented by counsel in the court below and was, at all proper times, advised of his constitutional rights.

At the trial on the charge of burglary appellant took the stand and admitted that at a former trial he not only had testified falsely as to his whereabouts on the night of the burglary, but had induced three of his friends to falsely corroborate his alibi. Subsequent to that trial an indictment charging appellant with perjury was returned by the grand jury. Thereto appellant first entered a plea of not guilty, but, upon the request of appellant and his counsel later, he was permitted to withdrawn that plea and he thereupon pleaded guilty.

There is absolutely no ground presented by the record for an appeal from the judgment of conviction of perjury.

[1, 2] With reference to the burglary charge of which appellant was convicted, it appears that on the night of Saturday, January 5, 1957, a body and fender shop, which adjoined appellant's auto wrecking establishment, was burglarized by a Mr. Howse and a Mr. McDonald who implicated appellant as their accomplice. Mr. Howse and Mr. McDonald had, just before the burglary, been introduced to appellant by the latter's employee, Mr. Mays, who testified that he brought the parties together for the purpose of planning the burglary which appellant wanted perpetrated in order to put the body and fender shop out of business as there was ill feeling between him and the proprietor thereof. Incredible as this may appear, the jury

were entitled to give credence to that testimony and disregard appellant's conflicting version as to the reason for his meeting with Mr. Howse and Mr. McDonald. Further, while in jail appellant wrote some notes from which an inference of guilt might be drawn. The notes were introduced in evidence but need not be quoted herein. Also the jury had before it appellant's admission of perjury committed by him on his first trial on the burglary charge and his admitted subornation of perjury. Consequently, the verdict does not lack evidentiary support. A review of the record establishes that there were no errors in the admission or rejection of testimony and that the jury was fully and fairly instructed. Therefore, there is no merit in the appeal from the judgment entered upon the jury's verdict.

The judgment in each case is affirmed.

SCHOTTKY and PEEK, JJ., concur

166 Cal.App.2d 220

Joyce JONES, Individually and as Guardian ad litem of Linda Louise Jones, a Minor, Plaintiff and Appellant,

v.

Birdie Margaret REITH, Defendant and Respondent.

Civ. 23246.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1958.

Action for death of decedent in an automobile accident. From a judgment entered upon a verdict for the defendant in the Superior Court of Los Angeles County, Otto J. Emme, J., the plaintiff appeals. The District Court of Appeal, Fourt, J., held that an instruction on joint adventure between the decedent and operator of the automobile should not have been given under the evidence.

Judgment reversed.

1. Joint Adventures ⇐5(3)

Normally, it is for the jury to decide whether a joint adventure exists.

2. Joint Adventures ⇐5(1)

There must be some evidence which, if true, would establish a joint adventure under the law before the court can give an instruction thereon.

3. Negligence ⇐93(8)

A guest in a vehicle driven by another is not ordinarily bound by the negligence of the operator.

4. Negligence ⇐89(1)

The doctrine of imputable negligence, except when countenanced by statute, is a fiction of the law finding small favor with the courts.

5. Negligence ⇐138(4)

In action for death in an automobile accident, where the record failed to show that the decedent interfered with or controlled the automobile or that he had any right to so control the operation thereof, instructions on joint venture should not have been given.

Jack R. Berger, Los Angeles, for appellant.

Jarrett & Morgan, by Wm. Marshall Morgan, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a judgment entered upon a verdict for the defendant and against the plaintiffs in an action for damages resulting from the death of Aubrey Jones, caused by injuries sustained by him arising out of an automobile collision.

Appellant is the widow of Aubrey Jones and filed the action against the defendant in her individual capacity and as guardian ad litem for her minor daughter. The defendant filed an answer and thereafter her motion to consolidate this cause with

the trial of Arthur Frank, the driver of the vehicle in which the deceased was riding at the time of the accident, was granted.

A résumé of the facts is as follows: On or about April 6, 1955, a collision occurred between the Frank automobile and that of the defendant at or near the intersection of Sepulveda Boulevard and Roxford Street in Los Angeles, and as a result of the injuries sustained in such accident Aubrey Jones died.

Roxford Street runs generally east and west and intersects and terminates at Sepulveda Boulevard which runs generally north and south. The evidence disclosed that Jones was riding with Frank, who was operating his own vehicle, a 1948 Chrysler convertible in a southerly direction on Sepulveda Boulevard as they were returning to Los Angeles from a trip into the Lancaster area. The defendant had been operating her vehicle, a 1949 Mercury sedan, in a westerly direction on Roxford Street, before turning left onto Sepulveda Boulevard. She then proceeded in substantially the same direction as the Frank car was traveling. After traveling some distance beyond the intersection, the defendant's car was struck from the rear by the Frank car, with the result that both automobiles left the highway.

Sepulveda Boulevard, at the time and place of the accident, consisted of three lanes. There was a stop sign on Roxford Street near the intersection in question. Traffic was light, visibility was good and the area was substantially open country.

There was a sharp conflict in the evidence as to whether the impact occurred in the center lane or the westerly lane of Sepulveda Boulevard.

Frank, the driver of the car in which Jones, the deceased, was riding, testified at the trial that he and Jones had met about 10:30 o'clock in the morning of the day of the accident at the Jones residence in Rivera, and that such meeting was not by prearrangement. The two apparently decided to go hunting in the Lancaster area. Jones had a couple of calls to make to repair some refrigerator equipment some place along the way between the home of Jones and the place where the two intended to hunt. Jones made the call or calls and performed whatever work was to be done. No part of the compensation from such work or jobs, if any, was paid to Frank, nor was there any agreement to pay Frank any compensation from said work. In Frank's deposition the following questions were asked and answers were made:

"Q. And what were you doing up there? A. Oh, business and pleasure trip.

"Q. Does that describe the trip, sir? A. I guess so.

He testified further that the business of repairing the refrigerator equipment was entirely that of Jones and not his. Frank was vague and extremely indefinite as to where any such work was done, or where any stop or stops were made. Likewise he was vague and indefinite as to what route was followed to the Lancaster area on the day in question. He did not recall whether Jones had directed the route that they had taken from the Jones home to the first stop of the day where Jones was to do some work.

In his deposition the question was put: "Q. And had you planned on some particular place that you were going to on that particular day?" and he answered, "Just to make a couple of calls with him, and possibly go up around Lancaster."

Frank also testified that he was not familiar with the area where Jones was going to make the call or calls and that Jones had assisted him as far as directions were concerned, that Jones knew where he was going and that as far as the first call was concerned Jones did the directing as to how to get there.

There was no sharing of any expenses between Jones and Frank, nor was there any reimbursement or payment of any kind to Frank by Jones.

After hunting in the Lancaster area the men started to return to Los Angeles. Frank drove the automobile all of the time

and Jones did not give any directions whatsoever as to the route to be followed on the return trip. A stop was made on the return trip and gasoline was purchased and Frank paid the charges therefor.

Frank apparently had nothing to do with the refrigerator equipment repairs and received no money therefor, nor did he have any business or other dealings with any of the people who had refrigerator equipment to be repaired.

The appellant contends that the court committed prejudicial error (1) by giving instructions on contributory negligence; (2) by giving instructions on joint venture and imputed negligence, and (3) by giving BAJI No. 131 (the mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent).

Appellant insists that in the present case the defendant did not plead, as an affirmative defense, the contributory negligence of the deceased. The judge instructed the jury as to what constitutes contributory negligence, and the law with reference to the burden of establishing such contributory negligence.

The court also instructed that if contributory negligence existed, it would have consisted of negligence on the part of Frank, the driver of the car in which the deceased was riding, and then went on to state, "and if you further find that the said Arthur Frank and the deceased were engaged in a joint venture, the contributory negligence of Arthur Frank would be imputed to the deceased. If you further find that this negligence contributed as a proximate cause to his death, then the heirs of the deceased may not recover from other person for that death."

The court also gave BAJI Instruction No. 210–E, the last paragraph of which reads as follows: "To thus impute the negligence, if any, of the driver to the deceased, who was riding in the vehicle at the time of the accident, you must find from the evidence either that the said deceased and the driver were then in joint or common possession and control of the automobile, with the two having equal rights to be heard in its control and management, *or that the driver was then acting as the agent of the deceased and within the scope of his employment.*" (Emphasis added.) The record does not even disclose a claim by the defendant that Frank was the agent of Jones and that he was driving the car as a part of his employment by Jones, let alone any evidence to that effect.

[1, 2] The matter of whether the court should have instructed the jury upon the matter of joint adventure creates a difficult problem. Normally it is a matter for the jury to decide whether a joint adventure existed. In any event, there must be some evidence which, if true, would establish a joint adventure under the law before the court can give an instruction thereon.

For the purposes of this case, it must be admitted that Frank had the actual control of his automobile—he was the driver of the same and he was in charge of it mechanically. There is no contention that the relationship of master and servant, or principal and agent, or employer and employee existed between the two men, nor was there any family relationship between them. There was no mutual financial interest, and a reading of the record discloses no evidence of any fact which might show, or tend to show, that Frank exercised, or attempted to exercise any control over Jones in what he was doing in the discharge of his work of repairing refrigerator equipment, or otherwise, and there is nothing to show that Frank had the power to exercise any control over Jones in anything Jones did or was to do. In short, Frank had no voice in any matter of Jones'. They were not partners and there was no relationship between them of any kindred identity.

[3] In the case of Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, at pages 739–741, 164 P. 385, at page 386, the court said:

"This court has but recently reiterated the well-settled rule that a guest or passenger in a vehicle driven or operated by

another is not ordinarily bound by the negligence of the driver or operator. Parmenter v. McDougall, 172 Cal. 306, 156 P. 460. In that case the negligence of a person operating a motorcycle was held not to be imputed as matter of law to his brother, who was riding as his guest on the rear seat. * * * The family relation, or the business association, therefore, does not of itself identify the plaintiff with the driver so as to impute to him the latter's alleged contributory negligence.

"The rule is otherwise, however, if the occupant of the machine exercised control over the driver thereof, or, in the eyes of the law, may be said to possess such power of control. Illustrations of the application of this doctrine are found in cases where the parties are engaged in a common or joint enterprise. Ruling Case Law, after referring to the different rules as to whether negligence may be imputed to a guest or passenger in an automobile, says: 'There seems to be no difference of opinion as to the rule that, when two persons are engaged in a joint enterprise in the use of an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint undertaking.' Volume 2, p. 1208, § 43. But in order that there be such a joint undertaking it is not sufficient merely that the passenger or occupant of the *machine indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise of riding together.* The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it. 'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and *an equal right to direct and govern the movements* and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.' (Citing cases.)" (Emphasis added.)

In Pope v. Halpern, 1924, 193 Cal. 168, at pages 173–175, 223 P. 470, at page 473, the court said:

"The rule is well established that the contributory negligence of the driver of a vehicle is not ordinarily imputable to his passenger or guest (citing cases). But an exception to this rule is made in those cases where the parties are engaged in a common or joint enterprise, and in such cases it is held that the contributory negligence of one will bar recovery by either. The decisions are not in accord as to what constitutes a joint or common enterprise, but it has been held in this state that the passenger must exercise some control over the driver thereof, or, in law, may be said to possess the right of such control, before it will be held that they are engaged in a joint enterprise. (Citing case.) In St. Louis [& S. F.] Ry. Co. v. Bell, 58 Okl. 84, 159 P. 336, L.R.A.1917A, 543, the court said: '"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."' It will be seen from these two decisions that in order that there be such a joint enterprise it is not sufficient merely that the passenger of the machine indicate the route, or that both parties have certain plans in common, such as a 'joy ride,' but the community of interest be such that the passeneger is entitled to be heard in the control and management of the vehicle. In Bryant v. Pacific Electric Ry. Co., supra, the court, after referring to the case of Wentworth v. Town of Waterbury, 90 Vt. 60, 96 A. 334, where apparently the only basis for the imputation of negligence of the driver of an automobile to the plaintiff was the circumstance that they were both engaged in the common purpose of taking two ladies for an afternoon's drive to view

a lake, said: 'In our opinion, the doctrine of imputable negligence should not be so loosely applied. To do so leaves the law in an uncertain state. The better view is expressed by Nonn v. Chicago City Ry. Co., 232 Ill. 378, [83 N.E. 924]: "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies." Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care "except so far as the latter has, willfully or by want of ordinary care, *brought the injury upon himself.*"' (Italics ours.)"

In the present case, as in the Pope case, the decedent did not have any proprietary interest in the automobile the two men were riding in as would give him a right to be heard in its management, and there is no evidence that he did actually exercise any control at any time.

In Campagna v. Market St. Ry. Co., 1944, 24 Cal.2d 304, at pages 308–309, 149 P.2d 281, at page 283, the court said:

"When two occupants of a vehicle are engaged in a joint venture or enterprise with respect to its operation, the negligence of the driver is imputable to his companion. But to constitute such a relationship, the parties must have a community of interest, in a joint or common undertaking, each exercising or having the right to exercise equal or joint control and direction. (Citing cases.) The relationship of joint venturers is that of a mutual agency, akin to a limited partnership. (Citing cases.) It is founded on contract; and the acts of the parties over a period of time may be sufficient to raise an implied agreement of joint enterprise. (Citing case.) Although a joint venture generally contemplates an equal sharing of the profits and losses in the prosecution of the common purpose (2 Rowley's Modern Law of Partnership, § 975; 33 C.J. 841, § 2), the division may be left to the agreement of the parties (citing case).

"The doctrine of imputed negligence is not to be loosely applied, and 'where there is nothing in common between the passenger and driver of the vehicle except a common destination and a common purpose in going there the negligence of the driver is not to be imputed to the passenger.' (Citing case.) The passenger must do more than to indicate the route to be traveled, and a certain plan in common is not sufficient to establish the relationship. (Citing case.) Neither family relationship between the parties, nor association together in business, is determinative of the question. (Citing cases.) And as the imputation of contributory negligence is an affirmative defense, the defendant has the burden of proof upon that issue. (Citing cases.)"

In Roberts v. Craig, 1954, 124 Cal.App. 2d 202, at pages 208–209, 268 P.2d 500, at page 504, 43 A.L.R.2d 1146, the court said:

"* * * The negligence of one person is not imputed to another non-participant except in the clearest of cases and where the interests of justice demand it. The fundamental rule is that one person, himself free from fault, shall not be required to bear the consequences of the actions of another. Vicarious liability is the exception. It is only where a person actually acts through another to accomplish his own ends that the law will or should impose such vicarious liability. Right of control over the other person is a test of the required relationship, but it is not itself the justification for imposing liability. Aside from such legal relationships as master and servant, principal and agent, etc., before the courts will find that the parties were joint adventurers there must be clear evidence of a community of interest in a common undertaking in which each participant has or exercises the right of equal or joint control and direction. (Citing cases.) A joint venture is a sort of mutual agency, akin to a limited partnership. (Citing cases.) It

is not sufficient that the parties have certain plans in common, but the community of interest must be such that the passenger is entitled to be heard in the control of the vehicle. (Citing cases.) Most of the cases indicate that the common interest must be of some business nature. 20 Minn.L.Rev. 401, 404; 16 Cornell L.Q. 320.

* * * * * *

"* * * If the parties are joint adventurers, the right to control becomes of legal significance. If they are not so engaged the mere right to control which is not exercised is not sufficient to create the vicarious liability."

In Flores v. Brown, 1952, 39 Cal.2d 622, at pages 628–629, 248 P.2d 92, at page 925, the court said:

"* * * On the other hand, it is settled that if one person is riding in another's automobile, the right to control may not be inferred merely because the trip is undertaken for the passenger's benefit and the destination is selected by him. (Citing cases.) Similarly, the right to control may not be inferred merely from the fact that one person with his own equipment is transporting another's goods. (Citing cases.)"

In Edwards v. Freeman, 1949, 34 Cal.2d 589, at pages 591–593, 212 P.2d 883, at page 884, the court said:

"To permit a finding of agency upon this evidence would be, in effect, to hold that one who performs a mere favor for another, without being subject to any legal duty of service and without assenting to any right of control, can be an agent. This is not the law. 'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' (Restatement, Agency, § 1.) 'The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control.' (Id., Comment on Subsection 1.) In the absence of the essential characteristic of the right of control, there is no true agency and, therefore, no 'imputation' of the driver's negligence to the passenger. (Citing cases.) * * * And, as said in the Marchetti case [Marchetti v. Southern Pac. Co.], supra (204 Cal. [679] at page 681, 269 P. [529] at page 530): 'The negligence of the driver of a machine * * * cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated. * * *'

"A case quite similar to the one at bar is De Soto v. Pacific Electric Ry. Co. (1920), 49 Cal.App. 285, 286, 288, 193 P. 270. From the opinion it appears that (49 Cal.App. at page 286, 193 P. at page 271) 'plaintiff on the night of the accident was riding in an automobile belonging to her brother-in-law whom she had requested to convey her, as a matter of friendly accommodation, to a nearby store. She exercised no control over the driver of the machine other than to indicate the place to which she desired to be transported. Under these conditions the journey was made to the store, and it was upon the return therefrom that the accident happened.' It was held that as a matter of law (49 Cal.App. at page 288, 193 P. at page 272) 'under the relationship shown to exist between the plaintiff and the driver * * * the facts were undisputed and a conclusion irresistibly indicated that no responsibility was fixed upon the appellant [plaintiff] for any act of negligence committed by the driver * * *.' (See, also, Bryant v. Pacific Electric Ry. Co. (1917), 174 Cal. 737, 739–740, 164 P. 385; Irwin v. Golden State Auto Tour Corp. (1918), 178 Cal. 10, 14, 171 P. 1059.)"

In Atwood v. Utah Light & Ry. Co., 44 Utah 366, 140 P. 137, at page 139, the court, quoting with approval from Cotton v. Willmar & Sioux Falls Ry. Co., 99 Minn. 366, 109 N.W. 835, 8 L.R.A.,N.S., 643, said: "'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or pur-

poses of the undertaking, and *an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.*' (Italics ours.)"

Tested by the rules of law above set forth, it is plain that in the present case there was no control by Jones over Frank in the operation of Frank's vehicle, and there is no evidence that he had any right to so control the operations of the automobile.

[4] It was appropriately stated in Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, at page 525, L.R.A.1915F, 876, "The doctrine of imputable negligence, except when countenanced by statute, is a fiction of the law which finds small favor with the courts * * *."

[5] The question, reduced to its simplest terms, is whether Jones had the legal right and authority, and therefore the correlative duty and responsibility to direct the driving of the automobile by Frank. We think that there are essential facts which are necessary to establish a joint venture which are not present in this case, and therefore the instructions on joint venture should not have been given under the circumstances.

The record is bare of any fact which might show that Jones interfered with or controlled in anywise the automobile in causing the injury or otherwise. Perhaps it is true that Jones did tell Frank where he, Jones, wanted to go, but that, under the circumstances present in this case, is not sufficient to establish a joint venture.

In Mantonya v. Bratlie, 33 Cal.2d 120, at pages 124–125, 199 P.2d 677, at page 679, our Supreme Court stated: "The task of a jury of laymen to comprehend and apply pertinent instructions is onerous enough at best; it should not be unnecessarily aggravated by loading on them a congeries of wholly inapplicable legal propositions. Such wholly inapplicable propositions should not be requested by counsel, in the first place, but if requested, it is the duty of the trial judge to scrupulously delete them from the charge finally given."

It is unnecessary to consider the other contentions of appellant as the case should be retried.

The judgment is reversed.

WHITE, P. J., and LILLIE, J., concur.

166 Cal.App.2d 294

Alfred C. ROBERTS, Plaintiff and Respondent,

v.

Alexander SALOT, Alexander Realty Co., et al., Defendants,

Alexander Salot, Appellant.

Civ. 23129.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1958.

Action for a judgment that the defendant held title to property in trust for plaintiff and directing the defendant to deed the same to plaintiff free from encumbrance upon payment of a sum of money. From a judgment for the plaintiff in the Superior Court of Los Angeles County, Kenneth C. Newell, J., the individual defendant appeals. The District Court of Appeal, Ashburn, J., held that plaintiff was entitled under the evidence to declaration of a constructive trust and that a provision of the judgment requiring defendant upon affirmance to convey the property free of any encumbrances placed thereon by the defendant required modification.

Modified and affirmed.

1. Appeal and Error ⇐931(1)

An appellate court must accept as established all facts and inferences favorable to respondent finding substantial support in the evidence.

2. Appeal and Error ⇐1010(2)

Where appellant urges the insufficiency of evidence to sustain findings, such contention requires appellants to demonstrate that there is no substantial evidence to support the challenged findings.

3. Trusts ⇐110

In action for judgment that defendant held title to property in trust for plaintiff where plaintiff had defaulted under a first trust deed and defendant agreed to cure the default and took assignment of the trust deed and the only consideration therefor was his promise to cure the default and thus forestall a foreclosure sale, defendant's immediate failure to perform which occurred within 24 hours furnished cogent evidence that he never intended to do so.

4. Mortgages ⇐369(3)

In action for judgment declaring that defendant held title to property in trust for plaintiff where defendant agreed to cure plaintiff's default on a first trust deed on the property and received an assignment of the trust deed and then permitted the property to be sold on foreclosure, "chilling" of the bidding at the sale by the defendant constituted a fraud upon plaintiff and rendered the sale subject to rescission by him.

5. Trusts ⇐100

In action for judgment that defendant held title to property in trust for plaintiff where plaintiff had defaulted under a trust deed on the property and defendant in consideration for assignment of trust deed agreed to cure the default thereunder and failed to do so and purchased the property on sale under the trust deed, a constructive trust arose in favor of the plaintiff. West's Ann.Civ.Code, § 2224.

6. Estoppel ⇐90(1)

In action for judgment that defendant held title to property in trust for plaintiff where plaintiff had defaulted under a trust deed and defendant agreed in consideration for an assignment thereof to cure the default but failed to do so and purchased the property on foreclosure sale, fact that plaintiff negotiated with the defendant for a repurchase of the property and his attorney made a formal offer did not constitute an estoppel or waiver of the alleged fraud of the defendant where nothing came of the offer.

7. Trusts ⇐100

In action for judgment that defendant held title to property in trust for plaintiff where plaintiff had defaulted under a trust deed and defendant agreed in consideration of an assignment thereof to cure the default but instead purchased the property on foreclosure sale, alleged fact that the plaintiff had no direct negotiations with the defendant which were conducted through his daughter who acted as the plaintiff's agent did not preclude recovery for the alleged fraud, since a fraud worked upon the daughter by misrepresentation or silence was worked upon her principal and the plaintiff had a right of action for redress.

8. Appeal and Error ⇐1152

In action for judgment that defendant held property in trust for the plaintiff where plaintiff had defaulted on a trust deed and defendant in consideration of an assignment thereof agreed to cure the default but instead purchased the property for himself at a foreclosure sale, a judgment requiring the defendant upon affirmance to convey the property free of any encumbrances placed thereon by the defendant would be modified by providing that if defendant was unable to comply he should pay to the plaintiff certain sums in lieu of such performance.

Max Tendler, Los Angeles, for appellant.

Jack C. Stevenson, Baldwin Park, for respondent.

ASHBURN, Justice.

Defendant appeals from a judgment declaring that any title which he holds to property known as 283 Colwood Avenue, in the city of Puente, is held in trust for plaintiff and directing that he deed same to plaintiff free of encumbrance upon pay-

ment to defendant of the sum of $2,126.66. The only contention made on behalf of appellant is that the evidence is insufficient to support the findings.

[1, 2] The reviewing court is governed by the following rules: "The appellate court must accept as established all facts and all inferences favorable to respondent which find substantial support in the evidence. 'And where appellant urges the insufficiency of the evidence to sustain the findings * * * the rule is that, "Such contention *requires defendants to demonstrate* that there is no substantial evidence to support the challenged findings." Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. (Emphasis added.) It is said in Crawford v. Southern Pac. Co., 3 Cal. 2d 427, 429, 45 P.2d 183, 184, that: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deduction for those of the trial court." ' Hartzell v. Myall, 115 Cal.App.2d 670, 673, 252 P.2d 676, 677." New v. New, 148 Cal.App.2d 372, 383, 306 P.2d 987, 994.

Thus viewed, the evidence is sufficient to establish controlling facts favorable to plaintiff. He owned and resided in the premises above mentioned. In January, 1955, in order to assist his daughter, Mrs. Alice Berryman, he borrowed from First Federal Savings and Loan Association $2,000 upon a note secured by trust deed upon the property. He gave the proceeds to the daughter, who agreed to keep up the payments on the loan. This she did for a while but became delinquent sometime in the year 1956, the loan being by the middle of the year some six months in arrears, an aggregate of $120. In October of that year the loan association gave plaintiff written notice of default and intention to sell. He contacted his daughter who told him she would take care of it. Mr. Roberts was 70 years old, apparently in poor health and of limited education, so he left the matter to the daughter to work out through another loan upon the property. She thus became his agent and was in full charge of saving the property from foreclosure; "I was letting my daughter take care of the whole thing." Her efforts to secure a new loan were unsuccessful and finally she was referred to defendant.

About the first of October she telephoned him, asking about his making a loan to bring the payments up to date and he said to come to his office and pick up the papers. This she did forthwith. He had forms at hand and prepared a note for $710 and trust deed running from plaintiff to the daughter, with an assignment on the back of the note transferring note and trust deed to defendant. This she signed on that occasion in defendant's office. He told her that she could pay this second lien note at the rate of $35 a month. Then Mrs. Berryman took the documents to her father, had him sign them and had the trust deed notarized. Later she tried to contact defendant in order to further clarify the transaction in her own mind but was unable to reach him before the evening of October 16th. The sale was set for the 17th. He told her that "it is kind of late, but I will take care of the papers." She further testified: "Q. Did he tell you what this note was for? A. Well, it was for a second trust deed to bring the payments up to date to First Federal, the payment that was past due." Also: "Q. Mrs. Berryman, at any of the conversations that you had with Mr. Salot, isn't it a fact that he told you that he does not lend money? He would only buy property or trust deeds? * * * A. No. What he told me was he was making this loan here. * * * A. Well, he told me that—how much was past due and how much would—he said that there was costs and stuff on that and that then it was all added up and it was the amount that was on the loan." Defendant had previously contacted the loan

company and had verified the amount past due. He testified that he gave Mrs. Berryman $100 in cash for the assignment of the trust deed, obtaining no receipt therefor and asking for none. She denied this and said that he paid her nothing. Defendant further testified that he gave nothing to plaintiff Roberts for the trust deed or its assignment. The court specifically found that defendant "paid neither the plaintiff nor the plaintiff's daughter, Alice Berryman, nor anyone else, any sum of money or any other consideration of any nature whatsoever, for said second deed of trust." Mrs. Berryman relied upon defendant's promise to bring the payments up to date and the evidence shows that the holder of the first trust deed would have consented to a curing of default in that manner and at that late date.

[3] Defendant having paid no cash for the trust deed, the only consideration for same was his promise to cure the default and thus forestall the foreclosure sale. His immediate failure to perform (which occurred within 24 hours) furnishes cogent evidence that he never intended to do so. Longway v. Newbery, 13 Cal.2d 603, 611, 91 P.2d 110; Williams v. Hasshagen, 166 Cal. 386, 392, 137 P. 9; Kejr v. Construction Engineers, Inc., 128 Cal.App.2d 396, 400, 275 P.2d 529; Jarkieh v. Badagliacco, 75 Cal. App.2d 505, 507, 170 P.2d 994.

[4] On the 17th defendant drove by the property, made an appraisal sufficient for his own purposes and went thence to the sale. He bid it in for $2,875, but as he later stated to plaintiff's attorney, Mr. Netzley: "[T]hat figure that was bid did not represent his total expenditures in purchasing the property because he had to some sums to the fellows that were bidding on the same property so that he would be able to purchase it." He also told the attorney that he had had an offer of $6,500 for the property and would re-sell it to plaintiff Roberts for $4,500. Defendant himself placed a first lien of $2,650 upon it and a second of $3,250. The court found the value to be not less than $5,000. This chilling of bidding constituted a fraud upon plaintiff and rendered the sale subject to rescission by him. Jenkins v. Frink, 30 Cal. 586, 591–592; Packard v. Bird, 40 Cal. 378, 383; Crawford v. Maddux, 100 Cal. 222, 223 225, 34 P. 651; 6 Cal. Jur.2d § 15, p. 434; 5 Am.Jur., § 27, p. 464; 30A Am.Jur., § 99, p. 958, § 98, p. 958; 7 C.J.S. Auctions and Auctioneers § 7(e) (7) p. 1255; 50 C.J.S. Judicial Sales § 22d p. 608.

[5] On the same day as the sale but after its completion defendant recorded the second trust deed which he had received from Mrs. Berryman and later used it as a basis for demanding from Title Insurance & Trust Company, as trustee under the first trust deed, the surplus of $748.34 arising from the foreclosure sale. Having breached the promise which formed the only consideration for assignment of the second trust deed to him, and having paid no money for it, defendant had only nominal title thereto. However, he represented to Title Insurance & Trust Company that he was the owner of that second lien and entitled to receive the surplus. Having been told that he should get a release from Roberts, defendant went to see him on November 4th, told him that he, defendant, was the owner of the property and wanted a release signed. When plaintiff demurred, defendant said: "You've got no rights left in the place anyway"; "Don't make no difference whether you sign the papers or not"; "You will just save yourself some trouble if you do." Plaintiff knew nothing of the existence of a surplus from the sale or of his own right to claim it if one there was. Though he read the instrument, he, with his limited education and his ignorance of the fact of a surplus, did not understand its full import and signed it believing he had lost the property and that the document referred to his surrendering possession or paying defendant $20 a month as rent. Plaintiff explained: "[T]hese legal documents, I get so confused when I read them that I don't know what they mean or anything about them. * * * [T]his is the first legal procedure I was ever in in my life." Defendant then collected the surplus

from the trustee and again encumbered the property as above stated.

Clearly a constructive trust arose in favor of plaintiff pursuant to § 2224, Civil Code, which says: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

[6] This release was signed about November 5, 1956; plaintiff gave notice of rescission on January 7, 1957, and filed this action on February 5, 1957. There was no undue delay on plaintiff's part. Although he negotiated with defendant in November for a re-purchase and his attorney made a formal offer, nothing came of it, no estoppel or waiver of the fraud grew out of it, and indeed it is not contended that there was any such equitable defense available to defendant.

Defendant testified that his occupation consisted primarily of "buying distressed property"; his hand was undoubtedly faster than the eyes of plaintiff and his daughter, but not fast enough to escape the penetrating gaze of the trial judge.

[7] Most of the arguments made by appellant's counsel are directed toward specific findings and the claim that they are not supported by the evidence. The burden of the argument is that the court found that plaintiff was induced to do certain things and plaintiff was defrauded, that this could not be so because plaintiff did not personally participate in any transactions with defendant. The following are examples: "Finding Paragraph III is not supported by evidence in the further particular wherein the Court finds that the plaintiff-respondent, in consideration of defendant-appellant's promise, executed the second deed of trust to his daughter"; "The evidence clearly shows that there was no understanding or agreement of any kind or nature whatsoever at any time between the plaintiff-respondent and the defendant-appellant"; "The evidence clearly shows that there was no agreement or understanding at any time or on October 16, 1956, the night before the sale which was to be held on October 17, 1956, between the defendant-appellant and the plaintiff-respondent." These contentions ignore the fact that although the daughter had the direct dealings with defendant she was acting as plaintiff's agent throughout. A fraud worked upon her by misrepresentation or by silence was worked upon her principal and he has a right of action for redress. Lewis v. McClure, 127 Cal.App. 439, 447, 16 P.2d 166; Simone v. McKee, 142 Cal.App.2d 307, 313, 298 P.2d 667; Odell v. Frueh, 146 Cal.App.2d 504, 509, 304 P.2d 45; 23 Cal.Jur.2d, § 32, p. 78; 2 Am.Jur. § 385, p. 302; 23 Am.Jur. § 181, p. 1001; Restatement of Agency 2d, § 315, p. 56.

[8] The judgment requires modification in one respect. It declares that any title that appellant holds to the subject property is held in trust for plaintiff and "[t]hat the defendant within 30 days after the signing of this decree execute and deliver to the plaintiff a quitclaim deed or other sufficient deed conveying to the plaintiff the above entitled property free of any encumbrance placed thereon by defendant, upon payment by plaintiff to defendant of $2,126.66." Appellant testified that he bid in the property for $2,875 and in the latter part of October obtained a loan of $2,650 from Valley Savings and Loan upon a first trust deed; that he also placed a second lien of $3,250 on the property, payable at the rate of $30 a month; that there is approximately $2,500 outstanding on the first lien; that the second was given as security for another obligation of his; that he received $2,650 less expenses upon the first trust deed; that the second lien was, as far as he was concerned, an accommodation security which he could "take off any time"; "I can substitute that, yes."

A question thus arises whether appellant will be able upon affirmance of the judgment to convey the property "free of any encumbrance placed thereon by defendant." If he cannot do so or claims inability to comply,

additional and complicated litigation may ensue in order to assure to plaintiff the relief to which he is now entitled. Accordingly the judgment is modified by adding to paragraph 2 thereof the following language: "In the event that defendant, upon or after the time that this judgment becomes final, is unable to convey or claims that he is unable to convey title free of said encumbrances, he shall forthwith pay to plaintiff the full amount of principal and interest then due upon either or both of said encumbrances which he cannot remove or claims he cannot remove from the premises, plus any taxes which have become payable since defendant's purchase of the property and remain unpaid; but defendant will be entitled to offset against said last mentioned sums the aforesaid amount of $2,126.66."

As thus modified the judgment is affirmed. Respondent to recover costs on appeal.

FOX, P. J., and HERNDON, J., concur.

166 Cal.App.2d 240

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Redding HAZELIP, Defendant and Appellant.

Cr. 6129.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1958.

Rehearing Denied Jan. 7, 1959.

Defendant was convicted of robbery. The Superior Court of Los Angeles County, Allen T. Lynch, J., entered judgment, and the defendant appealed from the judgment of conviction and from the sentence. The District Court of Appeal, Fourt, J., held that evidence sustained finding of Superior Court that confession was freely and voluntarily given by defendant, so as to be admissible.

Judgment of conviction affirmed, and purported appeal from sentence dismissed.

1. Criminal Law ⇐519(8)

A confession made by one in illegal detention is not, for that reason alone, made inadmissible.

2. Criminal Law ⇐519(8)

Fact that when defendant made confession he was detained in alleged violation of sections of the Penal Code providing that defendant must in all cases be taken before magistrate without unnecessary delay, and, in any event, within two days after his arrest, and that when arrest is made without warrant, person arrested must, without unnecessary delay, be taken before nearest or most accessible magistrate in county in which arrest is made, and complaint stating charge against the person must be laid before such magistrate, did not render confession inadmissible in robbery prosecution. West's Ann.Pen. Code, §§ 211, 825, 849; U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐531(1)

In robbery prosecution, burden was on prosecution to show that confession offered by prosecution was freely and voluntarily made by defendant. West's Ann. Pen.Code, § 211.

4. Criminal Law ⇐736(2)

Whether confession was freely and voluntarily made by defendant, so as to be admissible, is for trial court to determine in the first instance.

5. Criminal Law ⇐1158(4)

It is not within province of reviewing court to say that trial court committed error in admitting a confession of guilt, as having been freely and voluntarily made by defendant, unless such error appears as a matter of law from record presented.

6. Criminal Law ⇐531(3)

In robbery prosecution, evidence sustained trial court's finding that confession

was freely and voluntarily made by defendant, so as to be admissible, though confession was completed by defendant, who was a narcotic addict, after he had been given narcotics by doctor called by officers. West's Ann.Pen.Code, § 211; U. S.C.A.Const. Amend. 14.

7. Criminal Law ⇐1023(10)

An appeal does not lie from a sentence.

Cornell Ridley, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction and from the "sentence made and entered" for first degree robbery.

An information was filed in Los Angeles county charging the defendant with armed robbery in violation of section 211 of the Penal Code on or about June 10, 1957, in that he took $3,300.00 from Irene Krichbaum, and further alleging two prior convictions of the defendant, one for sale and possession of narcotics prosecuted in the federal court in New York in 1943, and that he served a term in prison therefor; and one for conspiracy to violate the narcotics law in the same court in 1947, and that he served a term in prison therefor. The defendant pleaded not guilty and denied the prior convictions, however, he subsequently admitted the two prior convictions. A jury found the defendant guilty of robbery in the first degree and also found that he was armed with two revolvers at the time of the commission of the offense. The court sentenced the defendant to the state prison and this appeal followed.

A résumé of the facts most favorable to the prosecution, and facts which the jury might well have found to be true, is as follows: On or about June 9, 1957, a man by the name of Holland asked the defendant if he, the defendant, knew of a place he and a man by the name of Teresi could rob. The defendant was formerly employed as a waiter at the Miramar Hotel in Santa Monica, and knew of the location of the auditor's office where the hotel money was kept, and the defendant suggested that the hotel be chosen. Plans for the robbery were completed at the defendant's apartment. Pursuant to the plans, Holland and Teresi met at the defendant's apartment about 9:30 o'clock a. m. the next day, June 10, 1957. Susan Matlock and James Shannon, acquaintances of the defendant, had arrived at the defendant's apartment between 9:00 and 9:30 o'clock a. m., at a time when no one else was present in the apartment. The defendant returned to his apartment and shortly thereafter Holland and Teresi arrived. The defendant, Holland and Teresi went into the bathroom in the apartment and talked together. Holland, at that time, had two loaded revolvers in his possession. He gave one to Teresi and retained the other. The defendant, Holland and Teresi left the apartment about 9:30 o'clock a. m., in Holland's automobile with the defendant doing the driving. They returned to the defendant's apartment shortly thereafter and left again in about ten or fifteen minutes.

Holland's automobile was driven to the vicinity of the Miramar Hotel, and Holland and Teresi got out and went into the hotel. The defendant remained in the automobile. In about fifteen minutes Holland and Teresi returned to the automobile and stated that they had been unable to locate the auditor's office. The three of them then drove to a drug store, had some refreshments, and returned to the hotel. Holland and Teresi entered the auditor's office in the hotel at about 11:45 o'clock a. m.

Teresi pointed a gun at Mrs. Krichbaum, an assistant auditor in the office, and asked where the safe was located. She opened the safe and Holland removed some money and a metal box from the safe, and at the same time Teresi took currency from the cash drawer. Whatever was stolen was

taken without the permission of Mrs. Krichbaum, and she told where the money was kept only because she was frightened. Upon leaving the hotel the second time, Holland and Teresi entered the automobile of Holland, with the defendant as the driver, and they then proceeded together to the defendant's apartment.

The time lapse from their leaving the apartment the second time to their return after the robbery was about thirty to forty-five minutes. Holland and Teresi entered the apartment first, followed soon after by the defendant. Susan Matlock and Shannon were still there. Holland put two guns into his pockets, and Holland and Teresi got down on the floor and emptied the money from their pockets. The defendant joined them, but did not put any money on the floor. Holland had a metal box which contained money rolls. The money was then evenly divided between Holland and Teresi and the defendant, each getting about $900.

Holland and Teresi then left the apartment. Shannon also left and called for a taxi cab. The defendant asked Susan Matlock if she cared to count his money, and she replied that she did not. Susan Matlock asked the defendant where the money came from and said that the defendant replied, "it was none of my business, and that he didn't discuss his capers with me or any other woman." Shortly thereafter a taxi cab arrived and the defendant, Shannon and Susan Matlock left in it.

On June 26, 1957, at about 12:45 o'clock a. m., while Holland was driving Teresi home in the former's automobile, he and Teresi were arrested. The arresting officers searched the automobile and found two loaded revolvers, one in Holland's pocket and the other in a pocket of a jacket in the car. On July 11, 1957, while in custody, Holland made and signed a statement confessing his guilt in the robbery.

The defendant was arrested on July 10, 1957, at about 9:00 o'clock p. m., by an officer of the Santa Monica police department. The defendant was then released to the custody of the Los Angeles police department, at the latter's request upon another charge, on July 16, 1957. On July 19, 1957, a complaint was filed and a warrant for the defendant's arrest was issued. Pursuant to the warrant one Kocher, then an officer of the Santa Monica police department, arrested the defendant on July 19, 1957. The defendant was arraigned a few days after his arrest. Between the time of his arrest on July 10th, and his re-arrest on July 19th, the defendant was questioned about the robbery between five and fifteen times. During these occasions he made no admissions concerning the robbery.

The defendant appeared to be a narcotic addict, however, he made no request for any narcotics prior to July 19, 1957. He was asked by the arresting officer how he was getting along without narcotics, and the defendant replied, "'Oh, just fine,'" and remarked that he was able to "handle or control the situation." The defendant later admitted that he had, at the time of his arrest, concealed some narcotics in one of his body cavities and had been using such narcotics while in jail.

On July 19th, while the officers were talking with the defendant generally about narcotics, the robbery and other related matters, the defendant stated that he felt ill, and said, "'I will tell you what you want to know if you can help me out.'" The police told the defendant, "'we can't guarantee we can give you any narcotics, but we can call a doctor, and it is up to him.'"

A stenographer for the Santa Monica police department was called into the room to record the defendant's statement. The taking of the statement of the defendant was then interrupted by the arrival of Dr. Robert Vock at about 6:00 o'clock p. m. The doctor did not examine the defendant but did ask the defendant if he would "'like a drug which will make you *fell* better, but which is not an opiate, which is not a narcotic?'" The defendant refused any such drug and asked the doctor to

give him some morphine. The doctor left without giving the defendant anything.

Officer Kocher then told the defendant that they would attempt to obtain another doctor. Pursuant to the request of the officer for a doctor, Dr. H. W. Seiger was called by the Emergency Relief Panel of the Los Angeles County Medical Association and was asked to go to the police station, which he did. When the doctor arrived at the station the defendant's statement was in the course of being taken. The doctor testified that he asked what the defendant complained about and was told the defendant was a narcotic addict, and he further stated that as he recalled, the officer said, "in order to question him, they had to make him feel better; that he hadn't had anything for some time, and if I would give him an injection, they would appreciate it." Officer Kocher recalled that the doctor examined the defendant and said he would give him some morphine, but neither the officer nor his partner, who were both present in addition to the defendant and the doctor, told the doctor to give the defendant morphine so that they could get a statement from him. The doctor testified that in his opinion, the defendant was a narcotic addict and was at the time suffering from withdrawal pains. The defendant requested several grains of narcotics and the doctor finally gave him half a grain of morphine sulphate, and the defendant administered this drug to himself. The doctor left about 8:00 o'clock p. m.

The interview with the defendant continued until after 9:00 o'clock p. m. The defendant was then returned to his cell, and upon his request was given a shower bath and shave, and was permitted to clean up. The two officers who had questioned the defendant went out to eat and returned to the police station at about 11:00 o'clock p. m.

The statement was typed soon thereafter and the defendant was handed a copy which he read. He corrected the statement by inserting in his own handwriting the words, " 'Holland asked me if I knew a place he and Teresi could rob and I said yes,' " following the answer "yes" to the question, "On June 9th, Sunday, of this year, did you talk to anyone about a robbery?" The defendant told officer Kocher of this omission prior to writing it in, and was told, "Well, if that is true, just write it in." No promise of reward or immunity was made to the defendant, nor was any force or violence, or threat thereof, used with respect to the defendant. The defendant signed the written statement about 11:30 o'clock p. m. He had been shown portions of statements made by Holland, Teresi and Susan Matlock.

Susan Matlock testified that after she received a subpoena relative to the trial of the defendant, she received a letter from him, and that although the original letter was lost she recalled that it contained in part a statement that the defendant "wouldn't have broken and given in to the authorities if he hadn't seen my statement. He had seen the other statement that was signed, but when he had seen mine, it broke him down because he thought I was good people, and he didn't think that I would ever sign a statement against him, and that he hoped that I could smile and feel good while I was walking around."

The defendant did not take the witness stand to say that what was in the confession was not true and correct, or otherwise. The defendant did call as a witness Holland, who, by his testimony, repudiated a former statement which he had made to the police to the effect that the defendant was implicated in the robbery, and added that he and Teresi had planned the robbery, that they had not discussed it with the defendant and that he did not know that the defendant had previously worked at the hotel.

The defendant now contends that the court erred in admitting the defendant's full and complete confession into evidence in that it was obtained in violation of the Fourteenth Amendment of the United States Constitution (due process clause), and further that it was in violation of sections 825 and 849 of the Penal Code.

Section 825 of the Penal Code provides in part, "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays * * *."

Section 849 of the Penal Code, as it read at the time of the acts in question, provided: "When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person, must be laid before such magistrate."

[1, 2] The law in California is settled to the effect that a confession made by one in illegal detention is not, for that reason alone, made inadmissible. Rogers v. Superior Court, 46 Cal.2d 3, 10, 291 P.2d 929; People v. Bashor, 48 Cal.2d 763, 765, 312 P.2d 255.

[3] The burden is upon the prosecution to show that the confession offered was freely and voluntarily made, and such a showing was made in this case. A delay in the arraignment is only one of the factors which may be considered by the trial court in ascertaining and determining whether the confession was freely and voluntarily made.

The rule in the federal courts is different, although the United States Supreme Court in Gallegos v. Nebraska, 342 U.S. 55, pages 63–64, 72 S.Ct. 141, 146, 96 L.Ed. 86, said:

> "* * * The rule of the McNabb case [McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819] * * * is not a limitation imposed by the Due Process Clause * * *. Compliance with the McNabb rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state."

See, also, Crooker v. California, 356 U.S. 433, 78 S.Ct. 1287, at page 1291, 2 L.Ed.2d 1448, where the court said:

> "At times petitioner appears to urge 'a rule' barring use of a voluntary confession obtained after state denial of a request to contact counsel regardless of whether any violation of a due process right to counsel occurred. That contention is simply an appeal to the supervisory power of this Court over the administration of justice in the federal courts. See McNabb v. United States, 1943, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, which, significantly enough, petitioner cites. The short answer to such a contention here is that this conviction was had in a state, not a federal, court."

The California Supreme Court stated in Rogers v. Superior Court, supra, 46 Cal.2d 3, at page 10, 291 P.2d 929, at page 933, that, "A pre-trial confession is admissible, so far as due process is concerned, if it is voluntarily made." The court also pointed out in the cited case that (46 Cal.2d at page 10, 291 P.2d at page 933):

> "* * * Since the McNabb case, the state courts that have had occasion to re-evaluate their test of admissibility as it applies to a confession made during illegal detention continue to treat delay in arraignment as only one of the factors to be considered in determining whether the statement was voluntarily made. Apparently none of the states following the rule excluding illegally obtained evidence have adopted the rule of the McNabb case; and we are not disposed to adopt it." See also, People v. Bashor, 48 Cal.2d 763, 765, 312 P.2d 255; People v. Tipton, 48 Cal. 2d 389, 393–394, 309 P.2d 813.

The admitting of the confession under the circumstances of this case did not violate the due process clause of the Fourteenth Amendment of the United States Constitution.

[4, 5] The confession in the present case was, in our opinion, freely and voluntarily made, without any previous inducement or by reason of any intimidation or threat. Whether a confession is of the character as just stated is for the trial court to determine in the first instance. People v. Mehaffey, 32 Cal.2d 535, 548, 197 P.2d 12. The rule which this court is to follow in reviewing the matter was well stated in People v. Lapin, 138 Cal.App.2d 251, at page 263, 291 P.2d 575, at page 583, as follows:

> "* * * Discretion is vested in the trial court to determine whether or not a confession is admissible and the jury under proper instructions, are the sole judges of the credibility of witnesses in regard to the matter, People v. Oliveria, 127 Cal. 376, 381, 59 P. 772. It is not within the province of a reviewing court to say that the trial court committed error in admitting a confession of guilt unless such error appears as a matter of law from the record presented, People v. Lehew, 209 Cal. 336, 341, 287 P. 377 * * *."

[6] The rule governing the sufficiency of the evidence to sustain a verdict was stated in the often quoted case of People v. Newland, 15 Cal.2d 678, 681–682, 104 P.2d 778, and there is no reason to quote the rule here. The evidence in this case is, in our opinion, overwhelming, rather than merely clearly sufficient.

In short, the defendant in this case was a narcotic addict; he was suffering from withdrawal pains after having consumed all of the narcotics which he had surreptitiously taken into the jail in one of his body cavities at the time of his arrest. He stated, when the officers were questioning him, "* * * I'm sick. I'm down. I will tell you what you want to know if you can help me out." The officer stated, "Well, we can't guarantee we can give you any narcotics, but we can call a doctor, and it is up to him." The defendant then started to make the statement, and completed it after receiving the requested narcotics. About two hours later, after he had cleaned up, showered and shaved, he was presented with a typewritten copy of the statement and protested that it was incorrect in one aspect. He thereupon corrected it in his own handwriting, and signed the statement as corrected. There is no evidence that he was suffering from withdrawal pains at the time of correcting and signing the written statement; on the contrary it was indicated that he was in full possession of his faculties at such times. He later indicated that he never would have confessed but for the statement which was made by Susan Matlock, and which was shown to him during the course of the investigation.

The case of Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479, cited by the defendant did not involve the question of due process, but rather involved the interpretation and application of the federal rules of criminal procedure. None of the other cases cited by the defendant are, in our opinion in point.

[7] There is no appeal from a sentence. People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29.

The judgment of conviction is affirmed. The purported appeal from the sentence is dismissed.

WHITE, P. J., and LILLIE, J., concur.

166 Cal.App.2d 410

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ronald James MORAN, also known as Jim Moran, Eugene Zarcone, Harry Hubbard, Ralph James Jackson, also known as Jim Jackson, Edwin Elmer Berry, also known as Ed Berry, and Jack T. Way, Defendants,

Eugene Zarcone, Harry Hubbard and Ralph James Jackson, also known as Jim Jackson, Defendants and Appellants.

Cr. 1357.

District Court of Appeal, Fourth District, California.

Dec. 19, 1958.

Hearing Denied Feb. 11, 1959.

Defendants were convicted of conspiracy to cheat and defraud by criminal means, and to obtain money and property by false pretenses and by false promises with intent not to perform such promises. The Superior Court of San Diego County, William P. Mahedy, J., entered an order denying the motion of certain of the defendants for a new trial, and they appealed. The District Court of Appeal, Shepard, J., held that it was not necessary to prove that defendants entered into a concrete written agreement or gathered together at one time for a mutual and immediate discussion and agreement, and that evidence sustained convictions.

Order affirmed.

1. Conspiracy ⇐23

A criminal "conspiracy" is an agreement to commit a crime or do any other act denounced by statute, and gist of the offense is the unlawful agreement between the conspirators to do an act contrary to law, accompanied by an overt act to at least start to carry conspiracy into effect. West's Ann. Pen.Code, § 182.

See publication Words and Phrases, for other judicial constructions and definitions of "Conspiracy".

2. Conspiracy ⇐27

A conspiracy comes into existence in form punishable by law only when some overt act is committed tending to carry the common purpose into effect. West's Ann. Pen.Code, § 182.

3. Conspiracy ⇐24

In a conspiracy prosecution, it is not necessary to prove that parties entered into a concrete written agreement or that all the parties gathered together at one time for a mutual and immediate discussion and agreement. West's Ann.Pen.Code, § 182.

4. Conspiracy ⇐47

It is sufficient to warrant conviction for conspiracy, if, by either direct or circumstantial evidence, or both, trier of fact is convinced beyond reasonable doubt that unlawful agreement did, in fact, come into existence and that, while it was still in existence, an overt act pursuant to the unlawful conspiracy purpose was committed. West's Ann.Pen.Code, § 182.

5. Conspiracy ⇐47

Generally, conspiracy can only be established by circumstantial evidence, and therefore it is not necessary to show that parties met and actually agreed to undertake performance of the unlawful acts, or that they had previously arranged a detailed plan for execution of the conspiracy. West's Ann.Pen.Code, § 182.

6. Conspiracy ⇐47

In prosecution for conspiracy to cheat and defraud by criminal means and to obtain money and property by false pretenses and by false promises with intent not to perform such promises, evidence sustained implied finding of trial court that one of the defendants, who allegedly came in only after commencement of the alleged conspiracy, acted with other members of the conspiracy in furtherance of its purposes and with knowledge of the existence of the conspiracy, so as to be guilty as a member of the conspiracy. West's Ann.Pen.Code, § 182, subd. 4.

7. Conspiracy ⇐40

Where conspiracy has already been formed and, at a later date, a stranger to the original conspiracy associates himself with the conspirators, and, with knowledge of

the conspiracy, joins with the others in committing overt acts in furtherance of the unlawful purpose, he is guilty as a member of the conspiracy. West's Ann.Pen.Code, § 182.

8. Conspiracy ⇐44½

One, who has joined a criminal conspiracy, can only effectively withdraw therefrom by some affirmative act bringing home the fact of his withdrawal to his confederates, and unless there is some affirmative act bringing home the withdrawal to the knowledge of his confederates, conspiracy, once established, will be presumed to continue until ends are accomplished or its abandonment is established. West's Ann. Pen.Code, § 182.

9. Conspiracy ⇐47

Evidence sustained convictions for conspiracy to cheat and defraud by criminal means, and to obtain money and property by false pretenses and by false promises with intent not to perform such promises. West's Ann.Pen.Code, § 182, subd. 4.

Minsky & Garber, Bernard W. Minsky, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

SHEPARD, Justice.

Defendants were charged with others by indictment with the crime of conspiracy "to cheat and defraud by criminal means, and to obtain money and property by false pretenses and by false promises with intent not to perform such promises, in violation of section 182, subdivision 4 of the Penal Code * * *".

The cause was tried before the court sitting without a jury. Defendants Moran, Berry, Zarcone, Hubbard and Jackson were found guilty as charged. Probation was granted to all of the convicted defendants for a period of three years on condition that they spend the first eight months in the sheriff's custody, that they pay certain fines, and that they perform certain restitution in amounts fixed by the court in the judgment. An appeal was taken by Zarcone, Hubbard and Jackson from the order denying a new trial, but Zarcone has abandoned his appeal so that the appeal of only Hubbard and Jackson is before the court at this time.

The first specification of error is that there was no sufficient evidence from which the court could lawfully find that the appellants intentionally entered into a conspiracy with any persons to cheat and defraud as indicated by the indictment.

The cause was in trial for approximately one and a half months, 57 witnesses were examined, and the transcript covers nearly 3,500 pages.

A review of the evidence shows that defendants Moran and Zarcone started a used-car business in San Diego in the fall of 1956, which was moved to another location with an additional partner (not here charged) in February, 1957, and that this business continued at least until the month of May thereafter. To outward appearance this was a legitimate business.

However, the evidence shows that by a systematic use of false advertising, with full knowledge of its falsity and intent to use it falsely, they induced customers to come to the used-car lot with the idea that they could purchase a car with a $5 down payment. This intent was made clear not only by the pattern of conduct shown through dozens of transactions produced in evidence, but was also directly testified to by a salesman who worked on the lot with these defendants and who heard instructions given at sales meetings. A fair interpretation of the evidence shows that the trial court was fully justified in believing that the advertisement was pure "come-on", with no intent of performance or truth, and that both of these defendants over many weeks of daily work in the business were fully aware of that fact.

The evidence further shows that once in the clutches of the salesman the prospective buyer was systematically and intentionally fed false and misleading information, both of existing facts and of intended future conduct by the firm which the salesman knew

was never intended to be performed. This consisted of many different types of representation, including what could or would be done in refinancing, as to what amounts cars would be sold for, and by obtaining customers' signatures on blank contracts and later filling in amounts far different than those orally discussed. Space does not here permit the recounting in even sketch form all of the many transactions, details of which were received in evidence. However, the recounting of two will give a sufficient indication of the general pattern of conduct which marked them all.

George Vogel, a baker, saw the advertisement, responded, located a car on the lot marked $495, had the price confirmed by a salesman, and was transferred to the tender ministrations of Jackson. Jackson put a price of $785 on the purchase order and when Vogel noticed it and objected, Jackson said the salesman was a new man and just didn't know. He allowed Vogel $300 in trade on Vogel's Studebaker. Vogel told Jackson he could only pay $30 per month, and Jackson said his firm would carry the financing. He persuaded Vogel to borrow $400 from another source, which Vogel paid to Jackson. The same afternoon Jackson again phoned Vogel and demanded $184 more. Finally, Vogel examined his purchase order and discovered that the car he originally thought he was buying for $495 had been sold to him at the price of $1,385, and instead of $30 a month his total payments, including the payments on the $400 he had borrowed, were $53.87.

Manuel Anthony Zaragoza, a Navy truck driver, saw the "$5 down" signs, came to the lot, met a salesman, told him he could pay only $70 per month, selected a car at a purchase price of $2,195, and Jackson was introduced as credit manager. Jackson said "I am a loan Company" and would loan Zaragoza sufficient for a down payment. Jackson induced Zaragoza to sign a check for $584.80 although Zaragoza stated he had no money in the bank. He was then induced to sign a blank contract. He paid Jackson $100. Later, he borrowed $585 from a loan company and paid it to Jackson but had trouble getting back the $584.80 check. Jackson assured Zaragoza the payments on the balance of $1,600 would be $50 per month but Zaragoza later discovered the payment had been written in at $70.94 per month. He returned the car for repairs. Returning for it, he found it out for sale and an argument ensued. Zaragoza's total monthly payments ended up at $103 per month, counting the payments to the loan company.

It is understandable that occurrences of this kind might happen once in a great while through misunderstanding, but with dozens of this kind of transactions occurring over a period of a few weeks and with the pattern similar in each of them; with these defendants working together on the same lot with an agreement between them to split their commissions, plus other evidence from within the organization itself in which the whole plan of operation was loosely outlined by glib instructions on how to lie and what steps to take to enmesh a customer; with conferences going on back and forth on purchases of this kind; with this kind of a pattern between these defendants and the owners and other salesmen on the lot, it was not unreasonable for the trier of fact to be convinced beyond a reasonable doubt that those within the organization were conspiring together to cheat and defraud in the manner described in the indictment. Defense counsel say "One cannot condone the acts of Appellants", but primarily contend against the sufficiency of the evidence to show conspiracy.

[1] A criminal conspiracy is an agreement to commit any crime or do any other act denounced by the statute. The gist of the offense is the unlawful agreement between the conspirators to do an act contrary to law, accompanied by an overt act to at least start to carry the conspiracy into effect. Penal Code, § 182; People v. Curtis, 106 Cal.App.2d 321, 325, 235 P.2d 51.

[2–5] It comes into existence in the form punishable by law only when some overt act is committed tending to carry the common purpose into effect. It is not nec-

essary to prove that the parties entered into a concrete written agreement or even that all the parties gathered together at one time for a mutual and immediate discussion and agreement. It can happen that the agreement be arrived at in piecemeal fashion. It is sufficient if by either direct or circumstantial evidence, or both, the trier of fact is convinced beyond a reasonable doubt that the unlawful agreement did, in fact, come into existence and that while it was still in existence an overt act pursuant to the unlawful conspiracy purpose was committed. People v. Goldberg, 152 Cal.App.2d 562, 568, 314 P.2d 151; People v. Curtis, supra; People v. Jones, 136 Cal.App. 722, 726, 29 P.2d 902; People v. Fratianno, 132 Cal.App.2d 610, 624, 625, 282 P.2d 1002.

"As a general rule, a conspiracy can only be established by circumstantial evidence 'for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal.Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan * * * for the execution of the conspiracy'." People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17, 19.

[6, 7] Jackson contends he only came in after the commencement of the conspiracy and that, therefore, he was only guilty of independent unlawful acts. The evidence sufficiently supports the implied finding of the court that Jackson did act with other members of the conspiracy in furtherance of its purposes and with knowledge of the existence of the conspiracy. Where a conspiracy has already been formed and at a later date a stranger to the original conspiracy associates himself with the conspirators, and with knowledge of the conspiracy joins with the others in committing overt acts in furtherance of the unlawful purpose, he is guilty as a member of the conspiracy.

"It is of course true that mere association with the perpetrator of a crime is not sufficient to prove a criminal conspiracy. Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724. An entirely different situation may arise, however, when it is shown that a conspiracy is already in existence and that acts are being committed in furtherance thereof." People v. Griffin, 98 Cal.App.2d 1, 39, (17), 219 P.2d 519, 542.

[8] Jackson also contends that he withdrew from the conspiracy and therefore should be exculpated from responsibility therefor. The evidence shows that Jackson was actively identified with at least 14 of the transactions detailed in the testimony, and the evidence is also sufficient to support the finding that he was fully aware of the existence of the conspiracy during most of those transactions. There was no conclusive proof that Jackson ever withdrew from the conspiracy at any time but, even if he had withdrawn, he had already committed acts from which the jury were entitled to conclude that he was actively participating in the conspiracy with knowledge of its purposes.

"* * * [O]ne who has joined a criminal conspiracy can only effectively withdraw therefrom by some affirmative act bringing home the fact of his withdrawal to his confederates. 'Some affirmative act bringing home the withdrawal to the knowledge of his confederates is necessary, otherwise the conspiracy once established will be presumed to continue until the ends are accomplished or its abandonment established.' (Citing cases.)" Loser v. Superior Court, 78 Cal.App.2d 30, 32(1), 177 P.2d 320, 321.

[9] The order denying the motion for new trial is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

166 Cal.App.2d 515

Marvyn M. OVERMAN, Plaintiff and Appellant,

v.

Elvin M. BRIGHT, also known as E. M. Bright; Jean G. Bright, Bright Laboratories, John Doe I through John Doe X, Jane Doe I through Jane Doe X, and Doe Corporation I through Doe Corporation X, Defendants,

Elvin M. Bright and Jean G. Bright, Respondents.

Civ. 23108.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1958.

Action for a declaration that plaintiff and a defendant were partners, and for an accounting, or in the alternative for reasonable value of services rendered. The Superior Court, Los Angeles County, A. E. Paonessa, J., entered judgment adverse to plaintiff and he appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding that plaintiff had been compensated for all services rendered.

Affirmed.

1. Evidence ⇐129(6)

In action for a declaration that plaintiff and defendant were partners, and for an accounting, evidence to the effect that in prior years defendant had entered into an oral agreement of partnership with a named person and later denied the agreement, and to the effect that defendant had promised another person an interest in defendant's laboratories, was properly excluded, in absence of proof or offer of proof of any common plan, scheme, habit, or usage, since it was not relevant on issue of whether defendant had entered into a partnership with plaintiff.

2. Payment ⇐73(1)

In action for a declaration that plaintiff and a defendant were partners and for an accounting, and in the alternative, for reasonable value of services rendered, evidence sustained finding that plaintiff had been compensated for all services rendered.

N. E. Youngblood, Beverly Hills, for appellant.

Greenbaum, Baker & Ancel and Mark G. Ancel, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants in a suit for a declaration that the parties were partners and for an accounting. As an alternative, plaintiff prayed for the reasonable value of services rendered.

Defendant Elvin M. Bright, referred to as defendant, doing business as Bright Laboratories, was engaged in the development and manufacture of plastics. The court found there was no partnership; any services rendered by plaintiff were performed as an employee of defendant; defendant had terminated plaintiff's employment for cause; and plaintiff had been fully compensated for all services rendered.

Plaintiff first asserts the court erred in excluding evidence of similar transactions between defendant and other persons. He argues that the principal issue at the trial was whether a partnership existed between plaintiff and defendant and that evidence of similar transactions between defendant and other persons was relevant to that issue. The partnership at bar was alleged to be oral and to have been entered into about January 1953. The evidence excluded was to the effect that in 1949 defendant had entered into an oral agreement of partnership with one Crossman and that later he had denied the agreement, and to the effect that defendant had promised one McDonald an interest in defendant's laboratories.

[1] The evidence was properly excluded. The question here was whether defendant had entered into a partnership with plaintiff. The proffered evidence of

defendant's conduct with others had no relevancy on that issue. In Lande v. Southern Cal. Freight Lines, 85 Cal.App. 2d 416, at pages 422, 423, 193 P.2d 144, 148, Mr. Justice McComb, speaking for the court, stated:

"Did the trial court commit prejudicial error in excluding evidence of contracts entered into between defendant and other persons during the period the contracts between plaintiff and defendant were negotiated, and which other contracts were similar to the contracts involved in the present litigation?

"This question must be answered in the negative. It is the general rule that in the absence of a common plan, scheme, habit or usage, contracts between different parties have no probative value in the consideration and interpretation of other and different contracts even though one of the parties may be common to both. [Citations.] * * *

"Applying the foregoing rule to the facts here involved it is apparent that the trial court properly excluded the questioned evidence. The other contracts offered were not material in determining the nature of the transaction between plaintiff and defendant. Since there was an absence of any claim that there was a common plan, scheme, habit or usage followed by plaintiff, the general rule above stated is applicable.

"Moody v. Peirano, 4 Cal.App. 411, 88 P. 380, Lobree v. L. E. White Lumber Co., 53 Cal.App. 85, 199 P. 821; Bone v. Hayes, 154 Cal. 759, 99 P. 172; Turner v. Luning, 105 Cal. 124, 38 P. 687; Asamen v. Thompson, 55 Cal.App.2d 657, 131 P.2d 839; Swanson v. Wilsen, 13 Cal.App. 389, 110 P. 336, relied on by defendant, are all inapplicable for the reason that in such cases there were a series of agreements, each involving one common party and a number of separate parties, and such evidence was held admissible against the party who was common to all of them as evidence of a common plan, habit or usage, and in the nature of admissions against interest."

In the case at bar there was no proof or offer of proof of any common plan, scheme, habit, or usage; and the rulings were correct.

[2] One count of the complaint alleged that within four years defendant became indebted to plaintiff for personal services of the reasonable value of $33,466. Plaintiff asserts the finding that he had been compensated for all services rendered is without evidentiary support. The only claim in this respect is as to an item of $900.

Defendant Bright testified that from January 1, 1953 to May 14, 1954 and at one period in 1955 plaintiff worked on a project with him known as a diving board project and that the project had been abandoned. Plaintiff testified that at the time defendant dispensed with his services, about January 16, 1956, defendant "said he would dig me up, dig me up nine hundred dollars within a few days"; defendant did not say what it was to cover; within ten days defendant told him "he would have this nine hundred dollars that he could dig up for me"; defendant did not pay him the $900 or any part of it. Defendant testified further:

"Now, Mr. Bright, with reference to the date of January 16, 1956, the time you had this conversation with Mr. Overman about termination of your relationship, did you have any conversation with him then about a nine hundred dollar payment? A. Yes, I think so. No, that was, I think a day or two later.

"Q. A day or two later, did you have a conversation with him about a nine hundred dollar payment? A. Yes. * * *

"Q. And what did he say and what did you say about that subject at that time? A. He asked me about the nine hundred dollars, the nine hundred dollars that he

had received a credit for on early work on the diving board project.

"Q. And is that the way he phrased it? A. As near as I can recall, yes.

"Q. And what did you say? A. I told him that as soon as the diving board project had reached a point where stock would be issued to all of the people involved in that program, that he would either receive his stock or he would get his nine hundred dollars but that in the meantime I would contact the other people in Recreation Products to see if anything could be done about paying him the nine hundred dollars at that time.

"Q. Anything else? A. I think that covers it all.

"Q. Had you mentioned Recreational Products Corporation to him before then as a corporation? A. Yes.

"Q. When for the first time did you do that? A. I don't remember.

"Q. Did you later have any further conversation with him about any nine hundred dollars? A. Yes. He called and asked about it after that.

"Q. But the nine hundred dollars was supposedly to cover whatever he had done in connection with the diving board project? A. That's right.

"Q. Was any portion of nine hundred dollars or any other sum ever paid to him? A. No.

"Q. By Recreational Products Corporation or Bright Laboratories or anyone else as far as you know? A. No.

"Q. Did you at that time have any conversation with him as to how you had arrived at the sum of nine hundred dollars on the diving board? A. No.

"Q. Nor he to you. Is that right? A. No."

The foregoing appears to be all the evidence on the point.

The court could infer from the testimony of defendant that the services rendered in connection with the diving board project had been rendered by plaintiff to Recreational Products Corporation; that plaintiff was to be paid for the services only when the project had reached a point when stock could be issued to the people involved in the program; that at that time plaintiff would receive either stock or $900; and, since the project had been abandoned, nothing was owing to plaintiff. The evidence supports the finding that plaintiff had been compensated for all services rendered to defendant.

No other points are urged.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

C. A. WHITTAKER and Vera M. Whittaker, Plaintiffs and Respondents,

v.

Walter C. THOMPSON and Mary E. Thompson, Defendants and Appellants.*

Civ. 9357.

District Court of Appeal, Third District, California.

Dec. 29, 1958.

As Modified on Denial of Rehearing Jan. 22, 1959.

Hearing Granted Feb. 25, 1959.

Action to recover for timber allegedly removed from plaintiffs' property without making of required payment therefor. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Peek, Acting P. J., held that sale of standing trees to be removed may be absolute and agreement to remove within a specified or reasonable time merely a covenant, in which case timber remains property of buyer, even though not removed within specified time; and held that where such a contract contained no provision relative to any reversionary interest, buyer would have to be considered owner of timber,

* Opinion vacated 1 Cal.Rptr. 7, 347 P.2d 7.

purchased and paid for in full at time of execution of contract.

Affirmed.

Logs and Logging ⇐3(14)

Sale of standing trees to be removed may be absolute and agreement to remove within a specified or reasonable time merely a covenant, in which case timber remains property of buyer, even though not removed within the specified time; and where such a contract contained no provision relative to any reversionary interest, buyer would have to be considered owner of timber, purchased and paid for in full at time of execution of contract.

Geary, Spridgen & Moskowitz, Santa Rosa, for appellants.

Burke & Rawles, Ukiah, for respondents.

PEEK, Acting Presiding Justice.

This is an appeal by defendants from an adverse judgment in an action to recover the value of timber alleged to have been removed from plaintiffs' property under a timber sales agreement.

The complaint alleged that on July 3, 1948, plaintiffs and defendants entered into a written agreement whereby defendants agreed to sell and plaintiffs agreed to buy certain land located in Mendocino County on which was growing merchantable timber; that the contract provided the rights of plaintiffs as purchasers of the land would be subject to a timber sales contract, dated February 7, 1946, between defendants and S. C. Giles & Company, hereinafter referred to as Giles; that the contract between the parties hereto contained the further provision that defendants reserved the right to cut timber on the land for a period of six years following the execution of the agreement for the sum of $2.50 per thousand board feet; that thereafter plaintiffs paid the purchase price in full, and defendants delivered to them a grant deed; that by virtue of said deed plaintiffs are the owners of the land and the timber thereon, subject only to the right of Giles; that defendants have no right, title or interest in the same except the right to cut timber as previously alleged for the sum of $2.50 per thousand; that defendants cut 3,140,452 board feet, for which no payment was made; and that there is now owing to plaintiffs the sum of $7,851.12. The answer admitted the execution of the contract but denied that plaintiffs owned the land and timber subject only to the rights of Giles or that they had no right to cut timber except upon the payment of $2.50 per thousand.

The rights of the parties are predicated primarily upon the written document referred to in the pleadings. There is no dispute concerning the facts, all of which were stipulated to by respective counsel at the outset of the hearing. Such stipulations show additionally that the timber purchased by Giles had been paid for in full at the time of the execution of that contract; that Giles failed to cut 1,500,000 feet per year as specified in said contract; and that at the time defendants began cutting timber, more than five years had elapsed since the execution of their contract with Giles. Hence they had failed to comply with the terms of their contract.

At the conclusion of the trial the court found the allegations of plaintiffs' complaint were true and that the allegations of defendants' answer were untrue and gave judgment in favor of plaintiffs for the amount of the timber cut and removed by defendants.

It is defendants' contention that the timber cut by them was not timber contemplated under their contract with plaintiffs; that since Giles, under its contract with defendants, cut approximately 3,500,000 feet less than provided in their contract with the Thompsons, therefore the 3,000,000 feet cut and removed by defendants was timber which remained after Giles had abandoned its operation, and consequently did not come under the agreement between plaintiffs and defendants.

Defendants further argue that since there was an absolute sale of the timber to Giles on February 7, 1946, title to such timber became severed from the land at that moment, and hence plaintiffs could acquire no rights therein by the deed from defendants in January of 1949. True that deed did transfer title to plaintiffs to all timber in excess of 7,500,000 feet, but as noted by the court in the case of Peterson v. Gibbs, 147 Cal. 1, 81 P. 121, which is cited and relied upon by both parties, "while there is much apparent conflict in the decisions as to the proper construction of a contract for the sale of standing trees to be removed, it is well settled that such a sale may be absolute, and the agreement to remove within a specified or reasonable time merely a covenant, in which case the timber remains the property of the purchaser, although not removed within the specified time." 147 Cal. at page 6, 81 P. at page 123. The court therein further noted that the failure of the purchaser to seasonably remove timber does not of itself operate to forfeit his title thereto. Although the court therein does apparently imply that a failure to remove timber might work a forfeiture where the terms of the timber contract indicate less than an absolute conveyance, nevertheless in all cases it is essentially a question of the construction of the contract of sale.

Here the plaintiffs have clearly shown their title to the land subject only to the contract between Giles and the defendants, and since that contract contained no provision relative to any reversionary interest, nor did the court so find, Giles must be considered the owner of the 7,500,000 or balance thereof.

It necessarily follows that in the absence of any showing whatsoever by defendants that the timber cut by them was that to which Giles holds title, the judgment of the trial court must be affirmed.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

166 Cal.App.2d 446

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Horace Lee FAULKNER, Defendant and Appellant.

Cr. 6330.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1958.

Rehearing Denied Jan. 19, 1959.

Hearing Denied Feb. 18, 1959.

Defendant was convicted of unlawful possession of marijuana. The Superior Court of Los Angeles County, Richard C. Fildew, J., rendered judgment, and defendant appealed. The District Court of Appeal, Vallée, J., held that since search of defendant's person was predicated on his consent and guilt was predicated on finding of marijuana on defendant's person as a result of such search and informer played no part in criminal act and was not a material witness on issue of guilt, refusal to require disclosure of identity of informer did not deprive defendant of a fair trial.

Judgment affirmed.

1. Searches and Seizures ⇐7(28)

One may freely consent to a search of his person without a warrant, and any search or taking of evidence pursuant to such consent is not unlawful and does not violate constitutional rights of the person searched.

2. Criminal Law ⇐736(1)

Whether, in a particular case, consent to search of the person without a warrant was voluntary is a question of fact.

3. Searches and Seizures ⇐7(28)

In prosecution for possession of marijuana, evidence justified conclusion that defendant had voluntarily consented to search of his person by officers without a search warrant or warrant for his arrest.

4. Criminal Law ⇐562

If the only evidence of guilt was illegally obtained, conviction is without support in the evidence.

5. Criminal Law ⇐562

Conviction may be supported by the evidence, notwithstanding illegally obtained evidence, if there is other competent evidence of guilt.

6. Witnesses ⇐216

Where search of defendant's person by officers was predicated on defendant's consent and finding of guilt on charge of possession of marijuana was predicated on the finding of marijuana on defendant's person as a result of such search and neither search nor finding of guilt was predicated on information received by officers from undisclosed informer and informer played no part in the criminal act and was not a material witness on issue of guilt, his identity was not relevant and refusal to require disclosure of identity of informer did not deprive defendant of a fair trial.

Horace L. Faulkner, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

VALLEE, Justice.

In a nonjury trial defendant was convicted of possession of marijuana. He appeals from the judgment. The specifications of error appear to be that the police unlawfully searched defendant; his consent to the search was involuntary; the court erred in not compelling disclosure of an informer.

About 3:25 p. m. on January 22, 1958, two police officers received information from an informer that a man named Horace was living at 7773 Parmalee Street, Los Angeles, and that he was in possession of and dealing in marijuana. The informer gave the officers a vague description of defendant.

About 15 minutes later the officers went to 7773 Parmalee Street. They knocked on the door of the lower apartment. A feminine voice asked who was there. The officers identified themselves and asked the female to come to the door. In a few seconds the door was opened by a woman named Ann. The officers asked Ann if Horace was at home. She said he was not. They asked if they might enter. She said they might, and they did. About 5 or 10 minutes later defendant entered the apartment. He asked the officers who they were. They identified themselves and stated they had information he was dealing in narcotics. Defendant said he knew nothing about narcotics. One of the officers asked defendant if they could search him and the premises. Defendant said, "Sure, that is all right. We might as well get this cleared up." Defendant testified one of the officers asked him if he minded "if he searched"; that he replied no, he did not mind.

One of the officers searched defendant and found a package containing brown paper-wrapped cigarettes in a trouser pocket. The officer asked defendant where he had received them. Defendant stated he had just bought them, that he had given a fellow $4 for them. The cigarettes contained marijuana. No search was made of the premises. The officers did not have a warrant for defendant's arrest or a search warrant.

[1–3] The evidence was not obtained by an unlawful search. One can freely consent to a search of his person; and having done so, any search or taking of evidence pursuant to his consent is not unlawful and his constitutional rights are not violated. Whether in a given case the consent was voluntary is a question of fact. People v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852. One of the arresting officers testified the consent to the search was freely and voluntarily given. Defendant testified but he did not assert the officers used any force or violence to obtain his consent. The evidence justified the trial court in concluding that defendant voluntarily consented to the search.

Counsel for defendant asked the officer who searched defendant the name of the informer. The People's objection to the question was sustained. Defendant's motion to strike the testimony of the officer concerning the information he had received from the informer was denied; his objec-

tion to reception of the cigarettes in evidence was overruled; and his motion to strike the testimony of the officer in its entirety was denied. Apparently relying on Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, defendant contends the search and his arrest were based on the information from the informer, and consequently it was prejudicial error not to require disclosure of the identity of the informer and to deny the motion to strike the testimony of the officer.

[4–6] If the only evidence of guilt was illegally obtained, the judgment is without support. Priestly v. Superior Court, supra. However, if there is other competent evidence of guilt, the evidence supports the judgment. Mitchell v. Superior Court, 50 Cal.2d 827, 330 P.2d 48. Here neither the search nor the finding of guilt was predicated on the information claimed to have been received from the informer. The search was predicated on defendant's consent to the search of his person. Guilt was predicated on the finding of marijuana on his person.

People v. McShann, 50 Cal.2d 33, 330 P.2d 33, 36:

> "A mere informer has a limited role. 'When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged.' [Citation.] His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies. When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial. Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the People must either disclose his identity or incur a dismissal."

In the present case the informer played no part in the criminal act; he was not a material witness on the issue of guilt and his identity was not relevant. Nondisclosure did not deprive defendant of a fair trial.

Judgment affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

166 Cal.App.2d 449

M. DURAN et al., Plaintiffs and Respondents,

v.

Howard LYNN and Samuel Shapiro, etc., et al., Defendants and Appellants.

Civ. 5787.

District Court of Appeal, Fourth District, California.

Dec. 22, 1958.

Action brought by plaintiffs, who had allegedly executed crop mortgage and deed of trust on their lands to secure advances from defendants to plaintiffs for financing of growing and harvesting of produce, for (1) compulsory satisfaction of crop mortgage, (2) reconveyance of deed of trust, (3) injunction pendente lite, (4) damages, and (5) judgment for unpaid money due to plaintiffs from defendants, who had sold farm produce as commission merchants for account of plaintiffs. The Superior Court of Riverside County, Hilton H. McCabe, J., denied defendants' motion for change of venue, and defendants appealed. The District Court of Appeal, Shepard, J., held that Riverside County, being place where contract was entered into as well as place

where it was to be performed, was proper county for trial of action.

Affirmed.

1. Appeal and Error ⇐912, 991

Decisions on question of fact are for trial court, and if there is any conflict as to facts, doubt must be resolved in favor of party prevailing on motion for change of venue. West's Ann.Code Civ.Proc. § 395.

2. Venue ⇐7

County where contract is made is deemed to be county where it is to be performed unless there is a special contract in writing to contrary. West's Ann.Code Civ.Proc. § 395.

3. Venue ⇐7

County in which contract sued on is made and is to be performed is proper county for trial of action. West's Ann. Code Civ.Proc. § 395.

4. Venue ⇐7

Riverside county, being place where contract was entered into as well as place where it was to be performed, was proper county for trial of action brought by plaintiff who had executed crop mortgage and deed of trust on land to secure advances from defendant for financing of growing and harvesting of produce, to recover balance allegedly due for farm produce sold by defendant as commission merchants for account of plaintiffs and to compel satisfaction of the crop mortgage and reconveyance of the deed of trust.

Charles Chorna, Los Angeles, for appellants.

Frank E. Carleton, Indio, for respondents.

SHEPARD, Justice.

Plaintiffs filed this action in Riverside County and alleged the delivery to defendants of farm produce from plaintiffs' ranch in Riverside County for resale by defendants as commission merchants for the account of plaintiffs, and that there is a balance of unpaid indebtedness therefor due to plaintiffs.

The complaint also alleges the execution of a crop mortgage and a deed of trust on said lands to secure advances from defendants to plaintiffs for financing the growing and harvesting of said produce; that such advances have all been repaid by accumulation of credit to plaintiffs from such sales; that defendants refuse to clear plaintiffs' title from the cloud of the crop mortgage and deed of trust, and pray for compulsory satisfaction of the crop mortgage; reconveyance of the deed of trust; injunction *pendente lite*; damages; and judgment for unpaid money due from defendants to plaintiffs.

Defendants appeared, filed a demurrer, an affidavit of merits and of residence in Los Angeles County, and a notice of motion for change of venue to Los Angeles County. Plaintiffs filed a counter-affidavit to the effect that the agreement, the deed of trust, and the promissory note evidencing the indebtedness secured by it and the chattel mortgage, were all made, executed, entered into and delivered in Riverside County, and payment for all produce was to be made in Riverside County. The defendants' allegations of residence in Los Angeles County and the plaintiffs' allegations that the contract was made, executed and delivered, and to be performed in Riverside County are uncontradicted.

Upon presentation, the motion for change of venue was denied and defendants appeal from that order.

Code of Civil Procedure, § 395, provides in part as follows:

> "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the ac-

tion, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[1] On a motion for change of venue, if there be any conflict as to facts, the doubt must be resolved in favor of the prevailing party since decisions on questions of fact are for the trial court. Hale v. Bohannon, 38 Cal.2d 458, 466(7), 241 P.2d 4; Mitchell v. Griffin, 142 Cal.App.2d 811, 814(4), 299 P.2d 303.

[2] It will be noted that the county where the contract is made is deemed to be the county where it is to be performed unless there is a special contract in writing to the contrary. Code of Civ.Proc. § 395; Mitchell v. Griffin, supra, 142 Cal. App.2d at page 814(3), 299 P.2d 303; Dawson v. Goff, 43 Cal.2d 310, 315(3), 273 P.2d 1.

[3] The county in which the contract sued on is made and is to be performed is a proper county for trial of the action (Hale v. Bohannon, supra, 38 Cal.2d at page 470(17), 241 P.2d 4; Dawson v. Goff, supra, (1b); Campbell v. Clifford, 52 Cal. App.2d 615, 618, 126 P.2d 887; Wilson v. Scannavino, 159 Cal.App.2d 369, 324 P.2d 350.

[4] Riverside County being the place where the contract was entered into, as well as the place where it was to be performed, is a proper county for trial and the trial court's order was correct.

Counsel for respondents also makes the point that defendants are an association within the meaning of article XII, section 16 of the California Constitution, which authorizes action against a corporation or an association in the county where the contract is made or is to be performed, or obligation or liability arises, or breach occurs. In view of what has been said about the effect of Code of Civil Procedure, § 395 on venue in this case, we deem it unnecessary to pass on that point.

The order denying defendants' motion for change of venue is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

166 Cal.App.2d 196

PATTEN–BLINN LUMBER CO., Plaintiff and Appellant,

v.

John S. FRANCIS and Self-Realization Fellowship Church, Inc., et al., Defendants,

Self-Realization Fellowship Church, Inc., Respondent.

Civ. 22895.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1958.

Action for foreclosure of a mechanic's lien. From adverse judgment of the Superior Court, Los Angeles County, Burnett Wolfson, J., the materialman appealed. The District Court of Appeal, White, P. J., held that under statute providing that no mechanic's lien shall bind any property for longer period than ninety days after the same has been filed, unless within that time proceedings to enforce lien have been commenced in a proper court and a "notice of pendency of such proceedings" has been filed, purpose of notice of lis pendens is to give constructive notice and nothing more, and omission to record lis pendens was not jurisdictional and was not fatal as to action to foreclose mechanic's lien as against owner of property.

Judgment reversed.

1. Mechanics' Liens ⇐268

Under statute providing that no mechanic's lien shall bind any property for longer period than 90 days after the same

has been filed, unless within that time proceedings to enforce lien have been commenced in a proper court and a "notice of pendency of such proceedings" has been filed, purpose of notice of lis pendens is to give constructive notice and nothing more, and omission to record lis pendens was not jurisdictional and was not fatal as to action to foreclose mechanic's lien as against owner of property. West's Ann. Code Civ.Proc. §§ 1193.1, 1198.1(a).

2. Statutes ⇐217.2, 230

Legislative history of a statute or amendments thereto are helpful in determining intent of legislature.

3. Mechanics' Liens ⇐5

Mechanic's lien law is remedial in character and should be liberally construed in its entirety with a view to effect its objects and to promote justice. West's Ann.Code Civ.Proc. § 1193.1.

Thompson, Royston, Wiener & Moss, Los Angeles, for appellant.

Stuart B. Walzer, Beverly Hills, for respondent.

WHITE, Presiding Justice.

This is an action for foreclosure of a mechanic's lien. It was instituted in the Superior Court of Los Angeles County by plaintiff against John S. Francis, a general contractor and Self-Realization Fellowship Church, Inc. Subsequent to the commencement of the action, defendant John S. Francis received a discharge in bankruptcy, and as to him, the action was dismissed.

[1] The material and relevant facts are that in June, 1955, defendant Self-Realization Fellowship Church, Inc., entered into a contract with defendant John S. Francis, a licensed contractor, under the terms of which the latter would erect a classroom and printshop building on property belonging to defendant church. Defendant contractor agreed to furnish all necessary labor and materials to be used in the construction of said building. The church paid the contractor the full cost of materials and labor in advance of the construction of the aforesaid building. Instead of using this money on the church job, defendant contractor applied the money received by him to liquidate other obligations.

On December 30, 1955, a claim of lien against defendant church was recorded by plaintiff lumber company pursuant to the provisions of Section 1193.1 of the Code of Civil Procedure. The claim covered certain building materials used in the construction of the foregoing building, and for which materials there remained an unpaid balance of $4,050.82. The instant action to foreclose on the mechanic's lien was filed on March 27, 1956, within 90 days after filing of the claim of lien as required by Section 1198.1 of the Code of Civil Procedure. However, no notice of pendency of the present action was filed until May 9, 1956. This was more than 90 days after recordation of the claim of lien as provided for in Section 1198.1(a) of the Code of Civil Procedure.

In the court below, plaintiff lumber company and defendant church agreed that no issues of fact were involved in the case at bar, and that the sole issue was one of law. Thereupon, they entered into a written stipulation which in part, provided that all of the allegations in the complaint were true and that the matter might stand submitted on the pleadings and papers on file therein. The stipulation further provided that the sole issue between the parties was the contention of defendant church that the recording of a notice of pendency of action more than 90 days after the recordation of the claim of lien herein barred the further prosecution of this action. By an oral stipulation in open court on April 22, 1957, plaintiff acknowledged that Self-Realization Fellowship Church, Inc., had paid the full price of materials and labor for the construction of the buildings in question and that said moneys had been paid to John S. Francis, the general contractor.

The trial court held that the action to foreclose the claim of lien was barred by Section 1198.1(a) of the Code of Civil Pro-

cedure in that a notice of pendency of action was not filed within 90 days after recordation of the claim of lien. Judgment was accordingly entered for defendant church, from which plaintiff lumber company prosecutes this appeal.

It is conceded that the sole issue presented on this appeal involves the proper construction to be given to Section 1198.1 (a) of the Code of Civil Procedure, as amended in 1953. As so amended, that section now reads:

> "(a) No lien provided for in this chapter binds any property for a longer period than 90 days after the same has been filed except as hereinafter provided, unless within that time, proceedings to enforce the same be commenced in a proper court *and a notice of pendency of such proceedings be filed as provided in Section 409.*" (Emphasis added.)

The change which the 1953 amendment made in the aforesaid section and which is important on this appeal, was the addition of the above italicized phrase "and a notice of pendency of such proceedings be filed as provided in Section 409". It is appellant's contention that an action to foreclose a mechanic's lien is not barred *as against a party to that action* by failure to file a notice of the pendency of the action, while respondent earnestly insists that the section in question is jurisdictional.

It is true, as urged by respondent, that "In the construction of a statute or an instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted * * *" (Code Civ.Proc. Sec. 1858). However, this is followed by Section 1859 of the same code which provides that "In the construction of a statute the intention of the Legislature * * * is to be pursued, if possible".

It is noteworthy that in the 1953 amendment to the code section here in question, the legislature added the language, "and a notice of pendency of such proceeding be filed as provided in Section 409". Obviously, reference must be had to Section 409 to determine the scope of the requirement imposed upon the lien claimant. Section 409 clearly and unequivocally provides that "from the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action * * *".

In the case of Lee v. Silva, 197 Cal. 364, 373, 240 P. 1015, 1018, our Supreme Court stated that, "The purpose of a *lis pendens* is merely to furnish a means of notifying all persons of the pendency of an action, and thereby to bind any person who may acquire an interest in property, subsequent to the institution of the action, by any judgment which may be secured in the action affecting the property."

In Blackburn v. Bucksport, etc., R. R. Co., 7 Cal.App. 649, 653, 654, 95 P. 668, 670, in holding that failure to record a *lis pendens* was immaterial as against a party to the action who had actual notice of its pendency, and participated in it, as did respondent herein, the court had this to say: "* * * it is unimportant whether a *lis pendens* was or was not recorded, so far as this appellant is concerned. *He voluntarily submitted himself to the jurisdiction of the court in the case, and we do not think, as we have already indicated, that the mere omission to file for record the notice of the pendency of the action affects the question of the court's jurisdiction of the subject-matter of the litigation.* In other words, we do not think, as counsel's argument upon this point necessarily assumes, that the filing of the notice of the pendency of the action with the county recorder is an essential prerequisite to investing the court with jurisdiction of the subject-matter of a suit in which the recordation of such a notice is required. A *lis pendens,* or the filing for record with the recorder of a notice of the pendency of a suit involving the title to or right of possession of real property, is the mode substituted by the Legislature for the con-

structive notice to all the world of the pendency of such an action which formerly arose *ipso facto,* upon the institution of the suit. *Thus 'a purchaser or encumbrancer of property, instead of being required to examine all the suits pending in the courts to ascertain whether any of them relate to or affect the real estate he is negotiating about,* has now only to examine the notices of *lis pendens* filed in the recorder's office of the county where the real estate is situated.' Sampson v. Ohleyer, 22 Cal. [200], 211. The purpose of the legislature was thus to furnish the most certain means of notifying all persons of the pendency of the action and thereby warning them against attempting to acquire a legal or equitable interest in the property concerning which the suit was brought, and to bind such persons as might acquire any interest in the property in controversy after the recording of the notice by any judgment which might be secured affecting said property. *This is all that the Legislature intended by the present mode of giving constructive notice of the pendency of such actions, and the legislation does not, as we before observed, nor was it intended that it should, affect in the slightest degree the question of the court's jurisdiction of the subject-matter of the suit or of the persons of the parties thereto."* (Emphasis added.) See also Housing Authority of City of Oakland v. Forbes, 51 Cal.App.2d 1, 9, 10, 124 P.2d 194.

In actions to quiet title in favor of an adverse possessor (Code Civ.Proc. Sec. 749), wherein the section makes it compulsory within ten days after the filing of a complaint to file a notice of pendency of the action, it has been held that failure to file such notice is immaterial as to a party to the action (Blackburn v. Bucksport, etc., R. R. Co., supra, 7 Cal.App. at page 652, 95 P. at page 669).

Section 755 of the Code of Civil Procedure dealing with actions for partition provides that, "Immediately after filing the complaint in the Superior Court, the plaintiff *must* record * * * a notice of the pendency of the action * * *" (Emphasis added). In Rutledge v. Rutledge, 119 Cal.App.2d 114, 120, 259 P.2d 79, it was held that a party to the action could not assert as a defense the failure to file the aforesaid notice.

Section 1243 of the Code of Civil Procedure which concerns the right of eminent domain declares that, "A *lis pendens shall be* filed at the time of the commencement of the action * * *". (Emphasis added.) Again, a party to the action was denied the right to assert as a defense, the failure to file such notice (Housing Authority of City of Oakland v. Forbes, supra, 51 Cal.App. 2d at pages 9, 10, 124 P.2d at pages 198, 199).

[2] Manifestly, the legislative history of a statute or amendments thereto is helpful in determining the intent of the legislature. With regard to the 1953 amendment of Section 1198.1 of the Code of Civil Procedure by adding thereto the phrase here in question, "and a notice of pendency of such proceedings be filed as provided in Section 409", we have examined Senate Interim Judiciary Committee Report on the proposed amendment above set forth (Senate Interim Judiciary Committee Report, pp. 116, 118. Appendix to Journal of the Senate, Regular Session, 1953, Vol. 2). In this report, the legislative interim committee discusses the historical background of the law governing foreclosure of mechanic's liens, and throughout the report enumerates the difficulties encountered by the "purchaser of property or lender on property" under the then existing provisions of Section 1198.1 of the Code of Civil Procedure. As indicative of the legislative intention manifested by the aforesaid report, we find therein the following:

> "The provision in Section 1198.1 that no such lien shall be binding for more than 90 days 'unless proceedings be commenced in a proper court within that time to enforce the same' is the same as appeared in Section 1190 of the same code, when enacted in 1872. And certainly in 1872 there was little extra burden imposed upon those who

had to determine whether the lien, because an action was commenced, continued in existence beyond 90 days. In those days the county clerk's office was probably across the hall, or downstairs, from the recorder's office, providing a quick and easy way to determine whether an action had been filed.

"It was not until 1929 that the Legislature, by an amendment to Section 29 of the Municipal Court Act, provided that such courts should have jurisdiction over mechanics' liens foreclosures. (Stats.1929, page 838; now C.C.P. Sec. 89.) This move, together with the great growth of our State and the increased number of municipal courts, puts the statute in question in a different light than it appeared when enacted originally, in 1872.

"*The purchaser of property or lender on property* in Los Angeles County, to protect himself against a pending action to foreclose a mechanic's lien, must search the records in 16 different municipal courts. These 16 separate municipal courts are located within a radius of some 30 miles from the Hall of Records in downtown Los Angeles. He would have to cover a total distance of well over 200 miles, and it would undoubtedly take him at least two days to make the necessary search.

"Nor is the problem one unique to Los Angeles County. Other counties have municipal courts located away from the county offices. In Alameda County, for example, there is a municipal court in the City of Alameda, one in Berkeley, one in Oakland and one in San Leandro." (Emphasis added.)

Then, after noting the constitutional mandate that the legislature shall provide speedy and efficient enforcement of mechanic's liens, the Legislative Committee Report concludes: "Admittedly, it is somewhat easier not to file a lis pendens than to file one. *On the other hand, the heavy burden now imposed upon prospective purchasers or lenders* would seem to weigh heavier in the scales. And it should be kept in mind that no special obligations are being created; the proposal would simply extend to this group the policy of the law, as expressed in Code of Civil Procedure Section 409, that filing an action 'affecting the title to or the right of possession of real property' does not operate as constructive notice unless a notice of pendency thereof is recorded." (Emphasis added.) To us it seems clear that the legislature was not concerned with giving additional notice to a party to the action, who already has notice by service of the complaint upon him, but was concerned solely with extending to *purchasers or encumbrancers* the protection afforded by the provisions of Section 409 of the Code of Civil Procedure by requiring the filing of the notice before constructive notice is deemed given to such purchaser or encumbrancer, and not for the protection of the parties to the action, who already have notice of the pendency of the lien, the claim made by it, and the action seeking to foreclose the same. We are satisfied that the purpose of a notice of *lis pendens* under the mechanic's lien law is to perform its usual office, to give constructive notice, nothing more. It must be presumed that the legislature had knowledge of the cases cited herein and others so holding, and had the lawmakers intended that the phrase here in question and added to Code of Civil Procedure Section 409 should affect, even in the slightest degree the courts' jurisdiction of the subject matter of the suit or of the persons of the parties thereto, they would have so indicated. Our holding herein is of course, not to be understood as waiving the requirement of notice in cases to which the statute properly applies, viz. persons who may, subsequent to the recordation of the lien or filing of an action to foreclose the same, seek to acquire rights in the property, but that it is not intended to be jurisdictional insofar as the owner of the property is concerned, because he has had notice of the action.

It is also noteworthy that the Supreme Courts of other states have also held, under like or similar provisions as the 1953 amendment here under consideration, that the omission to record the *lis pendens* is not jurisdictional and not fatal to a cause of action to foreclose a mechanic's lien as against the owner of the property. See Laverentz v. Craig, 74 Colo. 297, 225 P. 250; Whitehead & Kales Co. v. Tann, 233 Mich. 597, 208 N.W. 148; Julius v. Callahan, 63 Minn. 154, 65 N.W. 267.

Respondent relies heavily upon the case of R. M. Hacker Co. v. Hollymount Bowl, 146 Cal.App.2d Supp. 875, 303 P.2d 387, decided by the Appellate Department of the Superior Court of Los Angeles County. We have carefully considered the cited case, but cannot reconcile ourselves with the conclusion reached therein.

In the light of the decisions we have herein cited together with the legislative history of the amendment as above narrated, none of which are cited or discussed in the Superior Court Appellate Department decision, we are persuaded that the aforesaid decisions and legislative history in this state together with the decisions in other jurisdictions, which we have set forth, point unerringly to the conclusion we have herein arrived at.

[3] Respondent urges that strict construction of the statute here in question is justified if not required by equitable considerations. That if appellant prevails in this action respondent church will be compelled to pay twice for the materials furnished. Conceding that the general rule is and has been that mechanic's lien law is remedial in character and should be liberally construed in its entirety with a view to effect its objects and to promote justice (Hendrickson v. Bertelson, 1 Cal.2d 430, 432, 35 P.2d 318), respondent nevertheless, earnestly argues that the legislature is equally bound to consider and protect the rights of owners of property which may be affected by such liens (Diamond Match Co. v. Sanitary Fruit Co., 70 Cal. App. 695, 701, 234 P. 322). We are impressed that the legislature has met that obligation. Several methods are provided whereby the property owner may protect himself against the filing of mechanic's liens. The latter may, (1) require the contractor to furnish him with a bond (Code Civ.Proc. Sec. 1185.1); (2) require affirmative evidence that the material man's bills and laborers' wages have been paid, as the owner makes each installment payment to the contractor; and, (3) withhold a portion of the funds until a notice of completion has been recorded and thirty days have expired after such recordation. Respondent availed itself of none of these available remedies but instead, paid the contractor the entire cost of materials and labor in advance of the construction of the classroom and printshop building.

The judgment is reversed.

FOURT and LILLIE, JJ., concur.

166 Cal.App.2d 367

T. L. MUELLER, as Executor of the Last Will and Testament of Ellery D. Marshall, deceased, Robert Davies, William E. Davies and Alva Davies Jensen, Plaintiffs and Respondents,

v.

Josephine MARSHALL and Howard Hanney Marshall, Defendants and Appellants.

Civ. 23322.

District Court of Appeal, Second District, Division 3, California.

Dec. 18, 1958.

Action by executor of will and beneficiaries for annulment of quitclaim deed executed by decedent in favor of his brother and his brother's wife. The Superior Court of Los Angeles County, George Francis, J., rendered judgment for execu-

tor and beneficiaries, and brother and his wife appealed. The District Court of Appeal, Shinn, P. J., held that where decedent and brother executed deeds to their properties to each other under agreement whereby survivor would get both pieces of property but that either one could dispose of property at any time he wanted, brother sold his property, destroyed deed in favor of decedent and put bonds bought with proceeds in safe deposit box in envelope marked that in case of accident property belong to decedent, and decedent allegedly accidently tore deed to his property and handed pieces to brother, deeds were testamentary to character, there was no intention on part of either grantor to convey vested interest in his property and there was no effective delivery of decedent's deed to brother.

Affirmed.

1. Deeds ⇐178, 208(1), 210

In action by executor of will and beneficiaries named therein for annulment of quitclaim deed executed by decedent in favor of his brother and his brother's wife, evidence sustained finding that decedent and brother executed quitclaim deeds on their properties in favor of the other for purpose of avoiding proceedings in probate, that agreement was canceled by mutual consent, that brother returned decedent's deed and decedent tore it into pieces and that there was no consideration for decedent's deed, that neither decedent nor brother intended by his deed to divest himself of title or to convey any present interest to the other and that each intended that his deed would not become operative unless he should predecease the other.

2. Deeds ⇐56(2)

Where decedent and brother executed deeds to their properties to each other under agreement whereby survivor would get both pieces of property but that either one could dispose of property at any time he wanted, brother sold his property, destroyed deed in favor of decedent and put bonds bought with proceeds in safe deposit box in envelope, marked that in case of accident property belonged to decedent, and decedent allegedly accidentally tore deed to his property and handed pieces to brother, deeds were testamentary in character, there was no intention on part of either grantor to convey vested interest in his property and there was no effective delivery of decedent's deed to brother.

3. Evidence ⇐589

In action by executor of will and beneficiaries for annulment of quitclaim deed executed by decedent in favor of his brother and his brother's wife, even though there was no direct evidence contradicting testimony of brother that deed executed by decedent to brother had been torn accidentally, and that decedent gave pieces to brother, court was not required to give his testimony full credit where brother stated that pieces of deed were pasted together almost a year before deceased died and instrument was not recorded until after decedent's death.

4. Evidence ⇐269(2)

In action by executor of will and beneficiaries for annulment of quitclaim deed executed by decedent in favor of his brother and his brother's wife, wherein brother testified that decedent had told him that he had accidentally torn deed which he allegedly handed to brother, testimony of executor that decedent had stated to him five days thereafter that decedent had intentionally torn the deed was properly admitted over objection of hearsay.

5. Evidence ⇐269(1)

The hearsay rule does not exclude evidence of declarations where they are offered to prove intention of the actor.

6. Deeds ⇐181

Whether deed was torn accidentally or purposely, if grantor gave pieces to grantee intending that they should be put together and serve as a deed, document as restored would have been no more and no less effective than it was before the mutilation.

W. E. Starke, San Diego, for appellants.

Clifton A. Hix, Elizabeth Hix, San Pedro, Raymond Choate, Wilmington, for respondents.

SHINN, Presiding Justice.

This action is by Mueller as executor of the will of Ellery D. Marshall, deceased, and by nephews and a niece of the decedent who are beneficiaries under his will, the purpose of the action being to procure the annulment of a quitclaim deed executed by decedent in favor of his brother, Howard Marshall, and Howard's wife. Judgment was in favor of plaintiffs and defendants appeal. We find no merit whatever in the appeal.

[1] The court found that on November 9, 1950, Ellery owned a lot in Wilmington, California; Howard owned real property in San Diego; on or about the said date, Ellery and Howard agreed that each would execute a quitclaim deed of his property in favor of the other for the sole purpose of avoiding proceedings in probate. The deeds were executed and were placed by Howard in a safety deposit box to which only he and his wife had access; in June 1954, the agreement was cancelled by mutual consent and Howard sold his San Diego property; later, at the request of Ellery, Howard returned Ellery's deed and Ellery tore it into pieces, twice lengthwise and twice crosswise; Ellery died August 19, 1956, leaving a will by which $10 was bequeathed to Howard and the remainder of his estate to the said nephews and niece. Two days after Ellery's death, Howard obtained possession of the pieces of the deed, took them to the office of his attorney who taped them together and caused the document to be placed of record August 21, 1956, two days after Ellery's death. Howard and his wife then took possession of the Wilmington property and have lived there ever since. The court found the facts as we have related them, that there was no consideration for Ellery's deed, neither he nor Howard intended by his deed to divest himself of title or to convey any present interest to the other and that each intended that his deed would not become operative unless he should predecease the other. The findings have ample support in the evidence. Howard, called under section 2055, Code of Civil Procedure, testified that the purpose and agreement was "whoever went first, why the last would have it. * * * Either one, yes, could dispose of the property at any time they wanted"; he was keeping the deed for Ellery; the survivor would get both pieces of property; when he sold his property he destroyed the deed in favor of Ellery; he bought bonds with the proceeds, put them in the safe deposit box in an envelope marked "in case of accident this property belongs to E. D. Marshall." Howard also testified that October 19, 1955, Ellery handed him the torn pieces of the deed "It was tore just like that—he just said he tore it accidentally"; his attorney pasted the pieces together and later had the instrument recorded.

[2] From the facts testified to by Howard with respect to the original transaction it resulted as a matter of law that the deeds were testamentary in character, there was no intention on the part of either grantor to convey a present interest in his property and therefore there was no effective delivery of Ellery's deed to Howard. 15 Cal.Jur.2d 486–487.

Howard E. Crandall testified that he was the attorney for Ellery, that at Ellery's directions he demanded of Howard a return of the deed, and it was returned in May 1954, that he prepared Ellery's will on October 24, 1955 and that the will was admitted to probate.

Plaintiff Mueller testified that he was named as executor of Ellery's will; on the day the will was executed Ellery brought it to him and told him that he had taken his deed in favor of Howard to a bank and asked what he should do with it; an officer of the bank told him the best thing to do would be to destroy it and that he "tore" it up. "I tore it this way and I tore it around this way" (indicating a motion of tearing it). Defendants' objection to this evidence was overruled.

The probate file in the matter of Ellery's estate was received in evidence. It contains a creditor's claim for $1,194.75 presented by the County of Los Angeles, Department of Charities, duly approved by the executor and the court. It is alleged in the claim that the indebtedness is secured by a mortgage executed by Ellery on the property in question October 17, 1955, to secure a promissory note in favor of the county in the amount of all the institutional care that Ellery had received or might receive from the county.

The principal contention on appeal is that the court was required to believe the testimony of Howard that Ellery had stated to him that the deed was torn up accidentally and that he gave the pieces to Howard just two days after he had executed the note and mortgage in favor of the county. This, it is claimed, constituted a valid delivery of the deed as of that date.

[3] It is true that there was no direct evidence contradicting the testimony of Howard but we do not believe the court was required to give his testimony full credit, even though he apparently testified fully and frankly as to the circumstances under which the deeds were executed and the purpose of their execution. There was circumstantial evidence which supports the court's disbelief in Howard's testimony that Ellery gave him the pieces of the deed. Howard testified that as soon as he got the pieces of the deed from Ellery he took them to his attorney who pasted them together; that was almost a year before Ellery died and it must have seemed strange to the court that neither Ellery, Howard nor Howard's attorney realized the irregularity of pasting together the torn fragments of the deed rather than to have a new deed executed. The recorded deed shows that it was placed of record at the request of Mr. Starke, Howard's attorney, who has offices in San Diego. Although Howard testified that he took the pieces of the deed to his attorney within two days after he received them from Ellery there was no evidence that after they were pasted together they were returned and retained by him until Ellery's death, nor as to how the document got back into the hands of Mr. Starke in order for him to forward it to the recorder's office. Even if the mutilated instrument had been handed to Howard the fact that it was not recorded until after Ellery's death, considered in connection with the evidence of the original transaction, would have warranted the court in finding that Ellery did not intend to effect a present conveyance of the property and that Howard did not understand that the document would be effective during Ellery's lifetime.

[4, 5] It is contended that it was error to receive the testimony of Mueller that Ellery told him he intentionally tore up the deed. There was no error. It was in question whether the act was intentional or accidental. Ellery's statement that it was accidental was made, if at all, October 19, 1955. His statement to Mueller was made about five days later. Evidence of the intention of Ellery was provable by his statement to Mueller as well as by his statement to Howard. It would be a strange rule that would allow evidence of the statement of Ellery that the act was accidental and bar his statement made shortly thereafter that it was intentional. The latter statement was just as good evidence as the former one of Ellery's intention. The hearsay rule does not exclude evidence of declarations under such circumstances where they are offered to prove the intention of the actor. Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530.

[6] It was immaterial whether the deed was torn accidentally or purposely. If there had been, originally, a valid delivery of the deed to Howard, Ellery's intentionally tearing it up would not have destroyed its efficacy. However it happened to be torn, if Ellery gave the pieces to Howard intending that they should be put together and serve as a deed, the document as restored would have been no more and

no less effective than it was before the mutilation.

The judgment is affirmed.

PARKER, WOOD and VALLÉE, JJ., concur.

166 Cal.App.2d 536

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gerald Dennis O'HERRIGAN, Defendant and Appellant.

Cr. 6369.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1958.

Defendant was convicted of three offenses in violation of West's Ann.Penal Code, section 337a, subdivisions 1, 2, 4, 6, relating to bookmaking, occupancy of residence for purpose of bookmaking, recording a bet or bets, and accepting a bet or bets. The Superior Court, Los Angeles County, J. Howard Ziemann, J., entered judgment and an order denying a new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1144(13)

On appeal from conviction, reviewing court must accept that view of the evidence which tends to support jury's verdict, even though it is contradicted by evidence favorable to defendant.

2. Gaming ⇐98(3)

Evidence sustained conviction for three offenses in violation of subdivisions of Penal Code relating to bookmaking, occupancy of residence for purpose of bookmaking, recording a bet or bets, and accepting a bet or bets. West's Ann.Pen. Code, § 337a, subds. 1, 2, 4, 6.

Oliver E. Linck, Jr., El Monte, for appellant.

Edmund G. Brown, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial O'Herrigan was convicted of three offenses of violation of Section 337a Penal Code, namely, subdivision I (bookmaking), subdivision II (occupancy of residence for the purpose of bookmaking), subdivision IV (recording a bet or bets) and subdivision VI (accepting a bet or bets). He made a motion for a new trial which was denied and he appeals from the judgment and the order. The sole contention on the appeal is that the evidence was legally insufficient to justify the verdicts.

[1] Since we must accept that view of the evidence which tends to support the verdicts, even though it be contradicted by evidence favorable to the defendant, the jury was required to draw reasonable inferences from the following facts: At premises numbered 11432 Elliott Avenue in El Monte there is a cottage; nearby are the Mainger Bar and a grocery; outside the grocery is a telephone in a booth; Officer Ray parked on Elliott in sight of the booth; on the first occasion he saw defendant come from the bar and go to the telephone, take the receiver off the hook, take a piece of paper from a hip pocket and then leave. Defendant repeated this operation two or three times at intervals of about twenty minutes. Defendant was not seen to dial the phone at any time. A few days later Ray observed defendant in similar activities. In this interval several persons drove up, parked, and entered premises 11432, remaining only a few minutes. On two occasions a few days later Ray observed defendant going through the same procedure; altogether he saw de-

fendant using the telephone in the same manner eight or nine times and another officer, Barker, watched the phone booth on several days after the surveillance by Ray. Numerous people came to the residence, staying only a few minutes; on three occasions defendant went to the phone booth, apparently for a call, and never called out. On each occasion, he would take a paper from a hip pocket. On one occasion a woman approached defendant, handed him what appeared to be currency and received from defendant a white paper. The two officers saw another man enter the cottage and in a few minutes defendant went again to the phone, picked up the receiver without dialing and removed a piece of paper from his pocket. After defendant had returned to the cottage, the officers approached it and looked through a window. Defendant was seated at a small table in the kitchen, in front of him was another man who had a scratch sheet (National Daily Reporter) in front of him; the man said "Give me 2 and 2 parley on Frozen Assets in the second and Marianne in the fourth," at the same time handing defendant some currency. The officers saw defendant writing something on a little "spiral" notebook. Soon thereafter defendant left the cottage and was arrested by the officers. In the cottage the officers found the scratch sheet and the racing section of a local newspaper of that day with pen notations in the upper left hand corner. Notations were also observed on the scratch sheet and another copy was taken from defendant's pocket. On the notebook was the date and in the waste basket in a paper sack were torn fragments of paper. Pasted together they bore notations "1–2–10," "1–4–3" and "2–2." The first two were identified by the officers as indicating a race track, the number of the race and the number of the horse; the "2–2" was identified as indicating a "2 and 2 parley." These same figures appeared as an impression on the paper in the spiral notebook from which the torn fragments had been taken. There was evidence that "Frozen Assets" was a horse running in the second race at Golden Gate and "Marianne" was a horse running in the fourth race on that day. The officers found another writing which in their opinion indicated that there was due to "Bill" $14.15. The officers took from defendant's person $241.59. Defendant testified that he was by occupation a bartender, at times helped out at the Mainger Bar and he denied specifically having engaged in any bookmaking activities; the numerous persons who visited the house were friends who dropped by for brief visits. He was out of work at the time of his arrest but had no explanation of his possession of the money that was found on his person.

[2] The brief on the appeal is merely an attempt to reconcile the facts established by the evidence with the innocence of the defendant. It fails to dissipate the reasonable inferences which pointed to defendant's guilt. There is no need for us to elaborate upon them. The actions of defendant were characteristic of the activities of small-time bookmakers. Instead of using a telephone in the premises, defendant received calls at intervals of about 20 minutes, and although these activities might have been innocent, they did not stand alone. The testimony of the officers that defendant accepted a bet with money to cover it and made a notation thereof on the leaf of a notebook established to the exclusion of any other reasonable explanation that defendant was engaged in actions which constituted violations of law as charged in the information. We need only say that in view of the evidence we have related a reversal of the judgment would be without precedent.

The judgment and the order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

166 Cal.App.2d 172

Aurora GUILLEN and Natividad Guillen, Plaintiffs and Respondents,

v.

J. Needham MARTIN et al., Defendant and Appellant.

Civ. 5763.

District Court of Appeal, Fourth District, California.

Dec. 15, 1958.

Action by patient against physician who performed surgery for removal of gall bladder. From adverse judgment of the Superior Court, San Bernardino County, A. D. Mitchell, J., the physician appealed. The District Court of Appeal, Shepard, J., held that award of $25,000 general damages to woman who underwent surgery for removal of gall bladder on August 6, 1954 and who after operation continued to suffer pain, developed fever, inability to retain food, abdominal distention, and absence of natural bowel movement during two week stay in hospital and who after discharge from hospital continued to suffer and was readmitted for bile peritonitis and after a month long body building process, she again underwent major surgery on October 13, at which time a drainage tube was inserted which remained sticking out of her abdomen until May of 1955, during all of which time she suffered some pain, discomfort and inconvenience, was not excessive.

Judgment affirmed.

1. Physicians and Surgeons ⇐18(11)

Award of $25,000 general damages to woman who underwent surgery for removal of gall bladder on August 6, 1954 and who after operation continued to suffer pain, developed fever, inability to retain food, abdominal distention, and absence of natural bowel movement during two-week stay in hospital, and who after discharge from hospital continued to suffer and was readmitted for bile peritonitis and after a month long body-building process again underwent major surgery on October 13, at which time a drainage tube was inserted which remained sticking out of her abdomen until May of 1955, during all of which time she suffered some pain, discomfort and inconvenience, was not excessive.

2. New Trial ⇐162(1)

Trial court, on proper motion, has duty of weighing evidence and making such adjustments as appear proper if it believes verdict to be excessive.

3. Appeal and Error ⇐1004(1)

On appeal, insofar as claim of excessive verdict is concerned, reviewing court can only pass on question of whether verdict was, as a matter of law, excessive.

4. Physicians and Surgeons ⇐18(8)

In action by patient against surgeon and others for alleged negligence in removal of gall bladder wherein there was testimony relating to patient's postoperative experience of fever, continued pain, accumulation of bile, drainage and flushing procedures found necessary, general physical deterioration, and finding by another doctor of severed parts of common bile duct with a loose catgut tie involved in scar tissue, evidence was sufficient to support implied finding of jury that surgeon severed common biliary duct and that there were strong symptoms of this fact during surgeon's postoperative attendance on patient from which surgeon should, in exercise of ordinary precaution, have known that some sort of repair or at least a laparotomy was necessary.

5. Physicians and Surgeons ⇐18(6)

In action by patient against physician who performed surgery for removal of gall bladder during course of which common biliary duct was severed, doctrine of res ipsa loquitur was applicable.

6. New Trial ⇐69

Physicians and Surgeons ⇐18(9)

In action by patient against physician arising out of surgery for removal of gall bladder, question of credibility was in the first instance one for the jury, and on motion for new trial, one for the trial judge.

7. Physicians and Surgeons ⇐18(10)

In action by patient against physician who performed surgery for removal of gall bladder, instruction, that if common hepatic bile duct or common bile duct of patient was cut and tied off during operation and if such cutting and tying off was not recognized by physician who was in attendance and as a proximate result thereof, patient suffered injury, inference arose that proximate cause of occurrence was negligent conduct on part of physician, was proper.

8. Trial ⇐295(1)

Instructions must be read together and harmonized.

Swing & Swing, San Bernardino, for appellant.

Collins & McKenna, Los Angeles, for respondents.

SHEPARD, Justice.

[1] Plaintiff-respondent Aurora Guillen (hereinafter called plaintiff) on July 2, 1954, consulted defendant-appellant Dr. J. Needham Martin (hereinafter called defendant) with an abdominal complaint that ultimately led to a diagnosis of cholelithiasis and a cholecystectomy, or surgery for removal of the gall bladder, on August 6, 1954. Defendant performed the surgery with the assistance of other doctors and nurses.

This was the plaintiff's first abdominal surgery in the area of the biliary ducts. The biliary duct system is composed of the right and left hepatic ducts which attach to and come directly out of the liver, to join together in the common hepatic duct which proceeds for about four centimeters to where it is joined by the cystic duct which connects with the gall bladder. The cystic duct itself is about four centimeters in length. From the point where the cystic duct joins the common hepatic duct the name "common bile duct" is applied until it reaches its ultimate destination about eight centimeters away at the duodenum, which is that portion of the digestive tract attached directly to the stomach. The function of the bile thus carried into the duodenum from the liver and the gall bladder is primarily to aid in the digestive functions. When the gall bladder becomes diseased it is sometimes found necessary to remove it. This is done by severing the cystic duct, removing the gall bladder, and suturing the end of the cut duct which is closest to its juncture with the common hepatic duct, so that the cystic duct becomes permanently sealed off and entirely inoperative. If the common duct or common hepatic duct should be severed and both of the severed ends ligated, the end closest to the duodenum will gradually atrophy and contract through disuse. The ligation of the end closest to the liver will cause the liver-produced bile to back up into the liver itself, causing the liver to swell and gradually disseminate its bile into the bloodstream with resulting severe jaundice and ultimate death unless the back pressure is relieved. If the ligation in this portion of the common bile duct slips off, the liver continuing to function will discharge its bile directly into the peritoneal cavity causing severe inflammation of those organs that it reaches, with resulting peritonitis and ultimate death unless prompt action is taken to correct the situation. In a cholecystectomy the operating surgeon is aware of all these things and knows that one of his primary needs is to expose and identify the cystic duct, the gall bladder, and the common hepatic and common duct, and to closely guard against severance of the common hepatic duct or the common bile duct. All of these things were also well known to defendant, and he testified that he did take such precautions.

After the operation plaintiff continued to suffer pain, developed fever, inability to retain food, abdominal distention, and absence of natural bowel movement during the entire stay in the hospital until she was discharged. On August 15, she was discharged from the hospital but continued to suffer, complained to defendant, was readmitted to the hospital, and was treated for bile peritonitis due to leakage of bile into the peritoneum. Defendant called in a consulting

physician and performed another surgery of an exploratory character (laparotomy), but due to plaintiff's poor physical condition did not expose the biliary tract (area around the liver and bile ducts), but did institute drainage; large amounts of bile-like fluid were drawn from the abdominal tract. Her condition worsened to the critical stage and on September 10, at her own request, she was removed to another hospital and employed another doctor (Wetrich).

Doctor Wetrich also removed substantial amounts of bile-like fluid from the abdominal tract, instituted further drainage, and after a month-long body building process to sufficiently strengthen her that she could again endure a major operation, opened the biliary tract to view and ultimately discovered that the common bile duct had been severed and at least partly ligated; that bile was leaking from it into the peritoneal cavity; that one catgut tie was lying loose and unattached near the severed end of the common bile duct closest to the liver, which catgut tie was involved or imbedded in scar tissue. It was found that the common hepatic duct had been severed about two centimeters away from the juncture of the right and left hepatic ducts; that portion of the common hepatic duct where the cystic duct joins was missing; the severed end of the common hepatic duct was then joined to the severed end of the common bile duct (an anastomosis). This operation was performed about October 13, 1954. A drainage tube was inserted and remained sticking out of her abdomen until May of 1955, during all of which time she suffered some pain, discomfort and inconvenience, but gradually recovered.

Thereafter, an action for damages was brought by plaintiff against defendant and others. Upon trial, a verdict and judgment went for plaintiff against this defendant alone in the sum of $29,423.64. Since plaintiff proved special damages of $4,423.64 it would appear that the jury awarded $25,000 general damages.

[2, 3] The defendant complains that the award of damages was excessive. The trial court, on proper motion, has the duty of weighing the evidence and making such adjustment as appears proper if it believes the verdict to be excessive. Gardner v. Marshall, 56 Cal.App.2d 62, 66(3), 132 P.2d 833. It did not do so. On appeal, this court can only pass on the question of whether or not the verdict was, as a matter of law, excessive. After examining all the evidence we cannot say as a matter of law the $25,000 was so excessive as to require intervention by this court.

[4] Defendant next contends that the evidence is insufficient to support the implied finding of the jury that the defendant severed the common biliary duct, and that there were strong symptoms of this fact during defendant's post-operative attendance on plaintiff, from which defendant should in the exercise of ordinary precaution have known that some sort of repair or at least a laparotomy was necessary. A reading of the entire medical evidence, including testimony relating to plaintiff's post-operative experience of fever, continued pain, accumulation of bile, drainage and flushing procedures found necesary, general physical deterioration, the finding by Dr. Wetrich of the severed parts of the common bile duct, with a loose catgut tie involved in the scar tissue, the end closest to the liver with that end not ligated but leaking bile directly into the peritoneal cavity, the other end or one closest to the duodenum being ligated; the fact that all evidence can well be interpreted to mean that the defendant was the only person performing any surgery on any of the bile ducts prior to the discovery by Dr. Wetrich of the severed bile duct, furnishes sufficient evidence in our opinion for the jury to conclude that defendant did, in fact, sever the common bile duct; that there were sufficient post-operative symptoms to cause an alert physician to believe that more than normal leakage of bile was occurring into the abdominal cavity; and that an exploration of the area of the bile ducts was immediately necessary to determine the cause of these symptoms.

"A defendant's conduct must always be gauged in relation to all the other material circumstances surrounding it, and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law. [Citing cases.]" Seneris v. Haas, 45 Cal.2d 811, 823(4), 291 P.2d 915, 922, 53 A.L.R.2d 124.

"When an appellate court is confronted with the question of the sufficiency of the evidence, its only duty is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support the finding and judgment." The question of the credibility of witnesses is one for the trier of fact. Anglin v. Conway, 41 Cal.2d 683, 688(3) (2), 263 P.2d 1, 4.

[5] The defendant also contends that there was no basis for the application of the rule of *res ipsa loquitur*.

"The conditions required for the application of the doctrine are: (a) There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not normally occur unless someone has been negligent. (b) It must be caused by an agency or instrumentality within the exclusive control of the defendant. (c) It must not have been due to any voluntary action or contribution on the part of the plaintiff. [Citing cases.]" Bauer v. Otis, 133 Cal.App.2d 439, 443, 284 P.2d 133, 136.

[6] It is our opinion that it would not be an unreasonable interpretation of all the evidence and circumstances of this case for the jury to believe that this accident is one that does not normally occur unless someone has been negligent. The defendant was in exclusive control of the surgery, the plaintiff was unconscious, there is no evidence whatever that she contributed in any way, voluntarily, to the injury. The question of the credibility of witnesses was in the first instance one for the jury, and on motion for a new trial one for the trial judge.

[7, 8] The defendant complains that the trial court should not have instructed the jury that

"If, and only in the event, you should find that there was an accidental occurrence as claimed by plaintiffs, namely, that the common hepatic bile duct or the common bile duct of plaintiff Aurora Guillen was cut and tied off during the cholecystectomy or gall bladder operation of August 6, 1954, and that the fact of such cutting and tying off was not recognized by those defendant physicians who were in attendance at that time; and if you should find that from that accidental event, as a proximate result thereof, plaintiff Aurora Guillen has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some negligent conduct on the part of those defendants. * * *"

In this cause the record shows that extensive instructions were given by the court covering every phase of the application of the rule of *res ipsa loquitur* to this case. Most of these instructions were given at the request of the defendant, and a review of the instructions shows that, taken as a whole, the jury was fully and fairly instructed on the subject and any advantage that can be found in the instructions is on the side of the defendant rather than that of the plaintiff. Any instruction standing alone may be insufficient. The question of whether or not the defendant did, in fact, cut the bile duct was left to the decision of the jury, and the effect of the mere inference of negligence was carefully explained to the jury. "* * * [I]nstructions must be read together and harmonized." Bates v. Newman, 121 Cal.App.2d 800, 807(12b), 264 P.2d 197, 202.

It appears to us that the case was fully and fairly tried, that the complained-of

rulings and instructions were proper and not unfair. While it is perfectly true that a different court or a different jury might have arrived at a different result, we cannot say that the result that was arrived at was beyond the realm of ordinary reason nor outside the law.

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., pro tem., concur.

166 Cal.App.2d 467

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jack STANPHILL, Defendant and Appellant.

Cr. 3328.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1958.

Prosecution for robbery and conspiracy to rob. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., rendered judgment convicting defendant as an habitual criminal, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that where defendant's conviction as an habitual criminal depended upon proof of the nature of Oklahoma convictions, sentence as an habitual criminal was improper where documents concerning such constructions were not properly authenticated and were merely presented to trial judge at time of sentencing, without giving defendant an opportunity to question the correctness or legal competence of the authentication of the documents.

Judgment reversed in part and cause remanded with direction.

Opinion, 330 P.2d 95, vacated.

1. Criminal Law ⇐1202(1)

Where, although defendant admitted prior conviction for burglary in Oklahoma, such conviction might have been had in Oklahoma on facts not constituting burglary in California, proof of nature of Oklahoma offense and, possibly, the date of its commission, would be necessary to a determination that defendant was an habitual criminal under California statute. West's Ann.Pen.Code, § 644; 21 Okl.St. Ann. § 1435; 21 Okl.St.Ann. (1937) §§ 1433, 1434, repealed Laws 1941, p. 87, § 2; Okl.St.Ann. Const. art. 5, § 54.

2. Criminal Law ⇐1202(3)

Where defendant's conviction as an habitual criminal depended upon proof of nature of Oklahoma convictions, sentence as habitual criminal was improper where documents concerning such convictions were not properly authenticated and were merely presented to trial judge at time of sentencing, without giving defendant an opportunity to question the correctness or legal competence of the authentication of the documents. West's Ann.Code Civ.Proc. § 1905; West's Ann.Pen.Code, § 644.

3. Criminal Law ⇐1186(1)

Where judgment and sentence were incorrect in so far as defendant was adjudged an habitual criminal, judgment would be reversed in part and remanded for retrial of issues limited to those pertaining to question whether defendant was an habitual criminal. West's Ann.Pen.Code, § 644.

4. Criminal Law ⇐1216(2)

If a retrial should result in determination that defendant was an habitual criminal and a life sentence was imposed, all other terms should run concurrently with life term, and not consecutively. West's Ann.Pen.Code, §§ 644, 669.

Edward Nelson, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of first degree robbery, committed while armed with a deadly weapon, and of conspiracy to commit robbery, with three prior convictions (one in Oklahoma in 1947 and two in California in 1951)[1], defendant was found by the trial court to be "a habitual criminal." Defendant questions this finding.

In respect to the Oklahoma conviction, the indictment charged that this defendant was convicted of the "crime of burglary, second degree * * *, a felony," that judgment thereon was rendered "on or about the 4th day of September, 1947," and that he "served a term of imprisonment therefor in the State Prison." Defendant admitted "as true the prior conviction of Felony of the date of September 4, 1947, as charged * * *."

However, it does not appear from the charge itself, nor from defendant's admission thereof, whether he was convicted of a crime which is specified by section 644 of the Penal Code as one which is used as a basis for determining that a person is "a habitual criminal." The Oklahoma statute includes in its definition of second degree burglary the doing of certain acts which would not constitute such an offense in California under our statutes.

For example, Oklahoma defines second degree burglary as breaking and entering "any * * * automobile, truck, trailer * * *" (21 Okl.St.Ann. § 1435). These are broader terms than those appearing in section 459 of our Penal Code, which uses the expression "vehicle as defined by" our Vehicle Code if "the doors of such vehicle are locked."

There is the possibility, also, that defendant may have been convicted under an earlier Oklahoma statute for an offense which would not qualify as burglary under our statute. Until their repeal in 1941, sections 1433 and 1434 of title 21 of the Oklahoma statutes defined certain entries as second degree burglary if made "with intent to commit any crime," not limited to "intent to commit grand or petit larceny or any felony" as in our section 459. See 21 Okl. St.Ann. (1937) §§ 1433–1434, repealed by Laws 1941, p. 87, § 2.

The repeal of sections 1433–1434 did not preclude subsequent prosecution for a violation thereof. The Oklahoma constitution provided and still provides that the repeal of a statute does not affect "any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." Okl.St.Ann.Const. art. 5, § 54. The applicable statute of limitations would be tolled during defendant's absence, if any, from the State of Oklahoma. 22 Okl.St.Ann. § 153.

[1] Consequently, it is possible that defendant may have been convicted in 1947 of an entry made prior to 1941 under circumstances that would not constitute burglary under our law.

Accordingly, proof of the nature of the Oklahoma offense and, possibly, the date of its commission, would be necessary to a determination that defendant is "a habitual criminal" under our statute.

[2] The record herein indicates that such proof was tendered in this case by means of certain documents which the district attorney presented to the trial judge. They consisted of certified photostatic copies of informations and commitment papers, guilty pleas of the defendant to those charges, and his commitment to the Oklahoma state penitentiary; also, a letter from the county attorney of Tulsa county, Oklahoma, to the district attorney of San Francisco outlining the details of the Oklahoma crimes. From these documents it would appear that each of the Oklahoma burglaries would have been a burglary under section 459 if committed in California.

1. The two California priors were tried together. Only one qualifies as a prior conviction "upon charges separately brought and tried," under Penal Code, section 644.

Those convictions were for attempted robbery and for violation of section 245 of the Penal Code, for each of which defendant was sentenced to and served a term of imprisonment in the state prison.

The entry in each case was for the purpose of stealing "certain personal property of value." That, at least, was a charge of an entry for the purpose of committing petit larceny.

However, these documents were not authenticated in the manner prescribed by section 1905, Code of Civil Procedure, nor by production of the originals as sanctioned by People v. Wilson, 100 Cal.App. 397, 400, 280 P. 137, nor by authenticated copies of the judgments and testimony identifying the defendant (People v. Wilson, 103 Cal. App. 420, 423–424, 284 P. 988), nor in the manner provided by section 969b, Penal Code. The plaintiff argues that section 969b has been satisfied, because the documents include a copy of the warden's receipt. The receipt is not a certification.

Moreover, the documents were merely presented to the trial judge by the district attorney at the time of sentencing. There is no indication in the record that defendant was at any time given an opportunity to question the correctness or legal competence of the authentication of the documents mentioned. Such an opportunity should have been afforded him.

Plaintiff says that because defendant admitted the Oklahoma priors as charged, there was no place during the trial where the admission of these documents in evidence would have been pertinent; indeed, their admission would have been prejudicially erroneous, citing Penal Code sections 1025 and 1093.[2] Accordingly, says plaintiff "what else could the trial judge do but accept the documents as he did in this case, inspect them to make sure the defendant was convicted of a crime which if committed in California would have been burglary under the laws of * * * California." That is not the production of evidence nor is it confrontation of the defendant with the purported "evidence" tendered, upon an issue of pivotal importance in the case. The habitual criminal, under the circumstances of this case, would be sentenced to imprisonment for life. Pen.Code, § 644. People v. Morton, 41 Cal.2d 536, 541–545, 261 P.2d 523, demonstrates that here we are not dealing with some trivial, inconsequential detail of procedure; instead, it is a matter of such great import, a formal adjudication is required.

[3] In such a case the established procedure is to reverse the judgment in part and remand for retrial of issues limited to those which pertain to the question whether or not defendant is a habitual criminal. People v. Taylor, 155 Cal.App.2d 26, 317 P.2d 167, hearing by Supreme Court denied.

[4] We note in passing that if the retrial results in a determination that defendant is a habitual criminal and a life sentence is imposed, all other terms should run concurrently with the life term, not consecutively as heretofore adjudged herein. Pen. Code, § 669; People v. Tucker, 127 Cal. App.2d 436, 437, 273 P.2d 934.

The part of the judgment adjudging defendant a habitual criminal and imposing sentence is reversed and the cause is remanded with directions to resentence defendant after the conclusion of the limited new trial on the issue of the challenged prior conviction.

PETERS, P. J., and BRAY, J., concur.

2. Such evidence is not to be presented to the jury but only to the judge at or prior to the time of fixing sentence.

166 Cal.App.2d 488

In the Matter of the ESTATE of Montague BROOME, also known as Montague W. Broome and Montague Watson Broome, Deceased.

Elvira Broome DOOLAN and Ynez Broome Jones, Appellants,

v.

Marian BROOME, Respondent.

Civ. 23170.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1958.

Proceeding on objections filed by remaindermen of testamentary trust to inclusion of certain moneys from oil leases as income payable to life tenant. From an order of the Superior Court, Santa Barbara County, Atwell Westwick, J., approving and settling report and fourth account of trustees including sums of money as income, the remaindermen appealed. The District Court of Appeal, Fourt, J., held that where deed executed by decedent as grantor required grantee to pay decedent one-half of all royalties or other compensation payable to or received by grantee from any oil, gas, minerals, or carbonaceous substances which might be developed from land but grantee was not obligated to permit premises to be drilled for any minerals or to give any leases for such purposes, obligation to pay was in nature of a perpetual contractual obligation imposed upon owner of land by reason of ownership thereof and contingent right to receive payment was in nature of a perpetual contract right and such contract right was regarded as principal, although its value, if any, was measured by extent of oil supply, and sums of money received by testamentary trustee from oil leases covering land was properly allocated to income and paid to life tenant and was not distributable to remaindermen.

Order affirmed.

Mines and Minerals ⇐55(2)
Wills ⇐684(3)

Where deed executed by decedent as grantor required grantee to pay decedent one half of all royalties or other compensation payable to or received by grantee from any oil, gas, minerals, or carbonaceous substances which might be developed from land, but grantee was not obligated to permit premises to be drilled for any minerals or to give any leases for such purpose, obligation to pay was in nature of a perpetual contractual obligation imposed upon owner of land and contingent right to receive payment was in nature of a perpetual contract right, and such contract right was regarded as principal, although its value, if any, was measured by extent of oil supply, and sums of money received by testamentary trustee from oil leases covering land was properly allocated to income and paid to life tenant and was not distributable to remaindermen. West's Ann.Civ.Code, § 730.12.

Robert Metcalf Jones, Allan, Miller, Groezinger, Keesling & Martin, San Francisco, for appellants.

Cavalletto, Webster, Mullen & McCaughey, Santa Barbara, for respondent.

FOURT, Justice.

This is an appeal from an order approving and settling the Report and Fourth Account of the Trustees, which included certain sums of money in said Fourth Account as "income."

Appellants Elvira Broome Doolan and Ynez Broome Jones are the daughters of decedent and the remaindermen of a testamentary trust, and respondent Marian Broome is the widow of decedent and the beneficiary of the trust income for her lifetime.

The sums of money with which we are concerned in this case consist of the two following items: June 21, 1957 "Recd Fr Herbert W. Naumann ⅓ of ½ Oil Lease Rental Fr Lloyd Corporation Ltd under Lease Dtd 6/15/55 and Terminated 2/13/57 $1,466.66" and "June 21, 1957, Recd Fr Security First Natl Bank Oxnard as Escrow Agent ⅓ of ½ of Rental Recd Fr Union Oil Co under Lease Dtd 6/15/55 & Terminated 2/13/57 $848.00."

These monies were delivered into the possession of the Trustees by reason of a deed dated September 19, 1924, executed by decedent and two others as grantors (parties of the first part) and American Beet Sugar Company, a corporation, as grantee (party of the second part) in which was included the following provision: "That the said party of the second part, by acceptance of this deed agrees, and it is mutually agreed between the parties hereto, that the party of the second part, its successors and assigns, shall, respectively, account for and pay to said parties of the first part an amount equivalent to one-half (½) of all the royalties or other compensation which may become payable to or be received by or for the account of said party of the second part, its successors or assigns, respectively, for any oil, gas, minerals or carbonaceous substances, or similar product, which may be developed on said land hereinbefore described as Parcel One, or from leases on said premises for the developed of any of said products above mentioned; it is, however, expressly understood and agreed that neither said party of the second part nor its successors or assigns shall be under any obligation to permit said premises to be drilled for any oil, gas, minerals, carbonaceous substances or similar products, or to give any leases thereon for any of said purposes; but it is understood and agreed that if the party of the second part, or its successors or assigns, do permit said premises to be drilled for any of said substances or do give any lease or leases for that purpose, the terms upon which said premises shall be drilled or any leases shall be made for any of said purposes, shall be wholly within the discretion of the party of the second part, its successors or assigns."

The appellants herein filed objections to the inclusion of the monies as "income," contending in the alternative:

(1) that, as an interest in real property in Ventura County, said monies should be distributed to them outright under the provisions of Paragraph Third of decedent's will, which provided as follows: "Third: I give, devise and bequeath to my daughters Ynez Broome Jones and Elvira Doolan, one-half of my interest in real property located in Ventura County, said one-half interest to be divided between them equally, share and share alike, and in addition thereto, I give and bequeath to my said daughters the sum of $1,000.00 each."; or

(2) that said monies were a portion of the corpus of the trust estate.

It has been agreed that the issues involved in this appeal are the following:

"(1) Whether or not a real property right was excepted or reserved in favor of the grantors in the original deed from which the present monies stem;

"(2) Whether or not a personal right was reserved in favor of the grantors in said deed;

"(3) What disposition should be made of the funds coming into the hands of the trustees in view of the determination made by this Court as to the nature of the right involved."

The Supreme Court very recently in Brown v. Terra Bella Irrigation District, 51 Cal.2d 33, 330 P.2d 775, at page 777, clarified the distinctions between exceptions and reservations, stating, "As a general rule an exception concerns property which is excepted from the grant and does not pass to the grantee, whereas a reservation is a right newly created in favor of the grantor out of property which does pass to the grantee. 'The word "reserved" in a strict technical sense is not synonymous with "exception." The former term is applied to a clause in a deed which creates some right or privilege for the benefit of the grantor in the land described as granted, and withholds it from the operation of the grant, so that the title to the thing passes to the grantee, and the right of privilege concerning it is the only thing retained by the grantor. The latter term applies to something which constitutes a part of the thing described as granted and which would pass but for the excepting clause, the office of which is to exclude it from the thing described, and the title to the thing excepted remains in the grantor.' Van Slyke v.

Arrowhead Reservoir & Power Co., 155 Cal. 675, 679, 102 P. 816."

There is nothing in the record before us to indicate who prepared the document in question, and we cannot speculate as to the reasons for the choice of form or terminology. The conveyance does pre-date the leading case of Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871, in which the Supreme Court extensively reviewed the law concerning oil interests in California and elsewhere, and in which the nature of the interest of an assignee to whom an owner of land has transferred a percentage interest in oil rights was defined. In Callahan v. Martin, 3 Cal.2d at page 115, 43 P.2d at page 791, supra, the court stated, "The difficulty experienced in defining with exactitude the nature of the assignee's rights is due in part to the fact that the oil industry is of very recent development, while in this country, by statute and judicial precedent, our classification of property as realty or personalty is based on common-law definitions which crystallized in a time when oil interests were not the subject of judicial cognizance." Later in the same opinion 3 Cal.2d at page 118, 43 P.2d at page 792, the court stated, "Giving full weight to this statement of the nature of the landowner's rights in oil and gas, we are of the view that an operating lessee under a lease for a term of years, or for a term of years and so long as oil shall be produced in paying quantities, has an interest or estate in real property in the nature of a profit *a prendre,* which is an incorporeal hereditament, and that the assignee of a royalty interest in oil rights under an assignment by the landowner also has an interest or estate in real property in the nature of an incorporeal hereditament."

It is extremely difficult to ascertain now what the intention of the parties was at the time the document in question was executed. Their intention could have been to create an exception, a reservation, a landowner's non-participating royalty interest, or any of a number of other interests in real property, or by contract to create rights in the grantor in consideration for the assumption of certain contingent obligations on the part of the grantee, which obligations would constitute a lien upon the land.

We have attempted to analyze the transaction in the light of the few circumstances known to exist when the bargain was made. It was apparently contemplated by the parties that the premises would be used for growing sugar beets, and for this use a certain value was placed upon the land which the parties agreed was fair and reasonable. The parties apparently also recognized the possibility that someone might at some indefinite future time strike oil on the land, and they realized that this would increase the value of the property far beyond any use for agricultural purposes.

The conveyance in question appears to us to break across the usual categories, and to partake of certain characteristics pertaining to a variety of classifications of interests. In Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237, the Supreme Court recognized the complexities confronting the draftsmen of documents describing interests affecting subsurface fugacious substances by the application of common law rules, and stated 4 Cal.2d at page 651, 52 P.2d at page 244, "It is not surprising, in view of the lack of a definite terminology descriptive of these interests, that those who are dealing in oil interests have difficulty in describing the interest transferred, and that ambiguous and uncertain instruments are presented to the courts for analysis. Such instruments must be construed as a whole in the light of the circumstances under which they were executed and the expressed intent of the parties at that time."

As a practical matter, the foreseeable possibility of striking oil on the premises in question must have been regarded by the parties as remote rather than probable, because the grantors did not retain for themselves or receive by way of grant any right to participate in making the decision whether the premises should be drilled; nor did they retain for themselves or receive

by way of grant any right of control as to the terms upon which the premises might be developed.

The parties must have recognized that they were competent to fix a fair purchase price in the event the land were of value only for use for agricultural purposes. They must have regarded this element as the important one making up the purchase price. It would appear that only under such circumstances would the grantors have been willing to agree to allow the grantee to have complete control of any future developmental possibilities concerning the land, subject only to the condition that any benefit derived therefrom be shared equally with grantors by requiring the grantee to agree to pay to grantors, their successors and assigns an amount equivalent to one-half of whatever might be received for any oil, gas, minerals or carbonaceous substances or similar products. So viewed, the obligation to pay is in the nature of a perpetual contractual obligation imposed upon the owner of the land by reason of the ownership thereof. Conversely, the contingent right to receive payment is in the nature of a perpetual contract right.

In our opinion, such contract right itself should be regarded as principal, although its value, if any, is measured by the extent of the oil supply. Such right, therefore, must be regarded as a specie of "property subject to depletion" within the meaning of that terminology as used in Civil Code, § 730.12, which provides as follows:

"Where any part of the principal consists of property subject to depletion, such as leaseholds, patents, copyrights and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties or income from the property shall be income to the tenant; but where the trustee or tenant is under a duty to change the form of the investment, either at once or as soon as a reasonable price, not representing an undue sacrifice of value, may be obtained, then the rents, royalties or income from such property not in excess of 5 per centum per annum of its inventory value as fixed by the appraiser or appraisers regularly appointed by the court, or in default thereof its market value at the time the principal was established, or at its cost where purchased later, shall be deemed income and the remainder principal."

Under the circumstances, in our opinion it was proper for the testamentary trustee to have allocated such sums of money as the ones in question to "income," and it was proper for the trial court to have ordered distribution thereof to the life tenant.

The order appealed from is affirmed.

WHITE, P. J., and LILLIE, J., concur.

51 Cal.2d 399

Hayden W. CHURCH, Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE of California et al., Respondents.

S. F. 19974.

Supreme Court of California, In Bank.

Dec. 30, 1958.

Rehearing Denied Jan. 28, 1959.

Proceeding on petition by carrier to obtain annulment of an order of the Public Utilities Commission ordering carrier to make reparation to certain subhaulers. The Supreme Court, McComb, J., held that where Public Utilities Commission ordered an investigation into practices of an overlying carrier relating to rate arrangements with certain subhaulers, but overlying carrier was not directed to file any pleadings and a stipulation was entered into by which all of carrier's legal defenses were reserved to him, carrier did not waive his right to rely upon defense of statute of limitations after commission rendered its decision adverse to carrier.

Order annulled.

1. Automobiles ⇐121

Law fixing minimum hauling rates to to be charged for transportation services by licensed highway carriers only determines amount of liability created by agreement of the parties and does not create the liability.

2. Limitation of Actions ⇐28(1)

Where overlying carrier entered into oral agreements with certain subhaulers relating to rate arrangements, two-year statute of limitations and not three-year statute of limitations was applicable. West's Ann.Code Civ.Proc. §§ 335, 338, subd. 1, 339, subd. 1.

3. Limitation of Actions ⇐15

Where public utilities commission ordered an investigation into practices of an overlying carrier relating to rate arrangements with certain subhaulers, but overlying carrier was not directed to file any pleadings and a stipulation was entered into by which all of carrier's legal defenses were reserved to him, carrier did not waive his right to rely upon defense of statute of limitations after commission rendered its decision adverse to the carrier. West's Ann.Public Util.Code, § 1756; West's Ann. Code Civ.Proc. §§ 335, 338, subd. 1, 339, subd. 1.

4. Estoppel ⇐53

A waiver of a right cannot be established without a clear showing of an intent to relinquish such right and doubtful cases will be decided against a waiver.

Monteleone & McCrory, Stephen Monteleone and Darrell P. McCrory, Los Angeles, for petitioner.

Everett C. McKeage, Chief Counsel, Roderick B. Cassidy, Asst. Chief Counsel, Harold J. McCarthy, Principal Counsel, Rita L. Heiser, Asst. Counsel, San Francisco, and William D. Campbell, Los Angeles, for respondents.

McCOMB, Justice.

Petitioner seeks to obtain annulment of an order of the Public Utilities Commission pursuant to the provisions of section 1756 of the Public Utilities Code.[1]

1. Section 1756 of the Public Utilities Code reads: "Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

The Public Utilities Commission on its own motion, on November 29, 1955, ordered an investigation into the practices of petitioner, an overlying carrier, relating to rate arrangements with certain subhaulers.

The commission found that petitioner was underpaying the subhaulers and ordered reparation. After respondent commission rendered its decision, a petition for rehearing was filed by petitioner in which he urged, among other points, that the order of the commission was barred by the statute of limitations, and particularly by the provisions of section 339, subdivision 1, of the Code of Civil Procedure. This petition was granted, and an answer was filed by petitioner pleading the statute of limitations and section 339, subdivision 1, of the Code of Civil Procedure. Thereafter, respondent commission rendered its decision ordering petitioner to make reparation. A petition for rehearing of this order was denied.

It is conceded that the oral agreements upon which petitioner's alleged liability rests were entered into more than two years before the present proceeding was instituted.

These are the questions necessary for us to determine:

First. *In the instant case, which statute of limitations was applicable, the one prescribed by section 338, subdivision 1, of the Code of Civil Procedure or the one prescribed by section 339, subdivision 1, of that code?* [2]

[1] Minimum hauling rates to be charged for transportation services by licensed highway carriers on either an hourly or a ton-mileage basis are fixed by law. The law, however, does not create the liability. It only determines the amount of the liability created by the agreement of the parties. (Gardner v. Basich Bros. Construction Co., 44 Cal.2d 191, 194 [4], 281 P.2d 521.)

[2] Under this rule, since the liability was created by the agreement of the parties, which agreement was an oral one, the two-year statute of limitations, as provided by section 339, subdivision 1, of the Code of Civil Procedure, was applicable to the present case and not the three-year statute provided by section 338, subdivision 1.

[3] Second. *Did petitioner waive the defense of the statute of limitations by failing to assert it at the hearing?*

No, for these reasons:

(1) Under the rules of procedure of the Public Utilities Commission, petitioner was not required to plead unless directed by the commission to do so. Rule 14 reads as follows: "The commission may at any time institute investigations on its own motion. Orders instituting investigation shall indicate the nature of the matters to be investigated, and will be served upon the person or entity being investigated. A respondent need not file a pleading in response to the investigatory order unless so directed therein." In the present case petitioner was not directed to file any pleading in accordance with the foregoing rule.

[4] (2) A stipulation was entered into by the parties prior to the commission's

2. Section 335 of the Code of Civil Procedure reads: "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:"

Section 338 of the Code of Civil Procedure reads in part: "Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture. * * *"

Section 339 of the Code of Civil Procedure reads in part: "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder. * *"

making its interim order, by which all of petitioner's legal defenses were reserved to him. Therefore, under the rule that a waiver of a right cannot be established without a clear showing of an intent to relinquish such right and doubtful cases will be decided against a waiver (Greninger v. Fischer, 81 Cal.App.2d 549, 554 [8], 184 P. 2d 694), petitioner did not waive his right to rely upon the defense of the statute of limitations.

In view of our conclusions, it is unnecessary to discuss other contentions made by counsel.

The order of the commission is annulled.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

51 Cal.2d 314

The FLYING TIGER LINE, Inc. (a Corporation), Plaintiff and Respondent,

v.

The COUNTY OF LOS ANGELES and The City of Burbank, Defendants and Appellants.

L. A. 24532.

Supreme Court of California.

Dec. 16, 1958.

Rehearing Denied Jan. 14, 1959.

Action by airline company engaged in business as a common carrier of freight by air, to recover 1953 taxes paid under protest to county tax collector upon five airplanes used for overseas flying. From adverse judgment of the Superior Court, Los Angeles County, Arnold Praeger, J., the county and city appealed. The Supreme Court, McComb, J., held that where aircraft were regularly flown in interstate and foreign commerce and physically present in Los Angeles County only a part of the time, county did not have power to assess an ad valorem property tax upon full value of aircraft during period for which tax was collected.

Judgment affirmed.

Traynor, J., Gibson, C. J., and Spence, J., dissented.

Opinion, 323 P.2d 1065, vacated.

1. Taxation ⇐100

Where aircraft used by taxpayer for overseas flights were regularly flown in interstate and foreign commerce and physically present in Los Angeles county only a part of the time, county did not have power to assess an ad valorem property tax upon full value of aircraft during period for which tax was collected. West's Ann.Rev. & Tax.Code, § 5138.

2. Taxation ⇐102

Rule which permits taxation by two or more states on an apportioned basis precludes taxation on all the property by state of domicile.

3. Taxation ⇐493(7)

A taxpayer resisting an ad valorem tax on personal property based on an unapportioned assessment does not have burden of showing that other states have actually imposed a tax on such property.

4. Taxation ⇐98

A taxpayer is entitled to an assessment on an apportionment basis if record shows that he was, during a tax year, receiving substantial benefits and protection in more than one state.

5. Taxation ⇐493(8)

When relief from an improper assessment is sought from board of supervisors sitting as board of equalization, and denied in belief that only issue is one of law for courts, applicant is not bound by such decision on an appeal to the superior court. West's Ann.Const. art. 13, § 9; West's Ann. Rev. & Tax.Code, § 5138.

Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, Los Angeles, and Alfred Charles DeFlon, Dep-

uty County Counsel, Hollywood, for appellants.

Hill, Farrer & Burrill, Carl A. Stutsman, Jr., and Leon S. Angviro, Los Angeles, for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff in an action to recover 1953 taxes paid under protest to the Tax Collector of Los Angeles County upon the assessment of five airplanes.

[1] *Facts:* Plaintiff is a Delaware corporation, with its principal place of business in the county of Los Angeles. It is engaged in business as a common carrier of freight by air, operating in interstate and foreign commerce under a certificate issued by the Civil Aeronautics Board.

On the assessment date in 1953, the first Monday in March, plaintiff owned and operated 37 aircraft of two different types. It had 27 C–46 planes, which were used only in its domestic commercial service. These planes did not have a sufficient range for overseas flying. They were assessed at a portion of their book value determined by computing the percentage of the total time, during a test period selected by the county assessor, that the planes were physically present in the county of Los Angeles. The tax on these planes is not disputed.

Plaintiff also operated 10 DC–4 planes in flying the Pacific airlift under control of the military authorities and in support of the war in Korea. The route of this lift was from the United States to Tokyo, Japan. Five of these planes were leased by plaintiff and five were owned by it. Plaintiff's interest in the leased planes was assessed on the same formula applied to the C–46 planes. This tax is undisputed.

The other five DC–4 planes that were operated on the Pacific airlift were removed from the remainder of plaintiff's fleet of 37 planes by the county assessor and were assessed at 100% of their value without regard to the time they were physically present in the county. The difference between the amount of the tax paid on the full assessment of these five planes and the amount which would have been taxed if the assessor had assessed them on the same basis as all the other planes is the amount sought to be recovered.

Plaintiff filed a petition for redetermination of the assessment before the Los Angeles County Board of Supervisors, sitting as a board of equalization, for the year 1953–54. After two hearings before the board, the application for relief was denied. The tax was subsequently paid under protest. Thereafter plaintiff filed this suit for recovery against the county of Los Angeles and the city of Burbank. The city was made a defendant as required by section 5138 of the Revenue and Taxation Code.[1]

Questions: First. *Does defendant county have the power to assess an ad valorem property tax upon the full value of aircraft which are regularly flown in interstate and foreign commerce and physically present in the county only a part of the time during the period for which the tax is collected?*

No. The five planes involved were used chiefly in the performance of the Pacific airlift instituted in 1950 as a result of the Korean war, and operations during the pe-

1. Section 5138 of the Revenue and Taxation Code reads: "Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

"If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

"Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel."

riod in question were scheduled by the military authorities and not by the Civil Aeronautics Board.

A proper decision of this case rests upon the application of four United States Supreme Court decisions. In 1944 the Supreme Court of the United States decided, in Northwest Airlines v. Minnesota, 322 U. S. 292, 64 S.Ct. 950, 88 L.Ed. 1283, that Minnesota, the home port state of the airline, could levy a property tax on the entire value of a fleet of planes in spite of the fact that the same planes were admittedly taxed on a portion of their value by six of the seven other states through which they operated.

In 1949 the Supreme Court, in Ott v. Mississippi Barge Line, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585, modified the rule previously laid down in Northwest Airlines v. Minnesota, supra. The Ott case involved barges and tugs operated up and down the Mississippi River and owned by a corporation domiciled in Ohio. These tugs and barges were taxed on an apportioned basis by the State of Louisiana, where they made certain irregular stops. The court held that Louisiana could tax the vessels on a *portion* of their value. With reference to the question of the due process aspect of a tax of this type, the court stated, 336 U.S. at page 174, 69 S.Ct. at page 434: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. (Citation.) Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State."

In 1952 the Supreme Court, in Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427, involving vessels travelling on the Mississippi River, adopted the rule that a domiciliary state could not tax the full value of property located only part of the time within a state without constituting an unreasonable burden upon interstate commerce and thus violating the due process clause of the United States Constitution. The court said in 342 U.S. at page 384, 72 S.Ct. at page 310: "No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Barge Line Co., supra, could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. (Citation.) Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

In 1954 the Supreme Court, in Braniff Airways v. Nebraska Board, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967, applied the rule previously laid down in Standard Oil Co. v. Peck, supra, to aircraft flying in interstate commerce. This case involved a fleet of planes which had its home port in the State of Minnesota, but which was used in and out of the taxing state, Nebraska. Nebraska imposed an apportioned ad valorem tax on the equipment, based upon the percentage of time in and out of the state. The court said, 347 U.S. at page 600, 74 S.Ct. at page 763: "We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats."

[2] It thus appears that the United States Supreme Court has now held that the rule which permits taxation by two or more states on an apportioned basis precludes taxation on all the property by the state of domicile.

In Standard Oil Co. v. Peck, supra, 342 U.S. at page 384, 72 S.Ct. at page 310, the court said: "Those cases, though exceptional on their facts, illustrate the reach of the taxing power of the state of the domicile as contrasted to that of the other states. But they have no application here since most, if not all, of the barges and boats which Ohio has taxed were almost contin-

uously outside Ohio during the taxable year. * * * The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. (Citation.) Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

[3, 4] A taxpayer resisting an ad valorem tax on personal property based on an unapportioned assessment does not have the burden of showing that other states have actually imposed a tax on such property. He is entitled to an assessment on an apportionment basis if the record shows that he was, during a tax year, receiving substantial benefits and protection in more than one state.

In the present case, there was no apportionment with respect to the assessment of the five planes. Therefore, as a matter of law, the tax was not levied upon a proper basis.

The holding in Slick Airways v. County of Los Angeles, 140 Cal.App.2d 311, 295 P. 2d 46, is in accord with the foregoing views. In that case, a fairly apportioned assessment on planes of this type was determined by the Los Angeles County Assessor. The company had its principal place of business in California in 1952 and 1953. The court, 140 Cal.App. at page 312, 295 P.2d at page 46, had this to say with reference to the normal assessment procedure in Los Angeles County: "Plaintiff is engaged in flying a fleet of airplanes in interstate and foreign commerce. Such airplanes, under the practice of the county assessor of Los Angeles County, are assessed on the basis of a fair allocation of time, to wit, the ratio of the time spent in Los Angeles County as compared to total time."

Thereafter, the court properly recognized that under the circumstances present, which were similar to those in the instant case, the county of Los Angeles had authority to tax only a portion of the value of the planes. In referring to the decision of the United States Supreme Court in Braniff Airways v. Nebraska Board, supra, the court, 140 Cal.App.2d at page 314, 295 P. 2d at page 46, said: "The Supreme Court, in upholding the validity of the tax, said, 347 U.S. at page 600, 74 S.Ct. 757: 'The limitation imposed by the Due Process Clause upon state power to impose taxes upon such instrumentalities was succinctly stated in the Ott Case: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State."'"

[5] Second. *When relief from an improper assessment is sought from the board of supervisors sitting as a board of equalization, and denied in the belief that the only issue is one of law for the courts, is the applicant bound by this decision on an appeal to the superior court?*

No. Defendants argue that plaintiff is entitled to a trial "of factual matter which should have been but was not presented to said Board for determination." This question is not presented to this court, because the trial court rendered its decision without consideration of any evidence offered before the trial court, basing it upon a question of law.

Security-First National Bank v. County of Los Angeles, 35 Cal.2d 319, 217 P.2d 946, relied on by defendants, is not applicable to the facts of the present case, for in that case no application for relief was filed with the board of supervisors.

The duties of a board of supervisors sitting as a board of tax equalization are prescribed in article XIII, section 9, of the California Constitution, which reads, in part: "The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation * * *."

The duties of the board are fully set forth by this court in Universal Consolidated Oil Co. v. Byram, 25 Cal.2d 353, 356–357,

153 P.2d 746, 748: "It must be conceded, of course, that it is well settled in this state that to the authorized county board of equalization has been confided the duty of determining 'the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable'; that in discharging this duty, 'the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment, so far as amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question,' adjudicating necessarily that 'the property is assessed at the same value proportionately as all the other property in the county'; *that such adjudication 'cannot be avoided, unless the board has proceeded "arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers"* * * * or unless there be something equivalent to fraud in the action of the board'; and that 'Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board.' (Citations.) *While not classifiable with any aspect of fraud or bad faith, the lack of due process distinguishing the procedural phase of these equalization matters as submitted to the board furnishes an equally appropriate basis for the court's intervention in protection of the plaintiffs' constitutional rights.*" (Emphasis added.)

The court said, 25 Cal.2d at page 360 [3] et seq., 153 P.2d at page 751:

> "The fundamental premise of the plaintiffs' recourse to the court for relief rests upon the proposition that, as with any ad valorem tax, their constitutional right to an equalization hearing comprehends a decision *in the light of the evidence there introduced* before any determination becomes final as to them. (Citations.) As any tax proceeding is *in invitum* in nature, each step must be taken in compliance with law or the proceeding is void. The equalization stage is no exception to this rule. Compliance with the constitutional requirement for an equalization hearing is not met unless the substance as well as the form of the hearing is granted to the complaining taxpayer. (Citation.) Typical illustrations of the denial of procedural due process which have been held to invalidate purported equalization determinations are: One man hearings (citation); the taking of evidence without the presence of the taxpayer or his representative (citations); the refusal to allow reasonable opportunity for cross-examination (citation); the refusal to permit reasonable argument (citation); reliance in the concluding steps upon the advice of the assessor or the assessor's attorney, particularly if done secretly (citation); and the attempted determination of a case by members of the board who did not hear the evidence, if their vote be necessary to the determination (citation).
>
> "In line with these instances of the denial of procedural due process are the present cases. The *concluding steps* of the equalization proceeding are many times the most essential to the preservation of the taxpayer's rights."

Again the court said, 25 Cal.2d at page 362 [6], 153 P.2d at page 751: "As appears from the numerous authorities cited in the forepart of this opinion, the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal.Const., art. XIII, § 9), and when that tribunal, after due hearing and within the limits of reasonable discretion, makes its *findings on the facts,* such decision is final and conclusive."

It is evident from the foregoing authority that when a board of equalization purports to decide a question of law, or refuses to hear a case on the ground that it involves only a question of law to be decided by the courts, a taxpayer has the right

to resort to the courts for determination of such question.

In the present case, there was no dispute as to the facts, a question of law alone being presented to the board of equalization, as appears from the following excerpt from the transcript:

"Mr. Jessup [Member of the Board]: Mr. West, there is no chance of you and this gentleman sitting down and working this thing out?

"Mr. Anson [Deputy County Counsel]: There is a very definite legal issue other than the facts; I don't think there is too much of a quarrel as regards the facts.

"Mr. Hahn [Member of the Board]: There's no quarrel with the facts, but a legal question?

"Mr. Anson: Primarily a legal question; that is, as far as the five aircraft covered under this second item are concerned."

(See also Mahoney v. City of San Diego, 198 Cal. 388, 403 [9], 245 P. 189, where an arbitrary method of property valuation adopted by the assessor and approved by the board of supervisors was held a proper subject for court review.)

Applying the foregoing rule to the present case, it appears that plaintiff sought relief before the board of equalization. This relief was denied solely because the board, on the advice of its counsel, applied an improper principle of constitutional law. Therefore, plaintiff properly applied to the superior court for relief.

In light of the foregoing, the trial court was correct in holding that defendant county had exceeded its power to tax the airplanes here involved and in entering judgment in favor of plaintiff.

The judgment is affirmed.

SHENK and SCHAUER, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance.

The issue presented by this case is: To what extent can the domicile state of an interstate and foreign air carrier impose an ad valorem tax on its property when one or more non-domiciliary states have acquired the power to impose an ad valorem tax on an apportioned basis. While the decided cases seem to hold that under the circumstances the domicile state cannot tax on the basis of the full assessed valuation of *all* the property, the precise extent of its power to tax has not yet been decided by the Supreme Court of the United States.

The principles bearing on this issue are contained in several recent cases. In Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283, the court held that Minnesota, the domicile of the airline, had constitutional power to tax the airline's entire fleet of aircraft at its full value even though all the planes were continuously engaged in interstate flights. In this case Chief Justice Stone wrote a vigorous dissent in which he held that Minnesota could only impose an apportioned tax. In 1949 the Supreme Court held in Ott v. Mississippi Barge Line, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585, that Louisiana, a non-domiciliary state, could tax barges and tugs, moving in and out of the state, on an apportioned basis according to the commerce carried on within the state. In Standard Oil Co. v. Peck, 1952, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427, involving vessels traveling on the Mississippi River, the Supreme Court adopted the rule that a domiciliary state could not tax the full value of property located only part of the time within its borders, and which must have acquired a tax situs elsewhere, without constituting an unreasonable burden on interstate commerce. The court said, 342 U. S. at page 384, 72 S.Ct. at page 310: "The rule which permits taxation by two or more states on an apportioned basis precludes taxation of all of the property by the state of the domicile." Northwest Airlines was distinguished on the ground that in that case it had not been shown that [322 U.S. 292, 64 S.Ct. 952] "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere. The court did not

spell out, however, the extent of the domicile's taxing power under the circumstances. Finally, in 1954, in Braniff Airways, Inc., v. Nebraska Board of Equalization and Assessment, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967, the court, applying the reasoning of the Ott case, upheld the power of a non-domiciliary state to impose an apportioned tax on planes and flight equipment used by the taxpayer in operating a purely interstate line.

In the present case Los Angeles County, the domicile for tax purposes, seeks to impose an ad valorem property tax on the full value of five aircraft belonging to Flying Tiger Line, used chiefly in the Korean Airlift, but also used in other foreign and interstate commerce. The tax was paid under protest, and in the suit for refund the trial court gave judgment for plaintiff in an amount equal to the difference between the tax paid on the full value and the tax that should have been paid on a value apportioned according to the time the planes were physically present in the county during a certain test period.

I agree with the views expressed in the opinion prepared by Mr. Justice McComb which holds, in effect, that where a non-domiciliary state has acquired the power to impose an apportioned tax, the domicile must also impose an apportioned tax. There is no express authority to support this proposition, but it appears to be in harmony with sound principles of constitutional law.

The commerce clause is violated when a tax subjects interstate commerce to an undue burden or creates a risk of such a burden. However, it has been recognized that interstate commerce should "pay its way" in the states where it receives substantial benefits and protection, with the result that reasonable state taxation is permitted. To avoid a violation of the due process clause, the tax must bear a reasonable relation to the benefits and protection conferred by the taxing state. These rules were recognized in the Standard Oil case where the court said: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

The rule stated in the opinion prepared by Mr. Justice McComb presents no real risk of multiple taxation. A cumulative burden could result from the use in different states of different apportionment formulae, but this is not very likely. Apart from this slight possibility, apportionment of the tax base is generally acknowledged to be the best way to avoid multiple taxation. It was stipulated at the trial that the aircraft in question were physically present in Los Angeles County only 36.37% of the time during a test period. This percentage was used to apportion the value of the planes by the trial court and is reasonably related to the benefits and protection conferred by the county. Therefore, there does not appear to be a violation of due process.

I can see no basis for holding that the case be remanded to the Board of Equalization for a hearing to determine whether any other state has acquired the power to impose an apportioned tax under the rule of the Braniff case. The trial court was apparently satisfied that such a showing had been made. If no state has such power, then Los Angeles County may tax on the full value of the aircraft under the holding of the Northwest Airlines case. On the other hand, if one or more states have such power, then the Standard Oil case applies, and the full value cannot be taxed.

I have found no authority holding that the Board of Equalization should determine to what extent the property has acquired a taxable situs elsewhere, and then should order a reassessment of the tax accordingly. Under this basis of taxation an undue burden on interstate commerce is likely to result in two different ways. The Board of Equalization is required to determine whether any portion of the Flying Tiger

Line's property has acquired a taxable situs elsewhere and what that portion is. Although tests framed by the Supreme Court are available to aid the board in this determination, there are no iron-clad rules describing what contacts are sufficient to give a state jurisdiction to tax. Thus it may be that while the board will find that certain property has not acquired a taxable situs in another state and so is taxable in full by Los Angeles County, the taxing authorities in that state may reach a contrary determination and impose a tax under that state's apportionment formula. The cumulative burden that would result is apparent.

An undue burden may also arise because of the various formulae for apportionment used among the states. These formulae are computed on the basis of the presence of the aircraft in and out of the state, mileage in and out of the state, arrivals and departures in and out of the state, revenue earned in and out of the state, as well as many combinations of these factors. With a 100% tax base being applied in the domicile state, different formulae applied by other states are very apt to lead to excessive taxation.

That personal property has its situs at the owner's domicile, has long been recognized as a fiction employed to prevent migratory property from avoiding taxation completely. Pullman's Palace Car Co. v. Com. of Pennsylvania, 141 U.S. 18, 29, 11 S.Ct. 876, 35 L.Ed. 613. This fiction was primarily used in cases involving ocean-going vessels which acquired no actual situs elsewhere. It was thought that if they were not taxable at the domicile they might not be taxable at all. Ott v. Mississippi Barge Line, supra, 336 U.S. at page 173, 69 S.Ct. at page 433. As Chief Justice Stone said in his dissenting opinion in the Northwest Airlines case [322 U.S. 292, 64 S.Ct. 960]: "And our decisions establish that, except in the case of tangibles which have nowhere acquired a tax situs based on physical presence, and for that reason remain taxable at the domicile even if never present there, the state's power to tax chattels depends on their physical presence and is neither added to nor subtracted from because the taxing state may or may not happen to be the state of the owner's domicile." But where it appears that the carrier will not avoid taxation on a considerable portion of its property, there should be no reason to employ the fiction in whole or in part. It is obvious that to permit Los Angeles County to tax the full value of the property here involved, would impose a tax beyond that justified by its physical contacts with the county, a tax that the county has no power to impose, and thus violate due process. Moreover the tax is not reasonably related to the benefits and protection conferred by the county. "So far as due process is concerned, the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State." Ott v. Mississippi Barge Line, supra, 336 U.S. at page 174, 69 S.Ct. at page 434.

It is of some significance to note that recommendations made by the Civil Aeronautics Board in 1945, as a result of the confusion engendered by the Northwest Airlines case indicate disapproval of the domicile basis for taxation and support for some system of apportionment of the tax base. See Multiple Taxation of Air Commerce, H.R. Doc. No. 141, 79th Cong., 1st Sess.

It has been suggested that Flying Tiger Line will probably avoid taxation of a large portion of its property because the greater part of Flying Tiger's flights are overseas. This suggestion is probably well-founded. Another quotation from the dissenting opinion of Chief Justice Stone in the Northwest Airlines case, however, adequately disposes of this point: "It is no answer to suggest that the states other than Minnesota have not asserted their constitutional power to tax or that we do not know how or to what extent they have exercised it. The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen

to do, but on what the taxing state has constitutional power to do."

The logic of the foregoing is inescapable.

TRAYNOR, Justice (dissenting).

I dissent.

Migratory property not subject to taxation elsewhere remains taxable at the owner's domicile, for otherwise it would escape taxation altogether. People of State of New York ex rel. New York Central Railroad v. Miller, 202 U.S. 584, 597, 26 S.Ct. 714, 50 L.Ed. 1155; Southern Pacific Co. v. Kentucky, 222 U.S. 63, 69, 73, 32 S.Ct. 13, 56 L.Ed. 96; Northwest Airlines, Inc., v. Minnesota, 322 U.S. 292, 294, 64 S.Ct. 950, 88 L.Ed 1283; Braniff Airways v. Nebraska Board, 347 U.S. 590, 602, 74 S.Ct. 757, 98 L.Ed. 967; Olson v. San Francisco, 148 Cal. 80, 83, 84, 82 P. 850, 2 L.R.A.,N.S., 197; California Shipping Co. v. San Francisco, 150 Cal. 145, 146, 88 P. 704. To the extent that the property is taxable elsewhere it cannot be taxed by the domiciliary state, for otherwise it would be subject to multiple burdens in violation of the commerce clause. Standard Oil Co. v. Peck, 342 U.S. 382, 385, 72 S.Ct. 309, 96 L.Ed. 427; Western Live Stock v. Bureau, 303 U.S. 250, 255–256, 58 S.Ct. 546, 82 L.Ed. 823. Random excursions of migratory property into a state do not render the property taxable there, but if there is habitual use of such property in a state, the average amount thus habitually used is taxable there, even though the specific items are not continuously the same. American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 82, 19 S.Ct. 599, 43 L.Ed. 899; Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 162, 54 S.Ct. 152, 78 L.Ed. 238.

Under the foregoing rules defendants are not precluded from taxing the aircraft in question except to the extent that they are taxable elsewhere. The majority opinion, however, is at odds with these rules in holding that the county must limit the tax on the aircraft according to the time they are physically present in the county, even if they are not taxable elsewhere.

The County Board of Equalization was likewise at odds with these rules in deciding that the aircraft were taxable on their full value at the commercial domicile [1] on the ground that apportionment of the tax was not required as a matter of law since the aircraft were not flown on a schedule. The board's failure to determine whether or not any part of the property had acquired a taxable situs elsewhere was error, for defendants' power to tax is diminished accordingly if the property has acquired a taxable situs elsewhere (Standard Oil Co. v. Peck, supra, 342 U.S. 382, 384, 72 S.Ct. 309, 96 L.Ed. 427), whether or not other jurisdictions elect to assert their taxing power. Johnson Oil Co. v. Oklahoma, 290 U.S. 158, 162, 54 S.Ct. 152. Even migratory property that does not travel on a schedule may become subject to taxation in other jurisdictions.

It cannot be assumed, however, that the aircraft had acquired a taxable situs elsewhere merely because they were absent from Los Angeles County a large part of the time. No such assumption is supported by Standard Oil Co. v. Peck, supra, 342 U.S. 382, 72 S.Ct. 309, 310, invoked by the majority opinion. The court there struck down an unapportioned tax imposed by the domiciliary state on oil barges that traveled the inland waters of the Mississippi and

1. Although the state of incorporation is regarded as the legal domicile of a corporation, its domicile for tax purposes is its principal place of business or headquarters. Thus, the "commercial domicile" rather than the state of incorporation, is given the power to tax intangible property of the corporation on the ground that "it is there that the owner in every practical sense * * * realizes the economic advantages of his ownership." First Bank Stock Corp. v. Minnesota, 301 U.S. 234, 241, 57 S.Ct. 677, 680, 81 L.Ed. 1061; see Wheeling Steel Corp. v. Fox, 298 U.S. 193, 56 S. Ct. 773, 80 L.Ed. 1143; Southern Pacific Co. v. McColgan, 68 Cal.App.2d 48, 156 P.2d 81; Pacific Western Oil Corp. v. Franchise Tax Board, 136 Cal.App.2d 794, 289 P.2d 287. Although plaintiff is incorporated in the state of Delaware, its principal place of business, the home port of its planes, and its repair terminal are all located in the County of Los Angeles. Its aircraft habitually return to their California headquarters.

Ohio Rivers. It reasoned that river craft almost continuously within other states were subject to the taxing jurisdiction of those states, and a tax by the domiciliary state on their full value would result in "multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations." Barges that navigate interstate waterways ordinarily acquire more than one taxable situs along their course. In contrast, aircraft navigating the sky ordinarily do not acquire any other taxable situs along their course. See concurring opinion of Jackson, J., in Northwest Airlines v. Minnesota, supra, 322 U.S. 292, 304, 64 S.Ct. 950. The domicile is therefore free to tax all such aircraft so long as there is no showing that they have maintained sufficiently regular, recurrent physical and business contacts with other jurisdictions that would accordingly subject them to taxation there. Braniff Airways v. Nebraska Board, 347 U.S. 590, 600–602, 74 S.Ct. 757; People of State of New York ex rel. New York Central Railroad v. Miller, supra, 202 U.S. 584, 597, 26 S.Ct. 714.

Since the board erroneously failed to determine whether any part of the property had acquired a taxable situs elsewhere, the case should be remanded to it for a redetermination of the tax on the basis of the evidence submitted at hearings before it.[2] Universal Consolidated Oil Co. v. Byram, 25 Cal.2d 353, 362, 153 P.2d 746.

If the evidence then showed that the aircraft were not subject to taxation elsewhere, the county would be free to tax them on the basis of their full value. Southern Pacific Co. v. Kentucky, supra, 222 U.S. 63, 32 S.Ct. 13; People of State of New York ex rel. N. Y. Central Railroad v. Miller, supra, 202 U.S. 584, 26 S.Ct. 714; Northwest Airlines, Inc., v. Minnesota, supra, 322 U.S. 292, 298, 64 S.Ct. 950; Braniff Airways v. Nebraska Board, supra, 347 U. S. at page 602, 74 S.Ct. 757. If, however, the evidence showed that the property had acquired a taxable situs elsewhere, the county would have to forego taxation to the extent that other jurisdictions had acquired the power to impose an apportioned tax. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of domicile." Standard Oil Co. v. Peck, supra, 342 U.S. at page 384, 72 S.Ct. at page 310. The board would then be compelled to apportion the tax on a basis realistic enough to preclude due process and commerce clause objections. The formula upheld in the Braniff case, supra, exemplifies what can be done in this regard. It encompassed such realistic factors as arrivals and departures, revenue tons handled by the carrier, and originating revenue.[3] While not exhaustive, these solid

2. "[T]he proper procedure upon the failure of an administrative board to give a hearing under appropriate circumstances, is to remand the case to the board for proper proceedings. (Citations.) The policy underlying such a rule is that the determination of the issues should first be made by the administrative agency. It is given jurisdiction for that purpose, and interference with that jurisdiction should not be permitted until it has been pursued to the point of exhaustion." Steen v. City of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937, 939. Although the term of a board of equalization is limited by statute (Rev. & Tax.Code, § 1603), "that provision is directory only and does not deflect from the statutory scheme that the authorized tribunal pass upon matters properly within its jurisdiction though in the *completion* of its work it must act at a time beyond the prescribed period." Universal Consolidated Oil Co. v. Byram, 25 Cal.2d 353, 362–363, 153 P.2d 746, 752.

3. " 'The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the rev-

contacts with the state reflect the "opportunities, benefits, or protection conferred or afforded by the taxing State" (Ott v. Mississippi Barge Line, 336 U.S. 169, 174, 69 S.Ct. 432, 434) and the factors that contribute to the value of the property. Moreover, such a combination is apt to insure a fairness to both taxpayer and taxing authority that a single factor not counterbalanced by others does not afford. Indeed a single factor formula, such as that of physical presence compelled by the majority opinion, may be highly arbitrary. Suppose that Airline "A" flies non-stop between New York and Los Angeles, that the aircraft are physically present in New York ten per cent of the time and in Los Angeles thirty per cent of the time, and in the air the rest of the time. Under the majority view, the aircraft would be subject to tax on ten per cent of their value in New York and on thirty per cent in California; sixty per cent of their value would escape taxation altogether. Yet an Airline "B", flying exclusively between Los Angeles and San Francisco would be subject to full taxation in California. Such a single factor formula leads to still more capricious results in a case like the present one of aircraft that travel over the high seas where they have no taxable contacts with any other jurisdiction. The arbitrariness of such a formula arises from the inclusion therein of "bridge time," i. e. the time the aircraft are in the air and afford no state jurisdiction to tax, and the time they are in jurisdictions on random excursions that do not render them taxable there. If physical presence is used as the formula of apportionment or as one of the factors in the formula, certainly "bridge time" and the time spent in such random excursions should be excluded entirely from the formula, and the total time used should be only the time spent in jurisdictions where the property is taxable.

The perennial contention arises that there is always danger of multiple taxation latent in the possibility that different states would evolve different formulas of apportionment. It bears noting therefore that no court has found such a danger serious enough to invalidate an apportionment that reasonably reflects the opportunities, benefits and protection afforded by the taxing state.

GIBSON, C. J., and SPENCE, J., concur.

Rehearing denied: GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissented.

51 Cal.2d 361

E. SUGARMAN, Respondent,

v.

STATE BOARD OF EQUALIZATION, Appellant.

S. F. 19777.

Supreme Court of California, In Bank.

Dec. 23, 1958.

Action to recover use tax paid under protest. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., rendered judgment for plaintiff.

enue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.'" Braniff Airways v. Nebraska State Board of Eq. & A., supra, 347 U.S. at page 593, 74 S.Ct. at page 759. This is the formula of the "'proposed uniform statute to provide for an equitable method of state taxation of air carriers' adopted by the Council of State Governments upon the recommendation of the National Association of Tax Administrators in 1947." Ibid.

and defendant appealed. The Supreme Court, Shenk, J., held that immunity of imported goods from use tax is ended by their removal from original package in which they are imported or by their use by importer.

Reversed.

McComb, J., dissented.

Opinion, 327 P.2d 564, vacated.

1. Licenses ⇐34

In action to recover use tax paid, evidence would sustain defendant's contention that property in question had been used within state. West's Ann.Rev. & Tax.Code, § 6201 et seq.

2. Commerce ⇐31

Use of imported vessel and its machinery within California after its movement in foreign commerce had ceased, and its crating and protective covering had been removed, came within provisions of Revenue and Taxation Code section. West's Ann.Rev. & Tax.Code, § 6201 et seq.

3. Commerce ⇐77

The single exception stated in the import-export clause of the Federal Constitution is exclusive, and no further exceptions can be implied. U.S.C.A.Const. art. 1, § 10, cl. 2.

4. Commerce ⇐77

Immunity of foreign commerce from imposition of imposts and duties is not same as exemption of goods moving in interstate commerce, and tests of constitutional validity under commerce clause do not control result of cases arising under import clause. U.S.C.A.Const. art. 1, § 10, cl. 2.

5. Commerce ⇐31

Goods imported into United States from a foreign country are not permanently exempted from state and local taxes. U.S.C.A.Const. art. 1, § 10, cl. 2.

6. Commerce ⇐31

Property which has not been mingled with general property within state or devoted to use for which it is imported from abroad is exempt from state taxes. U.S. C.A.Const. art. 1, § 10, cl. 2.

7. Licenses ⇐15.1(6)

In traffic between several states, taxable event, for use tax purposes, may occur when goods are stored for use within state. West's Ann.Rev. & Tax.Code, § 6201 et seq.

8. Commerce ⇐30

All goods destined for export are not exempt from state taxation. U.S.C.A. Const. art. 1, § 10, cl. 2.

9. Commerce ⇐31

Imported yacht was subject to any applicable state and local ad valorem property taxes after removal of crating and protective covering and use within state. U.S.C.A.Const. art. 1, § 10, cl. 2.

10. Commerce ⇐31

Immunity of imported goods from use tax is ended by their removal from original package in which they are imported or by their use by importer. West's Ann.Rev. & Tax.Code, § 6201; U.S.C.A.Const. art. 1, § 10, cl. 2.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman and Eugene B. Jacobs, Deputy Attys. Gen., for appellant.

Walter E. Drobisch, San Francisco, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff in an action for the refund of $3,206.83, an amount paid under protest as use tax, penalties, and interest.

The plaintiff is a resident of San Francisco. In January 1953, after personal negotiations in Europe and by mail from San Francisco, the plaintiff entered into a contract with an Amsterdam ship builder for the construction of a motor yacht. The yacht was to be built in Amsterdam for an agreed price of $65,000. Machinery of a value of $16,340.23 was purchased by the

plaintiff from a Michigan manufacturer through its agent in Berkeley, California. The machinery was shipped directly from Michigan to Amsterdam. Fittings were purchased by the plaintiff in San Francisco and shipped to Amsterdam for installation. No state or local taxes were paid on the machinery or fittings.

On October 25, 1953, the plaintiff took delivery of the yacht at Amsterdam. The yacht was tested by him and on November 5, 1953, he delivered it to a freighter at Rotterdam for shipment to San Francisco. The yacht was enclosed in protective coverings and crating. The plaintiff's own skipper accompanied the yacht on the voyage to San Francisco.

On December 7, 1953, the plaintiff paid $9,413.40 to the United States Collector of Customs at San Francisco. The trial court found that "The yacht with its machinery, equipment, and engines which had been installed therein by the shipbuilder in Holland, was on its arrival in San Francisco, California on December 9, 1953, in the identical condition so far as protective coverings, cratings, and devices are concerned as it was when prepared for shipment at the commencement of its journey at Rotterdam, Holland and it arrived in San Francisco, California in the original package in which it was shipped from Rotterdam, Holland, and remained in such original package for a period of twenty-four hours until its unloading at San Francisco could be arranged and accomplished. On December 10, 1953, the yacht was removed from its protective coverings, cratings, devices, and original package and lifted from the seagoing freighter into the San Francisco Bay. Sugarman immediately piloted the yacht under its own power to a berth in Sausalito, Marin County, California. The yacht, with its machinery, equipment, and engines, has remained since that day in California and has been berthed and used in California from that day to the date of trial."

In October, 1954, the Board of Equalization made a determination of use tax, interest, and penalties for the use of the yacht during the period December 1, 1953, to December 31, 1953. A determination of taxes owing for the use of the machinery during the period October 1, 1953, to December 31, 1953, interest, and penalties was made on June 2, 1955. Upon exhausting his administrative remedies the plaintiff brought this action in the superior court to recover the amount paid under protest to the defendant State Board of Equalization.

The California use tax law is contained in section 6201 et seq. of the Revenue and Taxation Code. Section 6201 provides: "An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

Section 6202 provides: "Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer maintaining a place of business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer maintaining a place of business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers."

By the express provisions of section 6201, that tax could not apply until "storage, use, or other consumption" of the vessel occurred within the borders of this state. A further limitation upon the imposition of the tax provided in section 6201 appears in section 6352 of the Revenue and Taxation Code where it is provided: "There are exempted from the

taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State."

Thus, by the express provisions of the act, two inquiries are pertinent to determine whether the tax was here lawfully and validly imposed: first, it must be determined that the property was so utilized as to subject it to the provisions of the act; second, it must appear that the tax is not prohibited by the "Constitution or laws of the United States or under the Constitution of this State."

[1] The contention that the yacht was used within this state is conclusively supported by the evidence. The plaintiff testified that the yacht was not used for pleasure cruises until about six months after it was brought into California because of Mrs. Sugarman's illness and the making of certain changes in the masts and lights as required by an amendment of federal law regulating navigation lights. At the trial, the plaintiff was asked:

"Q. You stated it took two months to get it in shape? You stated it was six months before you used it for pleasure cruises. What happened in the intervening four months? A. It just laid there.

"Q. It laid at berth in Sausalito? A. Yes. The skipper lived on board and that is all there was to it.

"Q. And that yacht is still in your possession and ownership? A. Yes.

"Q. And has been used as you pleased since bringing it to California? A. Yes."

[2] The period for which the use tax was assessed included the time during which the yacht and its equipment were beyond the borders of this state; a time when it was on board the freighter in the San Francisco Bay in its original covering and crating, and a time when it was, as found by the trial court, used by the plaintiff within the State of California. The defendant seeks to tax only the use of the vessel and its machinery within this state after its movement in foreign commerce had ceased, and its crating and protective covering had been removed. Such use comes within the express provisions of section 6201 of the Revenue and Taxation Code.

The plaintiff contends that the tax was unconstitutional as applied because the yacht and its machinery were immune from state taxation under article I, section 10, clause 2 of the federal Constitution, the import-export clause. That clause provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

[3,4] The single exception stated in the import clause is exclusive; no further exceptions can be implied. Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 76, 67 S.Ct. 156, 91 L.Ed. 80. The board does not contend that the tax comes within that exception; its position is that the yacht lost its exempt status as an import when it was uncovered, uncrated, and put to the use for which it was imported. The immunity of foreign commerce from the imposition of imposts and duties is not the same as the exemption of goods moving in interstate commerce. Tests of constitutional validity under the commerce clause do not control the result of cases arising under the import clause. Richfield Oil Corp. v. State Board of Equalization, supra, 329 U.S. at page 75, 67 S.Ct. at page 159.

[5-8] Goods imported into the United States from a foreign country are not

permanently exempted from state and local taxes. "There must be a point of time when the prohibition ceases, and the power of the state to tax commences." Brown v. State of Maryland, 12 Wheat. 419, 6 L.Ed. 678. Property which has not been mingled with the general property within a state or devoted to the use for which it is imported from abroad is exempt from state taxes. The line separating imports from property subject to state taxation was drawn in Brown v. State of Maryland, supra, 12 Wheat. 419 at pages 441, 442, 6 L.Ed. 678, at pages 686, 687: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution." See also Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, 89 L. Ed. 1252 (ad valorem property taxes). In traffic between the several states, the taxable event may occur when the goods are stored for use within a state. Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (California use taxes). The plaintiff contends that the Richfield Oil case, supra, and Matson Navigation Co. v. State Bd. of Equalization, 136 Cal.App.2d 577, 289 P.2d 73, support his claim for a refund. Both cases hold the California sales tax inapplicable to goods which have begun to move in foreign commerce as exports at the time of the sale. The crucial distinction between those cases and the present case is not that they involve exports and the present case an import; it is that at the time of the sale, the goods in those cases were committed to the channels of export. All goods destined for export are not, however, exempt from state taxation. Joy Oil Co. v. State Tax Commission of Michigan, 337 U.S. 286, 69 S.Ct. 1075, 93 L.Ed. 1366 (ad valorem property tax); Empresa Siderurgica S. A. v. County of Merced, 337 U.S. 154, 69 S.Ct. 995, 93 L.Ed. 1276 (personal property tax). We cannot, as is asserted by the plaintiff, decide this case by assuming that if the Richfield and Matson cases had involved imports and the imposition of use taxes instead of sales taxes, the tax would have been declared unconstitutional. The decisions of the United States Supreme Court in the Joy Oil and Empresa cases above cited, Brown v. State of Maryland, supra, and its reasoning in Hooven & Allison, supra, enjoin upon us the duty to determine whether the property sought to be taxed remained an import at all times after its entry into this state and if it did not, to decide whether the tax was applied after the termination of the yacht's exempt status as an import.

The most recent review by the United States Supreme Court of the power of state or local governments to tax goods originating from abroad, appears in Hooven & Allison Co. v. Evatt, supra. There, the State of Ohio sought to impose an ad valorem tax upon bales of fibers imported from foreign countries and the Philippine Islands, then a possession of the United States. The bales were stored in the taxpayer's warehouse awaiting use in his manufacturing business. After deciding that the plaintiff was an importer within the meaning of the import clause, the court considered the duration of the immunity of such imported goods from local taxation. It was held that the bales were "original packages" as defined by Brown v. State of Maryland, supra, and the exaction was declared unconstitutional. The language of that opinion is pertinent here in distinguishing between imports in the constitutional sense and goods which have lost their exemption from taxation by use (Hooven & Allison Co. v. Evatt, supra, 324 U.S. 652 at pages 664, 665, 65 S.Ct. 870, at page 877):

"The reason for the original package doctrine, as fully expounded in

Brown v. [State of] Maryland, supra, is that unless the immunity survives to some extent the arrival of the merchandise in the United States, the immunity itself would be destroyed. For there is no purpose of taxing importation, itself, even its ultimate suppression which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer.

"On the other hand the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since Brown v. [State of] Maryland, supra, an import is deemed to retain its character as such 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported,' see Brown v. [State of] Maryland, supra, 12 Wheat. 442, 6 L.Ed. 678, or until put to the use for which it was imported. Chief Justice Marshall, in Brown v. [State of] Maryland, supra, 12 Wheat. at pages 442, 443, 6 L.Ed. 678, rejected the suggestion that 'an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.' Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end. It is quite another matter to say, and Chief Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, 12 Wheat. at page 443, 6 L.Ed. 678: 'The same observations [i. e., the importer has mixed the goods with the common mass of property, rendering them taxable] apply to plate, or other furniture *used* by the importer.' (Italics added.)"

[9] It is clear that had a sales tax been imposed on the transaction, it would have been unconstitutional under the import clause. The tax would have intercepted the plaintiff's yacht upon entering the country in its original package and before it was put to the use for which it was purchased. It is also clear that under the tests announced in the Hooven & Allison decision, the yacht was subject to any applicable state and local ad valorem property taxes after the removal of the crating and protective covering and use by the plaintiff.

In Southern Pacific Co. v. Gallagher, supra, 306 U.S. 167, at page 177, 59 S.Ct. 389 at page 393, the court stated: "We think there was a taxable moment when the former [goods] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective." It is contended that the Supreme Court, by declaring the goods shipped in from a sister state and stored for use in California were subject to the California use tax, has fixed a moment at which the use tax attaches and to which we must refer to determine the validity of the tax here involved. It is urged that because the tax attached to stored goods in the Southern Pacific case, the "taxable moment" at which it applied to the plaintiff's yacht was when it entered this state in its covering and crates, and that it ended when it was uncovered, uncrated and lowered into the water. The Southern Pacific case exemplifies the statement in Richfield Oil Corp. v. State Board of Equalization, supra, that the commerce clause and the import clause are not coextensive. Had the goods in the Southern Pacific case been purchased in a foreign country, they would, under the Hooven decision, have been exempt from taxation while stored. The Southern Pacific decision does not require us to select as a taxable event a point in time when the goods are constitutionally exempt and to declare that because the goods were immune at that time they could not be taxed

at a later time. The tax imposed by sections 6201 and 6202 is upon the use of goods in California. It is sufficient that subsequent to the arrival of the yacht in this state its original package was removed and it was put to use in this state.

[10] Although no authorities have been cited or found which determine the application of the use tax to imported goods, it appears that the immunity of imported goods is ended by their removal from the original package in which they are imported or their use by the importer. The tests laid down in Brown v. State of Maryland, supra, and Hooven & Allison Co. v. Evatt, supra, for determining the duration of the immunity are met by the finding of the trial court that the yacht was used by the plaintiff from the date it was piloted to Sausalito. The Richfield Oil Company and Matson Navigation Company cases do not, as is seen by the holdings of the United States Supreme Court in the Joy Oil Company and Empresa Siderurgica cases, require that all goods destined for export are exempt from state taxes. It cannot, therefore, as is attempted by the plaintiff, be argued from the Richfield Oil Company and Matson Navigation Company cases, that all goods imported into the United States thereafter remain immune from state or local taxation. The tax was imposed upon the use of the yacht in California which occurred after its exemption as an import had terminated.

The conclusion and judgment that the tax be refunded is contrary to the findings of the trial court, based on undisputed evidence that the yacht was in use by the plaintiff in this state at the time the tax was imposed, and was therefore subject to the use tax under state law; also that at that time, under the facts and applicable federal law, the yacht was no longer immune from taxation in this state.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, and SPENCE, JJ., concur.

McCOMB, J., dissents.

51 Cal.2d 388

In re Charles BANDMANN, Jr. on Habeas Corpus.

Crim. 6305.

Supreme Court of California, In Bank.

Dec. 23, 1958.

Rehearing Denied Jan. 21, 1959.

Habeas corpus proceeding. The Supreme Court, Carter, J., held that the first, rather than the second, subdivision of Penal Code section providing punishments for attempts applied to punishment for attempted abortion, and that petitioner, who had pleaded guilty to charge of such offense, could not complain because he had been sentenced to state prison rather than to county jail.

Order accordingly.

Schauer and Traynor, JJ., dissented.

1. Statutes ⇐211

Subdivision title found in Penal Code was merely an editorial one and was required to be disregarded in construing otherwise unambiguous subdivision. West's Ann.Pen.Code, § 664, subds. 1, 2.

2. Criminal Law ⇐1208(7)

Penal Code section providing punishment for attempts is unambiguous and evinces legislative intent that if substantive offense carries a maximum penalty of five years or more attempt shall be punishable for a term not exceeding one half of longest term of imprisonment prescribed upon conviction of offense so attempted, and that if substantive offense carries a maximum penalty of less than five years person guilty of such attempt shall be punishable by imprisonment in county jail for not more than one year. West's Ann.Pen. Code, § 664, subds. 1, 2.

3. Courts ⇐89

Where court had, in prior case, affirmed judgment of a defendant convicted of abortion and of attempted abortion and sentenced to one year in county jail for attempted abortion, but there was no discussion of point in its opinion, case

could not be considered authority for proposition that second subdivision of Penal Code section providing punishment for attempts was applicable to attempted abortion convictions. West's Ann.Pen.Code, § 664, subds. 1, 2.

4. Abortion ⇐15

First subdivision of Penal Code section providing punishments for attempts is applicable to attempted abortion convictions, and defendant pleading guilty to such charge was not entitled to have his punishment limited to the one-year county jail sentence provided for by the second subdivision of that section. West's Ann.Pen.Code, § 664, subds. 1, 2.

5. Statutes ⇐211

The index to the 1957 Standard Penal Code was inserted by author of publication and not by legislature, and alleged listing therein of felonies punishable by "more than" five years as governed by second subdivision of Penal Code section providing punishment for attempts was not controlling in construction of Penal Code section. West's Ann.Pen.Code, § 664, subds. 1, 2.

6. Courts ⇐92

Where the defendant involved had been convicted of attempted burglary in first degree, any statement made, in opinion disposing of such defendant's habeas corpus application, concerning punishment for attempted second degree burglary, was dictum.

7. Burglary ⇐49

Attempted second degree burglary is punishable by term not exceeding one half of allotted term of imprisonment prescribed for conviction of offense so attempted; disapproving Ex parte Hope, 59 Cal. 423. West's Ann.Pen.Code, § 664, subd. 1.

8. Criminal Law ⇐1208(7)

It is maximum term of substantive offense, and not one half of maximum sentence for substantive offense, that is guide in determining punishment for attempt to commit substantive offense; In re Bellis, 75 Cal.App. 146, 241 P. 910, and People v. Snow, 123 Cal.App. 33, 10 P.2d 767, disapproved. West's Ann.Pen.Code, § 664.

9. Constitutional Law ⇐250, 258
Criminal Law ⇐1206(1)

Language used in Penal Code section providing punishments for attempts is neither vague nor ambiguous, and defendant sentenced to state prison after pleading guilty to attempted abortion could not successfully urge that he had been denied due process of law and equal protection of laws because of the "vagueness" of such Penal Code section. West's Ann.Pen.Code, § 664.

10. Criminal Law ⇐1208(1)

Even if Penal Code section had been misconstrued and misapplied in past due to misleading editorial title for subdivision, defendant could not complain when section was properly applied as to him, even though he would have received lighter sentence if section had been similarly misconstrued and misapplied in his case. West's Ann.Pen. Code, § 664.

11. Habeas Corpus ⇐111(1)

Even if judgment in criminal case was fatally defective, it would not mean that defendant was entitled to discharge on application for writ of habeas corpus. West's Ann.Pen.Code, § 664.

12. Habeas Corpus ⇐9

As a prisoner on parole, habeas corpus petitioner was constructively a prisoner under sentence in legal custody and under control of Department of Corrections, and release on parole did not render habeas corpus proceeding moot.

Ruth Lubbe Young, Berkeley, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

CARTER, Justice.

This is an application for a writ of habeas corpus by Charles Bandmann, Jr., an

inmate of San Quentin, who, after a plea of guilty, of attempted abortion, was sentenced to state prison "for the term prescribed by law." In response to such application we issued an order to show cause why a writ of habeas corpus should not be granted.

Petitioner was committed to prison on February 18, 1957, and has now served 18 months. Petitioner contends that his maximum sentence should have been one year in the county jail.

The substantive offense of abortion "is punishable by imprisonment in the State prison *not less than two nor more than five years*". Pen.Code, § 274; emphasis added.

Section 664 of the Penal Code provides "[Punishments For Attempts.] Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

"1. [*Offense punishable by more than five years in state prison.*[1]] If the offense so attempted is punishable by imprisonment in the state prison *for five years, or more*,[2] or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted * * *.

"2. [*Offense punishable by less than five years in state prison.*] If the offense so attempted is punishable by imprisonment in the state prison *for any term less than five years*,[2] the person guilty of such attempt is punishable by imprisonment *in the county jail for not more than one year.*"

The only question involved here is whether subdivision 1 or subdivision 2 of section 664 applies when there has been an attempt to commit the crime of abortion. If subdivision 2 applies, petitioner has served in state prison more than the maximum term which, under that subdivision, would be one year in the county jail; if subdivision 1 is applicable then he has served 18 months of a possible 30 months and is properly in the state prison. The solution to the problem lies in the construction of the phrase found in section 274 of the Penal Code where the substantive offense of abortion is stated to be punishable by *not* [nor] "more than five years." It will be noted that subdivision 1 of section 664 of the Penal Code (Deering) is entitled "Offense punishable *by more than five years in state prison.*" If the body of the subdivision used the same language it would be obvious that petitioner is correct in his contention. This, however, is not the case, since the language used there differs in that the words used there are "*for five years, or more.*" This court held in In re Lee, 177 Cal. 690, 693, 171 P. 958, 959, that "It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty." It follows from this that the maximum sentence for the crime of abortion is five years, and the punishment for an attempt to commit abortion would be two and a half years in the state prison. In People v. Superior Court, 116 Cal.App. 412, 414, 415, 2 P.2d 843, it was held that subdivision 1 of section 664 provided for punishment for an attempt to commit a substantive crime at one-half of the maximum punishment prescribed for the crime itself. See, also, Ex parte Hope, 59 Cal. 423. On the other hand the language used in the title and body of subdivision 2 of section 664 is identical in that if the offense is punishable by "*less* than five years" or the punishment is "for any

1. Although the effect of this title will be discussed herein, it is interesting to note that as quoted here it is found in Deering's Penal Code. In West's Annotated Penal Code the title is "Offense punishable by five years or more." In Stats. 1953, when the section was amended, chapter 713, section 1, page 1983, *no title* is set forth for any of the subdivisions of section 664 of the Penal Code.

2. This emphasis added.

term *less* than five years" the person guilty of an attempt is to be imprisoned in the county jail "for not more than one year."

[1, 2] This court held in Los Angeles City School Dist. of Los Angeles County v. Odell, 200 Cal. 637, 641, 254 P. 570, 572, that "The authorities are numerous to the effect that the title of an act may be relied on in ascertaining the intention of the Legislature, where the act itself is ambiguous; but the title 'cannot be used for the purpose of restraining or controlling any positive provision of the act.' People ex rel. Flynn v. Abbott, 16 Cal. 358, 359, 366; Barnes v. Jones, 51 Cal. 303, 306; In Matter of Boston Min. & Mill. Co., 51 Cal. 624, 626. There is no ambiguity in the amendatory act of 1919, and the title thereto may not, therefore, be employed to control the plain provisions thereof." See, also, Heron v. Riley, 209 Cal. 507, 510, 511, 289 P. 160. It is apparent from the body of subdivision 1 of section 664 of the Penal Code that its provisions are unambiguous if the title thereof is disregarded as it must be since it is merely an editorial one. It is plainly stated that if the offense so attempted is punishable by imprisonment in the state prison *for five years or more* that the person guilty of such an attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted. Subdivision 2 of section 664 of the Penal Code makes provision for punishment of those guilty of attempts to commit crimes where the substantive offense is punishable in the state prison *"for any term less than five years."* From a careful reading of the two sections it is obvious that the Legislature intended that a crime carrying a five year maximum sentence should constitute the dividing line. In other words, if the substantive offense carries a maximum penalty of five years or more, subdivision 1 is applicable; if the substantive offense carries a maximum penalty of less than five years, subdivision 2 is applicable.

In disregarding the title of subdivision 1 of section 664 of the Penal Code, and looking only to the plain provisions found in the body thereof, subdivisions 1 and 2 are consistent and harmonious. We said in People v. Moroney, 24 Cal.2d 638, 642, 643, 150 P.2d 888, 890, that "the cardinal rule of statutory construction" was that "'a statute must be read and considered as a whole, in order that the true legislative intention may be determined. All the parts of a statute must be construed together, and harmonized, so far as it is possible to do so without doing violence to the language or to the spirit and purpose of the act, so that the statute may stand in its entirety. For the purpose of harmonizing apparently conflicting clauses, each should be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy.'" We also said that "In cases of conflict between the provisions of the same statute, those susceptible of only one meaning will control those susceptible of two if the statute can thereby be made harmonious." If we were to construe the two subdivisions of section 664 as contended by petitioner, we would have a hiatus at the five year mark since subdivision 1 would then provide for punishment for attempts where the maximum penalty for the substantive offense was *more* than five years with subdivision 2 providing for punishment for attempts where the maximum penalty for the substantive offense was *less* than five years. "The act must be considered and applied in all of its parts, and each section must be reconciled with the others and be made effective if possible." Wulff-Hansen & Co. v. Silvers, 21 Cal.2d 253, 260, 131 P.2d 373, 377, and, see, People v. Trieber, 28 Cal.2d 657, 661, 171 P.2d 1; In re Petraeus, 12 Cal.2d 579, 583, 86 P.2d 343.

[3] Petitioner argues that subdivision 2 of section 664 was held applicable to attempted abortion in People v. Bowlby, 135 Cal.App.2d 519, 287 P.2d 547, 53 A.L.R. 2d 1147. In the Bowlby case the defendant was convicted of abortion and of attempted

abortion. He was sentenced to one year in the county jail on the attempted abortion count. Although the court affirmed the judgment of conviction there was no discussion of the point raised here, and the case cannot be considered authority for the proposition urged by petitioner that subdivision 2 of section 664 is applicable to attempted abortion convictions.

[4, 5] In view of the clear wording found in the body of subdivisions 1 and 2 of section 664 of the Penal Code there is no merit to petitioner's contention that said statute is clearly ambiguous requiring a construction that subdivision 2 is applicable to this case and defendant should have received a county jail sentence. While it is true as contended by petitioner that the Index to the 1957 Standard Penal Code of California, published by Hanna Legal Publications, lists felonies punishable by *five years or less* as governed by subdivision 2 and those punishable *by more than five years* as governed by subdivision 1, such "Index" is not a part of the statute as it was inserted by the author of the publication and not by the Legislature.

[6, 7] Petitioner relies on Ex parte Hope, 59 Cal. 423, 424, 425, in support of his argument that "nor more than five years" is, in reality, a provision that the penalty is less than five years. In the Hope case the petitioner had been convicted of attempted first degree burglary and was sentenced to serve seven and one-half years which the court noted was "one half of the longest term of imprisonment prescribed for a conviction of the offense so attempted." Petitioner there contended that subdivision 2 of section 664 of the Penal Code was applicable. This court denied his application for a writ of habeas corpus and, after quoting both subdivisions of section 664, stated: "In making this enactment the Legislature was obviously classifying the punishment to be imposed on those convicted of attempts to commit certain crimes. The first class (provided for in Subdivision 1) embraces those cases where the offense attempted is punishable in the State prison for five years, or more, or by imprisonment in a county jail, and the second class (provided for in Subdivision 2) embraces those cases where the offense attempted is punishable by imprisonment in the State Prison for any term less than five years. In effect, as we construe the statute, the Legislature has said that (in the absence of another express provision) every person who is convicted of an attempt to commit an offense, which offense when completed is punishable by imprisonment in the State Prison for a term less than five years, *but which can not exceed or extend to that* period, is punishable by imprisonment in the county jail for not more than one year; and that every person who is convicted of an attempt to commit an offense, which offense when completed is punishable by imprisonment in the State Prison for five years, or more, is punishable by imprisonment in the State Prison for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense so attempted." (Emphasis added.) Petitioner, of course, relies on the underscored words as authority for his proposition that the term prescribed for the substantive offense of abortion which is "nor more than five years" really means that the term cannot extend to five years. The court continued, in the Hope case, as follows: "It results that the case of petitioner comes within the provisions of Subdivision 1 of Section 664; for he was convicted of an attempt to commit burglary of the first degree, and burglary of the first degree is punishable by imprisonment in the State Prison for a term which may extend to fifteen years. Burglary of the second degree is punishable by imprisonment in the State Prison *for not more than five years.* The Legislature evidently deemed the one a more heinous crime than the other, for the reason, doubtless, that one is committed in the nighttime and the other in the daytime. And since, in fixing the maximum punishment of the completed offense, the Legislature has prescribed three times as much in the one case as in the other, it is unreasonable

to suppose that it intended to prescribe the same punishment for an attempt to commit the one as for an attempt to commit the other, which would be the result of the construction contended for by the petitioner. At all events, the language employed does not, in our opinion, admit of that construction." Inasmuch as the petitioner in the Hope case had been convicted of attempted burglary in the first degree any statement there made concerning the punishment for attempted second degree burglary is dictum and is hereby disapproved.

[8] Petitioner also relies on In re Bellis, 75 Cal.App. 146, 147, 241 P. 910. The petitioner there was found guilty of attempted second degree burglary. The court, after noting that burglary in the first degree was punishable by not less than five years and that second degree burglary was punishable by not less than one nor more than fifteen years, held: "An indeterminate sentence is in legal effect a sentence for the maximum term. In re Lee, 177 Cal. 690, 171 P. 958. The crime of which petitioner pleaded guilty being punishable for not less than one nor more than fifteen years, *one-half of the longest term is greater than five years and the crime is, therefore, punishable by imprisonment in the state prison.*" Petitioner's argument that the Bellis case means that the measuring stick is *one-half* of the maximum sentence for the substantive crime for the purpose of applying the provisions of section 664 is, obviously, without merit. The provisions of section 664 are very clearly to the effect that it is the maximum term of the substantive offense which is the guide in determining the punishment for an attempt to commit the substantive offense. Any intimation to the contrary in the Bellis case is hereby disapproved. People v. Snow, 123 Cal.App. 33, 35, 10 P.2d 767, which quotes the underscored language in the Bellis case, is disapproved also in that it conveys the inference that one-half of the maximum sentence for the substantive offense is the guide in determining the applicability of section 664 of the Penal Code. It should be here noted that these cases correctly applied the law to the facts there involved and the statements which we here disapprove were clearly dictum and had no bearing on the result reached in those cases.

[9, 10] Petitioner also contends that he has been denied due process of law and the equal protection of the laws because of the "vagueness" of the provisions of section 664 of the Penal Code. When the two subdivisions are considered and construed together, as we have done here, it is obvious that the language used is neither vague nor ambiguous. Furthermore, even if the section has been misconstrued and misapplied in the past due to the misleading editorial title (see footnote on page 341 of 333 P.2d), petitioner cannot complain of an error which did not affect him and where the section was properly applied as to him.

[11] Petitioner contends that he was improperly sentenced to prison under section 274 of the Penal Code (abortion) whereas attempted abortion is punishable only under section 664 of the same code. The "Abstract of Judgment," petitioner's Exhibit "A," recites that he was convicted, on his plea of guilty, of "the crime of Felony, Attempted Abortion, (a lesser and included offense) * * * in violation of Section 274 Penal Code. * * *" In People v. Berger, 131 Cal.App.2d 127, 129, 280 P.2d 136, it was held that an attempt to commit abortion falls within the provisions of section 664 of the Penal Code. While it does not appear that the judgment is fatally defective, even if it were, it does not mean that petitioner would be entitled to discharge. It was held in In re Fritz, 179 Cal. 415, 416, 177 P. 157, that such offenders "should be returned to the superior court in which they had been convicted, for the imposition of a proper sentence."

[12] It has been brought to our attention that petitioner was released on parole to Charles R. Bradley, a Sonoma County parole officer on or about August 18, 1958, and that he is no longer in actual physical custody in San Quentin. As a prisoner upon parole, petitioner is constructively a prisoner under sentence in the legal custody and under the control of the Department of

Corrections. In re Marzec, 25 Cal.2d 794, 797, 154 P.2d 873. Such release does not render this proceeding moot.

For the reasons hereinabove set forth, the order to show cause heretofore issued is discharged, the writ of habeas corpus is denied and the petitioner remanded.

GIBSON, C. J., and SHENK, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

It is the established rule that "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (People v. Stuart (1956), 47 Cal.2d 167, 175 [7], 302 P.2d 5, 55 A.L.R.2d 705; People v. Smith (1955), 44 Cal.2d 77, 79 [2], 279 P.2d 33; In re Bramble (1947), 31 Cal.2d 43, 51 [6, 7], 187 P.2d 411; In re McVickers (1946), 29 Cal.2d 264, 278, 176 P.2d 40; People v. Valentine (1946), 28 Cal.2d 121, 143 [20], 169 P.2d 1; People v. Ralph (1944), 24 Cal.2d 575, 581 [2], 150 P.2d 401.) As further declared in People v. Ralph (1944), supra, "criminal statutes will not be built up 'by judicial grafting upon legislation. * * * [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.' [Citations.]"

Applying these principles in this case, any ambiguity in the statute here involved should be resolved in petitioner's favor, and the holding should be that he has already served the full maximum term for his offense of attempted abortion.

So far as here material the pertinent statute, section 664 of the Penal Code, provides (subdivision 1) one punishment where the offense attempted "is punishable by imprisonment in the state prison for *five years, or more,*" and (subdivision 2) a substantially lesser punishment for the attempt where the offense attempted "is punishable by imprisonment in the state prison for *any term less than five years.*" [1] (Italics added.) It seems to me that the legislative intent, as defined by the language used, thus places the turning point on the maximum and the minimum terms which may be imposed as punishment for the offense attempted. In other words, the distinction intended is based on the *potentials* of punishment as between *two classes* of crimes; i. e., one class having a *minimum* of five years' imprisonment and the other class having a *maximum* of five years. (Cf. Ex parte Hope (1881), 59 Cal. 423.)

This view, I think, gives rational effect to the differentiation expressed in the statute, and also follows the rule of construction in favor of the accused. The offense here attempted [1] obviously "*is* punishable by imprisonment in the state prison for any [some] term *less than* five years," but it is *not* punishable "for five years, *or more.*" (Italics added.) That is, it is *not* punishable for some or any term which is of *more than* five years' duration. Thus the attempt to commit the offense plainly does not fall within the class of attempts which carry the more severe penalty that results where the offense attempted is punishable by imprisonment for *more than* five years.

It follows that the crime to which petitioner pleaded guilty (attempted abortion) does fall within the class which bears the lesser punishment of "imprisonment in the county jail for not more than one year" (subd. 2 of Pen. Code, § 664), and that because petitioner has already served more than one year's imprisonment petitioner, and not the writ, should be discharged.[2]

TRAYNOR, J., concurs.

Rehearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

1. Abortion, the offense here attempted, "is punishable by imprisonment in the state prison not less than two nor more than five years." (Pen.Code, § 274.)

2. Penal Code, section 2900.1: "Where a defendant has served any portion of his sentence under commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts."

166 Cal.App.2d 633

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Hollie CROMEENES, Defendant and Appellant.

Cr. 2906.

District Court of Appeal, Third District, California.

Dec. 30, 1958.

Defendant, after trial to the court without a jury, was convicted of statutory rape. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment, and the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that action of trial judge in warning defendant's counsel not to call prosecuting witness, who had made conflicting statements concerning the guilt of the defendant, a liar was not prejudicial.

Judgment affirmed.

1. Criminal Law ⇐1170½(1)

In statutory rape prosecution, examination of deputy district attorney, who was called by defendant to testify concerning conversations that preceded confession, was not prejudicially curtailed by trial court, where defendant's counsel was permitted to ask deputy district attorney if, before defendant made his confession, any mention had been made of any arrest or prosecution of defendant's wife, and deputy district attorney denied that there was any mention of arrest or prosecution of defendant's wife, and defendant's counsel then stated that he had no further questions.

2. Criminal Law ⇐260(11)

In statutory rape prosecution, evidence that after prosecuting witness and her grandmother went to district attorney and made complaint against defendant, prosecuting witness stated to a neighbor and to defendant's counsel that charge she had made against defendant was wholly false did not render testimony of prosecuting witness so clearly false and unbelievable as to entitle it to no credence, and it was a matter for trial court, as trier of the facts, on conflicting testimony and conflicting inferences reasonably to be drawn, to decide where the truth lay.

3. Criminal Law ⇐1166½(12)

In statutory rape prosecution, which was tried without a jury, action of trial judge in warning defendant's counsel not to call prosecuting witness, who had made conflicting statements concerning guilt of defendant, a liar was not prejudicial.

Lawrence M. Goldstein, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Lloyd Hinkelman, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was convicted of statutory rape. The cause was tried to the court, a jury having been waived.

On April 18, 1958, appellant was living with Marie Sutton, the mother of the complaining witness. He described Marie as his common-law wife. The relationship had existed for some time. He had a child by Marie. The complaining witness, 13 years of age, lived with the couple. The girl testified that on April 1, 1958, at about 9 p. m., and after she had gone to bed, appellant came to her bed and had intercourse with her. A few days thereafter she went to her grandmother and told her about the incident. On April 8th, she and her grandmother went to the district attorney's office. Appellant was arrested April 9th in Sacramento where he was in jail for some minor offense. He made a statement to a police officer and a deputy district attorney of San Joaquin County, which amounted to a complete confession. At the trial, after the girl had testified, the prosecution over defense objections introduced the confession of appellant in evidence and rested. Appellant testified that he did not have intercourse with the girl and that the statement he made to the officers had been obtained as a result of a threat by the district attorney's office to arrest his common-law

wife. He said that her physical condition was such that if she were placed in jail she would not, in his opinion, have lived thirty days and that he would have confessed to anything to prevent her arrest. He did not deny that he had made the statements introduced in evidence, but did assert that the statements were false.

[1] The errors complained of revolve around the proceedings to determine whether or not appellant's confession had been voluntary. A stenographic reporter had been taken to Sacramento with the officers and at the trial he was made a witness and asked to read the conversation between the officers and appellant. He testified that appellant's statements had been made voluntarily. This was challenged and he was taken on cross-examination. It then appeared that the officers had talked with appellant before the witness had been asked to come in and take the statement and that the witness did not know what occurred prior to his being called in. Thereupon the deputy district attorney, a Mr. Corren, was called by appellant to testify concerning the conversations that preceded the formal statement. Appellant contends that his counsel's examination of the deputy was prejudicially curtailed by the trial court. The following occurred: The witness testified that before the statement was taken he had a conversation with appellant. He was asked if during that conversation he had informed appellant at any time that he had sufficient evidence to prosecute Marie and that it was probable that some action would be taken. This the witness denied. He was then asked if there was anything said concerning Marie, and the witness replied:

"A. Yes, there certainly was a conversation concerning his wife.

"Q. Yes, sir. A. Would you like to hear what it was? A. Just a moment until I ask the question.

"The Court: I hope you are not going to call Mr. Corren a liar?

"Mr. Chargin [Attorney for defendant]: No, Your Honor, no, Your Honor.

"Mr. Chargin:

"Q. Sir, in reference to this conversation, was there any mention of her being prosecuted? A. There was no mention of her being prosecuted.

"Q. Was there any mention of her being arrested? A. There was no mention of her being arrested.

"Q. Do you recall her [sic] saying that 'We could have taken the girl's mother to jail yesterday but we did not want to do that?' A. I did not say that.

"Q. Was there anything said of a similar nature? A. There was nothing said of any similar nature at all as to that.

"Mr. Chargin: I have no further questions."

Appellant contends that the statement by the court had the effect of curtailing his counsel's examination of the deputy district attorney. The record does not bear this out. Apparently, his counsel completed his examination and ended the same when it developed that the deputy district attorney denied there had been any talk of arresting or prosecuting appellant's common-law wife.

[2] Appellant next contends that the testimony of the prosecuting witness is so clearly false and unbelievable as to be entitled to no credence whatsoever. The contention cannot be sustained. After the girl had testified to appellant's commission of the act charged, it developed on cross-examination that, after she and her grandmother had gone to the district attorney and complained of appellant, she had stated to a neighbor, a Mrs. Padgett, that the charge she had made against appellant had been wholly false. It developed further that she had made a like statement in a conversation with appellant's counsel. Mrs. Padgett, sworn as a witness, testified that

the girl had admitted to her that her charges against appellant were false; that she then advised her to go to the district attorney and the girl refused, stating that she was afraid of what would happen to her in view of the complaint she had made. It is unnecessary to pursue the matter further. Her credibility was a question for the trial court and from comments made by the trial judge upon the submission of the case for decision it appears that he considered the girl had been pressured and confused, after informing against the appellant, by members of her household, with the result that she had made the statements concerning falsity of her complaint. The trial court indicated further that, although appellant had denied he had told the truth to the officers, the statement he had admittedly made to them was couched in such language and was of such tenor as to indicate strongly he had told the truth to the officers and had falsified at the trial. The record presents a situation where it was clearly a matter for the trial court upon conflicting testimony and conflicting inferences reasonably to be drawn to decide where the truth lay.

[3] Appellant charges misconduct of the trial judge prejudicial to his cause. During the cross-examination of the complaining witness when she was being questioned concerning the conflicting statements she had made, she began to cry. The following occurred:

"Q. You were lying then, also? A. Yes.

"The Court [Intervening]: Now, it is the duty of the Court to protect the witness from harsh and abusive treatment of counsel, and counsel is admonished and warned."

The cross-examination continued until the following occurred:

"Q. You also remember telling Mrs. Padgett that you were afraid to go to the District Attorney and tell them that you had told a lie about Hollie [appellant] because of the fact that you were afraid of what they would do, you remember that? A. Yes.

"Q. You do?

"The Court [Intervening]: Counsel, I wish you would not use the word 'lie' and 'liar' in the courtroom.

"Mr. Chargin: Yes, Your Honor.

"The Court: My only suggestion would be that there are ways of using that phrase in other forms. Of course, you are dealing with a child. I have seen that expression used on grown men and the lawyer taken right out on the courthouse lawn and had the hide taken off of him. It has happened to members of the Bar. And I would suggest that when you start with children you might work up to grown people and have some bad bruises some day."

If this case had been tried to a jury the foregoing comment of the trial judge might well have worked much mischief. On the other hand, had the case been tried to a jury it is not likely the comment would have been made. Apparently the trial court strongly objected to the use of the terms "lie" and "liar" during the cross-examination of the 13-year-old girl, but his suggestions as to proper retribution for a lawyer so conducting himself were unnecessary and not to be commended. In our view, however, the record will not support an inference that the court was prejudiced against the appellant because of what to it was needlessly offensive conduct toward the witness. Although the girl had made squarely conflicting statements concerning the guilt of appellant, the appellant had made a statement frankly confessing that the complaint she had made to the district attorney and upon which he had been charged was true, with a strong implication, by the way in which he made it and the description he gave of the event, that the incident complained of was one in a series. Upon the whole record we can-

not sustain the contention of defendant that he did not receive a fair trial.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

166 Cal.App.2d 620

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carlos Zapata ZUBIA and Seferino Ralph Guzman, Defendants,

Seferino Ralph Guzman, Defendant and Appellant.

Cr. 6295.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1958.

Prosecution for unlawful possession of marijuana. The Superior Court, Los Angeles County, J. Howard Ziemann, J., entered judgment of conviction and denied a motion for new trial and one of the defendants appealed from such judgment and order. The District Court of Appeal, Parker Wood, J., held that evidence, including testimony by officer that after he stopped defendant's automobile because of a defective stop light, defendant got out of his automobile and approached the police automobile, and that when the officer asked defendant whether he had any weapons in the automobile defendant replied in the negative and said further that the officer might look in the automobile if he wished to do so, and that defendant immediately thereafter jumped into his automobile and covered two sacks with a blanket, presented a question for the trial court as to whether defendant gave consent to the search, and in view of fact search of the automobile revealed a leafy substance which officer thought was marijuana, officer had reasonable cause to search defendant who was owner and driver of the automobile, and marijuana discovered in such search was properly received in evidence.

Judgment and order denying motion for new trial affirmed.

Criminal Law ⇐260(11), 394.4(12)
Searches and Seizures ⇐7(10)

In prosecution for unlawful possession of marijuana, evidence, including testimony of an officer that after stopping defendant's automobile because of a defective stop signal light, defendant got out of his automobile and approached the police automobile, and that when the officer asked defendant whether he had any weapons in the automobile defendant replied in the negative and said that the officer might look in the automobile if he wished to do so, and that defendant immediately thereafter jumped into his automobile and covered two sacks with a blanket, presented a question for the trial court as to whether defendant gave consent to the search, and in view of fact search of the automobile revealed a leafy substance which officer thought was marijuana, officer had reasonable cause to search defendant, who was owner and driver of the automobile, and marijuana discovered in such search was properly received in evidence. West's Ann. Vehicle Code, § 637(a).

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Guzman and one Zubia were accused of unlawfully possessing marijuana. In a nonjury trial, they were convicted. Guzman appeals from the judgment

and the order denying his motion for a new trial.

Appellant contends that the court erred in receiving the marijuana in evidence. His argument is that the marijuana was obtained by unlawful search and seizure.

Officer Boyle testified that on December 26, 1957, about 12:45 p. m., while he was driving an automobile south on Arroyo Boulevard, he observed a Chrysler automobile that was also traveling south on that boulevard. He followed the Chrysler about six blocks in an area on the boulevard where there are many sharp curves. When the Chrysler slowed down on some of the curves, he did not see the stop light on the Chrysler "light up." He thought the Chrysler was being driven in violation of section 637(a) of the Vehicle Code (without an adequate stop light). When he turned the automobile siren and red light on, the Chrysler stopped, and he (witness) stopped the police automobile beside the Chrysler. Defendant Guzman got out of the Chrysler on the "driver's side" and approached the police automobile. (Guzman will be referred to as the defendant.) When he (officer) asked defendant for his driver's license, defendant produced the license and asked why he had been stopped. The officer replied that he had been stopped for violation of section 637(a) of the Vehicle Code. Defendant said that he had been stopped before by the police, and he planned to have the stop light fixed. The officer asked defendant if he had any weapons in the automobile. Defendant said that he did not have any weapons in the automobile and, "If you wish, you may look in the car—I do not have any weapons." As the officer approached the Chrysler from the left side, defendant jumped into that automobile and crawled across the front seat on his knees. The seat was covered with a blanket, and there were two paper sacks on the blanket about the center of the seat. While defendant was crawling across the seat he moved the blanket with his knees and the blanket covered the sacks. The officer unrolled the blanket, removed the sacks, and asked defendant what the sacks were. He replied that "they" were his lunch. The officer opened the sacks. One sack contained a salt shaker and the other sack contained a portion of a sandwich and a rolled-up paper sack. The rolled-up sack contained a small portion of wax paper in which there was a green leafy substance. The officer thought that the substance might be marijuana. He showed the leafy substance to the two defendants and "they" said that "they knew nothing of it." The officer found a package of cigarette papers in the glove compartment of the Chrysler, and found another package of cigarette papers in a pocket of defendant Guzman's pants.

On cross-examination, Officer Boyle testified that he did not have a warrant for the arrest of either defendant. The question he asked Guzman regarding weapons was a routine question. There had been many "burglaries of guns and so forth in broad daylight" in the neighborhood where the arrest was made, and Guzman, "according to his driver's license," did not live in that neighborhood.

The leafy substance which was in the wax paper was marijuana. The package of cigarette papers which was in the Chrysler and the package of cigarette papers which was in defendant's pocket contained fragments of marijuana within the leaves of the papers.

Defendant testified that he did not tell Officer Boyle to "go ahead and look" in the automobile; and he did not tell the officer that he had permission to search the automobile.

Defendant Zubia testified that he was riding with Guzman at the time the automobile was stopped by the officers (Officer School accompanied Officer Boyle in the police automobile); the officers did not ask him for permission to search the automobile.

When the leafy substance and the cigarette papers were offered in evidence, the defendant objected to the offer on the ground that those things were obtained as the result of an illegal search and seizure. The objection was overruled. At the close

of the prosecution's case, the defendant made a motion to exclude the leafy substance and cigarette papers as evidence. The motion was denied.

Appellant contends that the marijuana and cigarette papers should not have been received in evidence, for the reason they were obtained by illegal search and seizure. He argues that the fact that defendant committed a minor traffic violation (not having an adequate stop signal light on his automobile) did not justify the officer in searching the automobile or defendant, since the search was unrelated to such an offense and was not incidental to such an arrest. By reason of the defective stop signal light, the officer had reasonable cause to stop the defendant. When the defendant stopped, he got out of his automobile and approached the police automobile before the officer approached the defendant's automobile. When the officer asked the defendant a routine question as to whether he had any weapons in the automobile, the defendant replied in the negative and said further that the officer might look in the car if he wished to do so. The conduct of defendant, immediately thereafter, in jumping into his automobile, crawling across the seat, and covering the sacks with the blanket might reasonably cause the officer to suspect that defendant was attempting to conceal something that was in the automobile. The question as to whether defendant consented that the officer might search the automobile was a question of fact for the determination of the trial court. Under the evidence here the court could reasonably find that defendant gave such consent. Since the search of the automobile revealed a leafy substance which the officer thought was marijuana, the officer had reasonable cause to search the defendant, who was the owner and driver of the automobile. The court did not err in receiving the marijuana in evidence.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

165 Cal.App.2d 808

William L. STAPP, Plaintiff and Appellant,

v.

Sally Ann MARSHBURN et al., Defendants and Respondents.

Civ. 5758.

District Court of Appeal, Fourth District, California.

Jan. 6, 1959.

On rehearing. The District Court of Appeal by the court held that objections respecting the incompleteness of the record, newly specified errors on instructions and alleged misconduct of counsel would not be considered where raised for the first time on appeal.

Rehearing denied.

Prior opinion, 332 P.2d 798.

1. Appeal and Error ⇐835(2)

On a petition for rehearing, an appellate court will not consider questions not previously raised.

2. Appeal and Error ⇐835(2)

Objections respecting the incompleteness of the record, newly specified errors on instructions and alleged misconduct of counsel would not be considered where raised for the first time on appeal.

William L. Stapp, in pro per.

Ball, Hunt & Hart and Clark Heggeness, Long Beach, for defendants.

PER CURIAM.

As grounds for a rehearing appellant urges (1) that the record on appeal was incomplete; (2) that errors in the giving and refusing of instructions and misconduct of counsel, not heretofore specified, should now be considered; and (3) that this court incorrectly stated the "testimony".

The "testimony" referred to is a narrative of the facts supported by evidence in the record, and related in consonance with the rule on appeal as stated in our opinion.

Objections respecting the incompleteness of the record, newly specified errors

in the giving and refusing of instructions and the alleged misconduct of counsel now are being raised for the first time.

[1, 2] On a petition for rehearing an appellate court will not consider questions not previously raised. Pasadena Ice Co. v. Reeder, 206 Cal. 697, 705, 275 P. 944, 276 P. 995; Estabrook Co. v. Industrial Accident Comm., 177 Cal. 767, 177 P. 848; Ocean Park Pier Amusement Corp. v. City of Santa Monica, 40 Cal.App.2d 76, 87, 104 P.2d 668, 879; Conner v. East Bay Municipal Utility Dist., 8 Cal.App.2d 613, 619, 47 P.2d 774, 48 P.2d 982.

Rehearing denied.

166 Cal.App.2d 687

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jack Eugene BISHOP, Defendant and Appellant.

Cr. 6351.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1959.

Prosecution for first degree robbery of a gasoline station, wherein defendant claimed that he was intoxicated and was at some other place at time of robbery. From adverse judgment and sentence of the Superior Court, Los Angeles County, Mark Brandler, J., the defendant appealed. The District Court of Appeal, Lillie, J., held that fact that victim was not examined concerning physical characteristics of person who robbed him was of no import when he was able to positively identify defendant and defense counsel had an opportunity to cross-examine victim.

Judgment affirmed.

1. Robbery ⇐24(1)

Evidence was sufficient to sustain conviction of first degree robbery of a gasoline station.

2. Criminal Law ⇐260(11)

Trial court's determination will not be disturbed where the evidence is in conflict.

3. Criminal Law ⇐1159(2)

Where there is positive direct testimony that defendant committed offense, defendant has burden of showing that such testimony is inherently unbelievable in order to justify a reversal on that ground.

4. Criminal Law ⇐1159(2)

Although reviewing court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category.

5. Criminal Law ⇐1159(4)

To warrant rejection of statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

6. Robbery ⇐24(3)

In prosecution for first degree robbery of a gasoline station wherein defendant claimed that he was intoxicated and was at some other place at time of robbery, fact that victim was not examined concerning physical characteristics of person who robbed him was of no import when he was able to positively identify defendant and defense counsel had an opportunity to cross-examine victim.

7. Robbery ⇐24(3)

Conviction for robbery may be sustained on appeal where identity of accused is based on testimony of a single witness.

8. Criminal Law ⇐260(11)

Determination of credibility of witnesses, truth or falsity of facts upon which

a decision depends, and weight of evidence is within exclusive province of trial judge.

9. Criminal Law ⇐1182

Affirmance of a judgment carries with it affirmance of the sentence.

Taylor, Sherman & Heller, Charles B. Taylor, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

LILLIE, Justice.

[1] Defendant was convicted by the court of first degree robbery of a gasoline station. At the time of sentence, the trial judge found the weapon used to be a dangerous one and sentenced defendant to the state prison.

The sole issue on this appeal is whether the testimony of the victim is so inherently unbelievable or improbable as to render it insufficient to sustain the judgment of conviction.

According to the testimony of Harold Ray, an employee of the gasoline station and the complaining witness, the following events occurred during about five minutes, at approximately 8:45 p. m. on July 19, 1957. Ray was in the process of closing the station, which was still lighted, but was under his car fixing the stop lights when he heard some one say: "May I have the key to unlock the restroom?" Ray asked him if his lights were working and the person replied: "Yes, they are sir." He emerged from under the car and as he reached the restroom, the one with whom he had been speaking placed a gun in his back and said: "All right, let's go inside." The washroom, about four feet square, was also lighted. Ray went in, turned around and faced a person wearing a brown suede jacket, dark pants and no hat or glasses, holding a blue steel automatic pistol six or seven inches long. He said: "We are going to go out front and we'll get the money out of the cash drawer. I don't want you to make any unusual disturbance or anything like that." In all, they remained in the washroom 30 to 45 seconds, then walked out and over to the island where the cash box was kept. More conversation took place between them and they returned to the restroom, where Ray gave him the money. There was further discussion concerning the cash, after which he took Ray's wallet saying: "Don't worry, I am not going to hit you." As he left the washroom he closed the door and dropped the keys outside. Ray testified he was in fear during the time he turned over the money and that $109.07 was taken.

After the robbery, Harold Ray was shown a "mug" book by police but made no identification; later he was shown a set of pictures from which he identified defendant as the robber; seven days after the robbery he picked defendant out of a police lineup as the one who took the money; again pointed out defendant in court at the preliminary hearing and during the trial definitely identified defendant as the person who robbed him, saying: "There is no doubt in my mind."

Ray further testified he noticed nothing unusual about the voice, speech, walk or condition of the eyes of the man who took the money. Defendant was arrested approximately five days after the robbery and although his car was searched, no revolver or brown suede jacket were found. Police did not search his home.

Defendant denied commission of the robbery both to police and at the trial. Officer Reeves testified for the prosecution that when he first talked to defendant, he told him that on the day of the robbery he drank beer in the Passtime Bar from 3:30 p. m. to 7 p. m., at which time he went across the street to a cafe for several cups of coffee, where a waitress told him to leave because of his drunken condition; that at approximately 8 p. m. he returned to the bar and did not leave until 1 a. m. The distance between the bar and the gasoline station is approximately 2½ miles. The officer further testified that he checked his story and later told defendant he was unable to substantiate the time element; that defendant then told him that

when he left the cafe it was possible he had driven his car around for awhile, but in any event people should remember him at the bar and cafe because of his drunken condition.

At the trial, defendant testified to substantially the same story he told Officer Reeves, but added that he left the bar to go to the cafe between 7:30 and 8 p. m.; that after leaving there he went to sleep in his car and that he wore a "T" shirt, work boots and denims. He further testified that he did not in his prior conversation tell police he fell asleep in his car, but instead told them he was at the bar because he "thought" that was where he had been; that he did not actually sleep in the car but only "dozed"; that he went across the street and talked to his boss, returned to the cafe and went home; and that he did not own a brown suede jacket or revolver.

The bartender at the Passtime Bar testified defendant was in the bar when he went on duty at 6 p. m. and that he left around 8 p. m. to go across the street to a cafe, from which he returned at 10:30 in a drunken condition. The waitress at the cafe testified he entered at about 8 p. m., was drunk, and she refused to serve him beer; that after a slight commotion, he sat in a booth and drank three cups of coffee and was drunk when he left around 3:30.

Appellant argues that to sustain the judgment all testimony other than that of Harold Ray must be disregarded because it is inherently improbable. He further points out that as to Harold Ray there was "no examination with reference to the physical characteristics of the person who robbed him."

[2, 3] The evidence shows, on the one hand, the actual commission of a crime of robbery—use of a dangerous weapon (People v. Rainey, 125 Cal.App.2d 739, 271 P.2d 144) and the felonious taking of personal property from the person of another by means of force or fear (People v. Cleary, 1 Cal.App. 50, 81 P. 753; section 211, Penal Code); and the positive identification of the defendant as the one who committed it; and on the other hand, testimony which, if believed, would constitute an alibi. On the record before us, unless the testimony of Harold Ray is inherently improbable, there exists merely a factual conflict which was resolved by the trier of fact; and on appeal the trial court's determination therefor will not be disturbed. It is well settled that where, as in the case at bar, there is positive direct testimony that defendant committed the offense, defendant has the burden of showing that such testimony is inherently unbelievable in order to justify a reversal on that ground. People v. Braun, 14 Cal.2d 1, 92 P.2d 402; People v. Castro, 58 Cal.App.2d 491, 157 P.2d 25.

[4, 5] As to the inherent improbability of testimony generally, the court in People v. Lyons, 47 Cal.2d 311, at pages 319–320, 303 P.2d 329, at page 334, stated: "The rule is thus stated in People v. Huston, [1943], 21 Cal.2d 690, 693, [134 P.2d 758]: 'Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. (Kidroski v. Anderson, [1940], 39 Cal.App. 2d 602, 605, [103 P.2d 1000].) To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citing cases.)' "

In the instant case we find not only no unusual circumstances concerning Ray's testimony of the robbery and identity of the person who took his money, but nothing which would even subject it to justifiable suspicion. Actual events of the robbery lasted approximately five minutes. The witness had ample opportunity to observe him. The service station was lighted; he was within close proximity to the person who robbed him while walking and talking with him, particularly in the small lighted

washroom where Ray was confronted with him face to face for about 45 seconds, and where later he turned the money over to him. He saw that the man wore no hat or glasses and that he had on a brown suede jacket with knit sleeves and collar and dark pants. The witness walked with him three times the distance between the station and the washroom, and saw him walk and stand and heard him speak on five or six occasions. He later identified defendant as the man who robbed him, from a set of photos, out of a police line-up, at the preliminary hearing and at the trial. We find nothing apparently false or physically impossible about Ray's testimony or his identification of the defendant.

[6] The fact that Harold Ray was not examined concerning the physical characteristics of the person who robbed him is of no import under the circumstances at bar. Since he was able to positively identify defendant, there was no reason why the prosecutor should or would have further questioned him concerning his physical appearance. However, defendant's counsel had every opportunity to do so on cross-examination but chose not to, taking a chance that the trial judge would not accept Ray's testimony as it then existed. Having gambled and lost, he is not now in a position to raise the matter on appeal. No restriction was placed on defendant's cross-examination of the complaining witness and no objection of any kind was interposed in the trial court.

[7] Having found Harold Ray's testimony to be reasonable and believable, we conclude it sufficient to sustain the judgment. A conviction for robbery may be sustained on appeal where the identity of the accused is based on the testimony of a single witness. Concerning this, the court in People v. Thompson, 147 Cal. App.2d 543, at pages 546–547, 305 P.2d 274, at page 276, stated: "An identification of an accused by the victim of a robbery is sufficient to sustain an implied finding that he committed the crime. (Citations.) The identification need not be corroborated by other evidence. People v. McNeal, 123 Cal.App.2d 222, 266 P.2d 529."

[8] In opposition to the testimony of the complaining witness that he noticed nothing unusual about the speech, carriage or physical condition of the man who robbed him, defendant offered evidence to the effect he was drunk at the time of the robbery, approximately 2½ miles away, which if believed would have established an alibi. At most, it presented a conflict in the evidence. The determination of the credibility of the witnesses, the truth or falsity of the facts upon which a decision depends, and the weight of the evidence is within the exclusive province of the trial judge and it is he who has the duty to resolve the factual conflict. People v. Thompson, 147 Cal.App.2d 543, 305 P.2d 274; People v. Spillard, 15 Cal.App.2d 649, 59 P.2d 887. The trial court accepted the testimony of Harold Ray as worthy of belief and found accordingly. It obviously rejected the alibi testimony of defendant and his witnesses. Viewing the evidence in the light most favorable to the prosecution, the evidence is more than ample to sustain the conviction.

[9] Affirmance of the judgment carries with it affirmance of the sentence. People v. Perkins, 147 Cal.App.2d 793, 305 P.2d 932; People v. Cochran, 162 Cal.App.2d 733, 328 P.2d 532.

For the foregoing reasons, the attempted appeal from the sentence is dismissed. The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

166 Cal.App.2d 698

Arthur P. POLLARD, Jr., Barbara P. Van Sicklen, Constance P. Tebault, and Doris Shaffer, Plaintiffs and Respondents,

v.

Arthur P. POLLARD et al., Defendants,

Altha Thompson Pollard, alias Noel Pollard, Defendant and Appellant.

Civ. 17827.

District Court of Appeal, First District, Division 2, California.

Jan. 5, 1959.

Rehearing Denied Feb. 4, 1959.

Hearing Denied March 4, 1959.

Action for declaration of existence of trust and for enforcement thereof. The Superior Court, Alameda County, Richard H. Chamberlain, J., granted the relief sought, and defendant appealed. The District Court of Appeal, Draper, J., held that the evidence was sufficient to sustain finding that trustor had intended and had effected delivery of trust properties.

Affirmed.

1. Trusts ⇐345

Beneficiaries were proper parties to bring action for declaration of existence of trust and for enforcement thereof where it was futile, under peculiar circumstances of case, to expect trustees to sue trustor. West's Ann.Civ.Code, § 863.

2. Trusts ⇐33, 373

Delivery is largely a matter of intent of donor or trustor, and is a question of fact.

3. Trusts ⇐44(1)

In beneficiaries' action for declaration of existence of trust and for enforcement thereof, evidence was sufficient to sustain finding that trustor had intended and effected delivery of trust properties.

4. Trusts ⇐95

One to whom property is transferred in violation of trust holds it as involuntary trustee unless he purchased it in good faith and for value, and such a transferee, even though he enters into no conspiracy with trustee, is liable under Civil Code section. West's Ann.Civ.Code, § 2243.

5. New Trial ⇐150(3, 4)

In action for declaration of existence of trust and for enforcement thereof, it was not an abuse of discretion to deny defendant's motion for new trial on ground of newly-discovered evidence of release given to attorney who was allegedly joint tortfeasor with defendant, where affidavit in support of motion did not show with particularity that attorney was a joint tortfeasor but, at most, afforded basis for inference to that effect and affidavit did not specify date of discovery of asserted release.

6. Continuance ⇐26(11)

Where record indicated that witness had been ill for some 18 months before trial and there was no indication that he would ever be able to appear and it appeared that even though case had been pending for two years before trial his deposition had not been taken, it was not error to deny motion for continuance to permit such witness to testify.

7. Appeal and Error ⇐931(6)

Where competent evidence supports judgment, it will be presumed on appeal that evidence erroneously admitted was disregarded by court.

8. Appeal and Error ⇐1051(1)

Where action, for declaration of existence of trust and for enforcement thereof, was tried to court without jury and there was other competent evidence that trustor intended to and knowingly did transfer his entire interest in property described in agreement, error, if any, in permitting attorney who drew trust agreement to testify, over objection, that trustor had told him, in coversation preceding drafting of agreement, that he desired to place in trust his entire interest in described property rather than a half interest, would not require reversal of judgment for plaintiffs. West's Ann.Code Civ.Proc. § 1881, subd. 2.

9. Appeal and Error ⇐1057(1)

In action for declaration of existence of trust and for enforcement thereof, it may have been error for court, to which case was tried without jury, to refuse to

admit evidence of statements made by trustor, after execution and delivery of trust agreement, negativing his intent to transfer all of his interest in described property, but error could not have been prejudicial where testimony of such declarations was admitted and rejected evidence would thus have been only cumulative.

10. Depositions ⇐93

In action for declaration of existence of trust and for enforcement thereof, it was not an abuse of discretion to refuse to admit deceased trustor's partially completed deposition, where there had been no cross-examination of trustor and there was some question as to whether even direct examination had been completed.

Haley, McInerney & Logan, William H. McInerney, Oakland, Hennigan, Ryneal & Nixen, J. David Hennigan, Riverside, for appellant.

James C. Calkins, Alameda, for respondents.

DRAPER, Justice.

This action arises out of a trust agreement executed by Arthur P. Pollard May 6, 1954, a few days before his second marriage. It provided that income of the trust estate, plus payments from principal which the trustees were permitted to make, should go to Pollard for his life. Upon his death the trust was to terminate, and its assets to be distributed to the four adult children of Pollard by his predeceased wife. The agreement included a detailed list of real and personal property conveyed to the trustees. Trustor executed deed and assignment to the trustees. He and one trustee delivered to a stockbroker stock certificates and executed stock transfer powers, under circumstances warranting the conclusion that they were so delivered for transfer to the trustees. However, the certificates were in the name of trustor and his deceased wife as joint tenants, and the broker advised that it was necessary to transfer them first to trustor's name alone. At about the time the certificates were reissued in trustor's name and returned to the broker, the trustor expressed dissatisfaction with the trust, asserting in part that he had intended to transfer only a half interest in the property described in the trust agreement. He retook the certificates from the broker, made no further transfers to the trustees, and treated assets in his hands as his own. He and his second wife attempted to start negotiations with his children for modification of the trust agreement.

The trustees remained inactive from mid-June until September 23, when the trustor accepted the resignation he had previously requested of them and appointed a successor trustee. Four days later, the four children filed this action against trustor, his wife, and the two original trustees. By amendment, the successor trustee was joined as a defendant.

The amended complaint seeks a declaration that a valid trust exists, enforcement of the trust agreement, to impress a trust upon real property held by trustor and his wife to the extent that funds subject to the trust agreement can be traced to such property, and for money judgment against trustor and his wife to the extent that trust property was expended by them for their own purposes. Trustor died November 24, 1955, and the executor of his will was substituted as a defendant. After trial without jury, judgment was entered directing that trustor's estate and his surviving widow restore to the trust the sum of $37,158.36, ordering that the executor pay to the trustee the proceeds of four life insurance policies, and finding that the trustee, as such, is the owner of certain promissory notes described in the trust agreement. Save to the extent that the trust is declared valid and is ordered enforced, no relief is awarded against any of the trustees. Defendant widow appeals.

[1] Appellant first contends that an action to redress wrongs against the trust estate can be brought only by the trustee, that the beneficiaries are not proper parties, and that hence her motion for nonsuit should have been granted. No Cali-

fornia case deals directly with the precise issue here raised. Appellant cites a number of California decisions holding that a beneficiary cannot maintain an action to quiet title to property of the trust estate. But these cases turn upon the rule that generally the owner of an equitable interest cannot maintain an action to quiet title against the holder of the legal title. 41 Cal.Jur.2d 479, Quieting Title, § 13. Since this is not an action to quiet title, that rule has no application. In other jurisdictions the general rule is that "[a]s long as the trustee is ready and willing to take the proper proceedings against the third person, the beneficiaries cannot maintain a suit against him." 3 Scott on Trusts 2144. However, when the trustee fails or refuses to sue, the beneficiaries can sue the trustee in equity to compel him to bring the proper action and, to avoid multiplicity of suits, the beneficiaries are permitted to join the third person as a defendant with the trustee. 3 Scott on Trusts, § 282.1. It is clear that beneficiaries may enforce the performance of a trust (Civ.Code, § 863), as distinguished from assertion of trust rights against third persons.

In the case at bar the trustor, within a few weeks after his execution of the trust agreement, questioned its validity and expressed his view that at most it applied only to a half interest in the property decribed in the agreement. His wife joined in these expressions. The original trustees, trustor's brother and the attorney who had drawn the trust agreement, could not well be expected to litigate this issue against the trustor. At trial, one of these trustees testified neither he nor his co-trustee would "be a party" to suing the trustor. The successor trustee testified that he made no demand upon the trustor because "I was trustee of what there was in the estate, not what there had been and what had been taken out."

It is apparent that the beneficiaries' action sought a declaration that a trust existed, and enforcement of the trust as declared; that it was futile under the peculiar circumstances of this case to expect the trustees to sue the trustor; and that the action of the beneficiaries was in no way an undue or improper interference with the orderly administration of the trust. In fact, there was little or no administration of the trust at the time this action was filed. In this situation, it would be unrealistic to expect the trustees to sue, and useless to require formal demand upon them by the beneficiaries.

[2, 3] Appellant next contends that title to the trust properties never vested in the trustees. The basis for this contention is the claimed insufficiency of the evidence to show delivery by the trustor. But the trust agreement recites that the specific properties here in issue have been "transferred and delivered" to the trustees. Deed and assignment were executed and delivered to the trustees upon execution of the agreement. The life insurance policies were in the possession of the trustees and there is evidence that assignments thereof were delivered. It would serve no useful purpose to detail further facts bearing upon delivery. Delivery is largely a matter of the intent of donor or trustor, and is a question of fact. Williams v. Kidd, 170 Cal. 631, 151 P. 1; In re Estate of Hall, 154 Cal. 527, 98 P. 269; Azevedo v. Azevedo, 1 Cal. App.2d 504, 36 P.2d 1078. Under the well-established rule, the evidence is to be viewed in the light most favorable to respondent, and all reasonable inferences are to be drawn in favor of the determination of the trier of the fact. In this view of the record, the evidence is sufficient to sustain the finding that trustor intended and effected delivery.

Appellant also asserts error in computation of the amount of the money judgment. But the evidence shows clearly that trustor took more than $72,000 of trust property. The court credited against this amount the sums to which it found trustor was reasonably entitled, during his lifetime, under the provisions of the trust agreement. On hearing of the motion for new trial, the court clearly summarized these items. We have reviewed them in detail and do not

find in the figures any error prejudicial to appellant.

[4] It is next contended that the money judgment against appellant was improper. But it is clear that one to whom property is transferred in violation of a trust holds it as an involuntary trustee unless he purchased it in good faith and for value. Civ.Code, § 2243. Such a transferee, even though he enters into no conspiracy with the trustee, is liable under this section. Scott v. Symons, 191 Cal. 441, 455, 216 P. 604. A transferee of property he knows to be misappropriated from a trust is liable for its value. 3 Scott on Trusts, § 291.2. Appellant's reliance upon Jud Whitehead Heater Co. v. Obler, 111 Cal.App.2d 861, 245 P.2d 608, is misplaced. There the wife had no knowledge of the misappropriations by her husband. Here there is evidence, direct or inferential, showing that appellant knew of the trust, knew that funds received by her husband, the trustor, were the proceeds of trust property, and that she participated actively in his use of these funds. She signed most of the checks drawn by her husband and herself, and their only bank accounts were in their names jointly or in her name. There is evidence to the contrary, but we cannot interfere where, as here, there is substantial evidence to support the finding of the trial court that appellant knowingly received and spent these funds.

[5] Appellant asserts that the trial court erred in denying her motion for new trial insofar as that motion was based upon the ground of newly-discovered evidence. She asserts that respondents, immediately before trial, executed a release to one who had acted as attorney for the trustor, that this attorney was a joint tortfeasor, and that it was a claim against him as such joint tortfeasor which was released. Thus she asserts that she, too, was released by the release of her joint tortfeasor. But the claim of newly-discovered evidence is looked upon with disfavor. 36 Cal. Jur.2d 241–2. Here the affidavit in support of the motion does not show with particularity that the attorney was a joint tortfeasor, but, at most, affords basis for an inference to that effect. Also, the affidavit does not specify the date of discovery of the asserted release. Under the affidavit, the date may well have been before filing of findings and conclusions, and thus have been at a time which would permit a motion to vacate the submission and reopen the case. Rockwell v. Italian-Swiss Colony, 10 Cal.App. 633, 103 P. 162. In this state of the record, we cannot say that the trial court abused its discretion, which is particularly broad in dealing with this ground for new trial. 36 Cal.Jur.2d 243.

[6] Error is claimed in the denial of appellant's motion for a continuance to permit W. H. Pollard, one of the original trustees and a brother of trustor, to testify. But the record indicates that he had been ill for some 18 months before trial, that there was no indication that he would ever be able to appear, and that, although the case had been pending for two years before trial, his deposition had not been taken. Thus there was no error in denying the motion for continuance. Callegari v. Maurer, 4 Cal.App.2d 178, 40 P.2d 883.

[7, 8] The attorney who drew the trust agreement was permitted, over objection, to testify that the trustor told him, in conversation preceding the drafting of the agreement, that he desired to place in the trust his entire interest in the described property rather than a half interest. Appellant urges that the communication was within the attorney-client privilege (Code Civ.Proc. § 1881, subd. 2), and thus inadmissible. Respondents assert that the attorney was a mere scrivener, and that the privilege therefore cannot be invoked. Collette v. Sarrasin, 184 Cal. 283, 193 P. 571. It also appears that much of this conversation was elicited from the witness by appellant's counsel before the examination by respondents to which she now objects. However, it is unnecessary to pass upon the question of competency of the testimony objected to. Other proof, including the trust agreement itself, affords competent evidence that the trustor intended

to and knowingly did transfer his entire interest in the property described in the agreement. This case was tried to the court without a jury. Where competent evidence supports the judgment, it will be presumed on appeal that evidence erroneously admitted was disregarded by the court. Keating v. Basich Bros. etc. Co., 66 Cal.App.2d 258, 263, 151 P.2d 892.

[9] Appellant assigns as error the court's refusal to admit evidence of statements made by the trustor, after execution and delivery of the trust agreement, negativing his intent to transfer all his interest in the described property. While this ruling may have been erroneous (Dinneen v. Younger, 57 Cal.App.2d 200, 134 P.2d 323), it was not prejudicial. Other testimony of such declarations was admitted, and the rejected evidence would have been only cumulative.

[10] Appellant and trustor commenced the taking of trustor's deposition in a proceeding to perpetuate testimony. Their attorney substantially completed direct examination, and then asked for a continuance to permit his attendance at a trial. He was to notify counsel for the other parties of a convenient date to resume the deposition. Trustor died before such notice was given. Thus there was no cross-examination, and there is some question whether even the direct examination was completed. Nevertheless, the deposition was offered in evidence in this trial. Objection was sustained, and appellant claims error in this ruling. The authority relied upon by appellant (Scott v. McCann, 76 Md. 47, 24 A. 536, 538) specifically limits admission of a partially completed deposition to cases where the cross-examination "has not in any way been prevented" by the party producing the witness. We find no abuse of discretion in refusing admission of the partial deposition here.

We find no merit in the other points raised by appellant.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

166 Cal.App.2d 777

PARACO, INC., a corporation, Plaintiff and Appellant,

v.

John Carl OWENS, Defendant and Respondent.

Civ. 9359.

District Court of Appeal, Third District, California.

Jan. 6, 1959.

Rehearing Denied Jan. 29, 1959.

Hearing Denied March 4, 1959.

Action to restrain unfair competition by former employee of plaintiff engaged in business of collecting used lubricating oils from service stations and garages. The Superior Court, Sacramento County, John Quincy Brown, J., denied the relief sought, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence justified denial of relief sought.

Affirmed.

1. Injunction ⇐126

A former employer seeking injunctive relief against a former employee must show (1) that information was confidential and not readily accessible to competitors, (2) that former employee solicited customers of his former employer with intent to injure him, (3) that former employee sought out certain preferred customers whose trade was particularly profitable and whose identities were not generally known to trade, (4) that business was such that a customer would ordinarily patronize but one concern, and (5) that established business relationship between customer and former employer would normally have continued unless interfered with.

2. Trade-Marks and Trade-Names and Unfair Competition ⇐93(3)

In action to restrain unfair competition by former employee of plaintiff engaged in business of collecting used lubricating oils from service stations and garages, evidence justified denial of relief sought.

Rowell, Lamberson & Thomas, Breckinridge Thomas, Fresno, for appellant.

Rowland & Paras, Darrel E. Pierce, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Action to restrain unfair competition. From a judgment denying relief plaintiff appeals.

Appellant is a corporation engaged in the business of collecting used lubricating oils, hereinafter referred to as drain oil, from service stations and garages throughout the State of California. For collection purposes appellant divides the state into several areas, one of which is from Lodi to Yreka and from the Coast Range Mountains to Reno, Nevada. Respondent was an employee of appellant, whose duties as such for several years were those of a tank truck driver picking up drain oil in the described area. After collection the oil was stored for later processing.

The record presents considerable factual conflict. The contention on appeal is that essential findings are not supported by the evidence. Resolving conflicts in support of the findings the evidence may be summarized as follows: Drain oil is a waste product. It presents disposal difficulties. It cannot be gotten rid of by dumping into sewers or drain ditches and disposal otherwise is expensive. As a result businesses that produce it accumulate it in sumps and surface containers and generally allow any person desiring drain oil to take it from their premises without cost. Ordinarily, these businesses do not save drain oil for any particular person desiring it, but give it away to those who will come and collect it on a first come, first served basis. In the geographical area assigned to respondent by appellant there were a number of competitors for drain oil. There were at least two other companies collecting it and there were numerous individuals and governmental agencies who, from time to time, wanted to and did secure drain oil for their uses. Those desiring drain oil call upon the service stations and garages, and secure permission to take the oil accumulated in the sumps or other receptacles. Service stations and garages and the like at which drain oil is accumulated are generally located on well-traveled and well-known streets or highways. Their names and locations are listed in numerous directories, such as telephone and city directories and in lists compiled by oil companies of stations and garages using their products, all of which are available to anyone seeking that information. Appellant does not maintain any record of the names and addresses of the service stations and garages where drain oil is accumulated and keeps no record of the oil storage capacity of individual stations and garages. Its drivers do, however, gain knowledge of such matters as they go about their areas. There was no record of the time or frequency of picking up oil at any particular station or garage. Respondent, too, never compiled any such records from his experience in collecting drain oil in his territory while employed by appellant. During the several years he was employed he was not introduced personally to the producers of drain oil except that on one occasion in Reno, Nevada, he was so introduced by another of appellant's employees. However, during the period of his employment, appellant did become personally acquainted with many of the producers of drain oil, but his ability to secure permission to pick up drain oil did not depend substantially on such personal acquaintanceship. Appellant's ability to secure drain oil in competition with other collectors did not depend upon any confidential information with regard to the most economically feasible time to pick up the oil at different service stations and garages nor upon any other secret or confidential information. After about three years' employment by appellant, respondent left his employment. He had already purchased a tank truck suitable for collecting drain oil. He at once began to work the same territory he had worked while employed by appellant and went from place to place soliciting permission to pick up drain oil from the stations and garages where he had procured it while working for appellant and wherever else it could

be had. In the week following his quitting respondent advised appellant's employee who succeeded him where he had last picked up oil and where oil would be available. That employee went to the localities indicated by respondent and was able to secure drain oil without difficulty. Respondent did not conceive his plan to collect and sell drain oil with any intent to injure appellant. There was nothing in the nature of a regular route of call developed or used by respondent during or after his employment by appellant. On cross-examination respondent testified as follows: In respondent's experience he found that once the garages and service stations started giving him drain oil they continued giving it to him. In developing the area he visited all of the service stations where he hoped to pick up oil and made contact with the proprietors. He requested permission to pick up the oil. He told them he was working for Paraco. In certain areas he gave the proprietors soap and floor sweeping material in return for permission to pick up the oil. He maintained contact with them as much as he could with the purpose of keeping out competition. To some extent he depended upon their good will for the continued privilege of picking up oil. As much as he could he learned the size of their sumps and other storage receptacles. It was important for him to know how often the station had to be visited. If a station had very little oil, then, as a general rule, he favored the larger stations. Some stations give oil to farmers for road oil. The proprietors gave oil to whomever they wished, but when the season was over they let respondent have it again. He found, as he continued, the proprietors would save their oil for him and it is a fact that many of them do save their oil for a particular person. The reason is that they get good service and have a friendly contact with that person. Respondent developed contacts and friendly relations while in appellant's employ so as to retain the privilege of picking up oil from the proprietors of those places. In the Sacramento area itself appellant's sources of drain oil comprised only 15 per cent of the total number of producers and its competitors picked up the other 85 per cent, but in the area north of Sacramento the appellant's sources of drain oil during its employment of respondent took in about 50 per cent of the total number of producers. When respondent quit his employment with Paraco it was his intention to pick up from the contacts he had made whatever oil he could get. He intended to do that before he quit and he purchased a truck and had it equipped to pump out the various sumps. He did not tell Paraco he was going into competition with them. He quit June 29th and he started picking up oil on his own account a few days later. During the first week he kept the knowledge from Paraco that he was picking up oil in competition; he considered that was his business. When he went into the business he picked up oil from whatever sources were available, including the sources from which he had obtained oil for Paraco.

When respondent had been operating on his own for about one month, Paraco began this action. The trial court granted a preliminary injunction enjoining respondent from collecting from places where he had obtained drain oil for appellant. This injunction was continued in force until the judgment herein which discharged it. During the period of seven weeks between his leaving appellant and the issuance of the restraining order, respondent picked up from appellant's former sources 41,737 gallons of drain oil which he sold to Brighton Oil Company at 3½ cents a gallon, making a total return to him of $1,460.79. This gallonage amounted to about half appellant's normal supply from that area.

The Supreme Court said in Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 110, 148 P.2d 9, 12:

> "Equity will to the fullest extent protect the property rights of employers in their trade secrets and otherwise, but public policy and the natural justice require that equity should also be solicitous for the right inherent in

all people, not fettered by negative covenants upon their part to the contrary to follow any of the common occupations of life. Every individual possesses as a form of property, the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided such competition is fairly and legally conducted. * * *

"* * * [E]quity will intervene to restrain an employee from divulging confidential information gained in the course of his employment or using such information to his employer's prejudice. * * * The courts regard as unfair competition, and will enjoin, the use by an employee to the prejudice of his former employer of the confidential information gained by the employee during his prior employment as to the business secrets of such employer."

[1] Where the facts of the case do not justify the application of the principle governing the rights of the parties in connection with delivery routes, a former employer seeking injunctive relief against a former employee must show: "(1) The information was confidential and not readily accessible to competitors; (2) The former employee solicited the customers of his former employer with intent to injure him; (3) The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; (4) The business is such that a customer will ordinarily patronize only one concern; (5) The established business relationship between the customer and the former employer would normally continue unless interfered with." Aetna Building Maintenance Co. v. West, 39 Cal.2d 198, 204–205, 246 P.2d 11, 15. See, also, California Intelligence Bureau v. Cunningham, 83 Cal. App.2d 197, 202, 188 P.2d 303, and cases there cited.

[2] From the facts narrated it is clear that the evidence before the trial court justified its finding as a matter of fact that none of the tests of unfair competition stated in Aetna Building Maintenance Co. v. West, supra, were met by the proof in this case. We think the court justifiably found that the information was not confidential and was readily accessible to competitors; that respondent did not solicit permission to take drain oil from those whose permission he had received while working for appellant with intent to injure appellant (the intent to divert business through the exercise of legitimate trade practices is not an intent to injure the business of plaintiff. Continental Car-Na-Var Corp. v. Moseley, supra, 24 Cal.2d at page 112, 148 P.2d at page 13); that there was no such thing involved as a preferred list of customers whose trade was particularly profitable and whose identities were not generally known to the trade; that the business was not such that a customer would ordinarily patronize only one concern; and, finally, that the business relationships with the producers of drain oil were not such that they would normally continue to patronize only one person.

The testimony was ample to sustain a finding that this case is not a so-called "route" case in which patrons usually want and expect to patronize a single route driver as is the situation presented by such cases as laundry route cases.

The judgment appealed from is affirmed

PEEK and SCHOTTKY, JJ., concur.

166 Cal.App.2d 545

Victor CHATTEN, substituted in the place and stead of O. D. Thomas, Deceased, Plaintiff and Appellant,

v.

John MARTELL, Thelma K. Martell, et al., Defendants and Respondents.

Civ. 5759.

District Court of Appeal, Fourth District, California.

Dec. 23, 1958.

Action by partner for cancellation of partnership agreement, dissolution of partnership and an accounting. Plaintiff died and, without notice, his alleged assignee was substituted as a plaintiff. The Superior Court of Orange County, Raymond Thompson, J., sustained demurrer without leave to amend, and assignee appealed. The District Court of Appeal, Griffin, P. J., held that there was no requirement that notice of application for substitution be given defendant and that court erred in sustaining demurrer without leave to amend.

Reversed.

1. Partnership ⇐313

An assignee of an interest in a partnership is entitled to those remedies for settlement of partnership affairs that existed in favor of his assignor unless otherwise provided by law. West's Ann.Corp.Code, §§ 15022, 15027, subds. 1, 2.

2. Partnership ⇐264

A sale, conveyance, transfer, or assignment by partner of his interest in partnership or in partnership property to copartner or to third person does not of itself dissolve partnership, although entire circumstance connected with transfer may be sufficient to bring about the dissolution. West's Ann.Corp.Code, §§ 15022, 15027, subds. 1, 2.

3. Partnership ⇐264

The dissolution of a partnership may be brought about, unless otherwise provided by agreement, by sale or assignment of a partner's interest to a third person. West's Ann.Corp.Code, §§ 15022, 15027, subds. 1, 2.

4. Partnership ⇐273

The conduct of a partner, to extent that it is injurious to partnership, constitutes ground for judicial dissolution of partnership. West's Ann.Corp.Code, §§ 15022, 15027, subds. 1, 2.

5. Partnership ⇐298

Ordinarily, purchaser or assignee of partner's interest is entitled to a partnership accounting subject to certain qualifications. West's Ann.Corp.Code, §§ 15022, 15031, 15032, 15043.

6. Partnership ⇐227

In determining what rights or interests pass under an assignment of a partnership interest, intention of parties as manifested in instrument is controlling.

7. Assignment ⇐80

An unqualified assignment of contract or chose in action with no indication of intent of parties vests in assignee the assigned contract or chose and all rights and remedies incidental thereto and those incidental rights include certain ancillary causes of action arising out of subject of assignment and accruing before assignment is made.

8. Partnership ⇐322

A partner who has parted with his partnership interest cannot join in an action for dissolution of partnership. West's Ann. Code Civ.Proc. §§ 367, 369.

9. Pleading ⇐236(7)

Statutory provision giving courts power to permit amendments in furtherance of justice permits amendment in discretion of court unless an attempt is made to present an entirely different set of facts by way of the amendment. West's Ann.Code Civ.Proc. § 473.

10. Pleading ⇐225(1)

Where original complaint filed by partner alleged that defendant partner wrongfully applied partnership money and profits to his own use and committed certain alleged fraudulent acts in connection therewith and sought decree of distribution, accounting and other relief, substitution of assignee of plaintiff partner did not change cause of action pleaded and sustaining of

demurrer without leave to amend was improper even though no notice of application for substitution was given defendant. West's Ann.Corp.Code, §§ 15022, 15027, 15031, 15032, 15043; West's Ann.Code Civ. Proc. §§ 369, 385, 473.

11. Parties ⇐61

It is better practice in substituting parties plaintiff to give notice to defendant. West's Ann.Code Civ.Proc. § 473.

Fred J. Martino, Beverly Hills, for appellant.

John Martell, Yucca Valley, in pro. per., and Z. B. West, Santa Ana, for respondents.

GRIFFIN, Presiding Justice.

To a second amended complaint to cancel documents, to impose a constructive trust, and for an accounting, the trial court sustained a general demurrer without leave to amend. This appeal is from the judgment for defendant which followed.

The original complaint was filed on *August 1, 1956,* by plaintiff, O. D. Thomas to cancel a partnership agreement between Thomas and defendant John Martell for the development and sale of land in San Bernardino County, to cancel a deed from Thomas to Martell of a partnership interest in section 33, township 1, north range 5 East, S. B. M. in that county, for imposition of a constructive trust covering sections 27, 29, 31 and 33 in said township and range, for dissolution of the partnership between them, and for an accounting.

It alleged generally that on April 4, 1952, he and defendant Martell entered into an oral partnership agreement, and pursuant thereto plaintiff Thomas conveyed certain real property to the partnership; that he received no consideration therefor; that defendant at the time was acting as plaintiff's attorney; that defendant Martell orally represented and assured plaintiff that if he, the said plaintiff, would deed said land to the partnership, defendant Martell "would procure sufficient monies to assist and aid plaintiff in not only selling and subdividing said land but also sufficient monies to assist and aid plaintiff in paying his encumbrances and debts so that plaintiff could maintain his interest in all of plaintiffs' properties"; that defendant "took advantage of the close and intimate relations with plaintiff and made said promises and assurances with no intention of performing the same"; that he failed, refused and neglected to perform any of said promises; that by reason of said defendant's "failure to perform his assurances and promises" plaintiff's creditors sold plaintiff's properties, including the real property conveyed to the partnership; and that "after said sale, defendant John Martell procured from the creditors of the plaintiff a conveyance directly to the defendants John Martell and Thelma K. Martell, for their own interest, the property theretofore owned by plaintiff." Plaintiff further alleged in the same cause of action that he and defendant Martell were the owners of an option to acquire certain real property for the sum of $10,000; "that shortly before the option was to expire defendant John Martell assured and orally stated to plaintiff, not to worry, and that he, the said defendant, would obtain monies for the purchase of said properties before the expiration of said option"; that defendant Martell made arrangements with "Defendants Does I Through IV" to purchase the properties described in the option in their own names and for their own interests and "conspired with said defendant John Martell to deprive plaintiff of the benefits of said option"; that said defendants Does I through IV, converted and appropriated the option to their own use and benefit and "took unjust advantage of the confidential relationship of defendant John Martell and plaintiff"; that said defendants, Does I through IV, paid to defendant Martell "sums of money" and that the said defendant retains and refuses to account therefor to plaintiff.

Plaintiff, in his second cause of action, seeks a partnership accounting. He failed to allege the continued existence of said partnership and failed to allege that he was a

partner at the time suit was filed. He prayed "that the conveyance to the partnership be set aside" and that the partnership agreement be annulled, and for a "partnership accounting". The complaint was verified by O. D. Thomas on *July 30, 1956.* Thomas died on November 3, 1956. Without notice, Victor Chatten was substituted as plaintiff upon the facts alleged in paragraph XV of plaintiff Chatten's first amended complaint, and realleged in paragraph XIII of plaintiff Chatten's second amended complaint, namely,

> "That on or about *July 3, 1956,* the said O. D. Thomas duly assigned to the plaintiff, by an instrument in writing, signed and delivered by him to plaintiff, *all rights of action* accrued against the defendant John Martell, including all interest in and to the properties herein listed, for his right to damages therefor and the value thereof by reason of the acts of the defendants, and that plaintiff is now the owner and holder of said claims and properties." (Italics ours.)

These first and second amended complaints were unverified and contained two causes of action substantially the same as the original complaint of O. D. Thomas. Defendant Martell moved to strike the first amended complaint upon the following grounds: (a) that the amended complaint set up a cause of action foreign to the original cause of action; (b) the order of substitution should have been made upon notice to defendant; (c) the substituted plaintiff had no standing in court. He also moved to dismiss the action on the grounds (a) that the court did not have jurisdiction over the subject matter of said action; (b) that O. D. Thomas, plaintiff, with full knowledge of the facts, on October 4, 1954, conveyed his interest in and to the partnership and the real property referred to in plaintiff's complaint, to Victor Chatten and Louise Chatten; (c) that Thomas, with full knowledge of the circumstances which would warrant rescission upon the alleged ground of fraud, accepted and retained the benefits accruing to him under the partnership agreement by disposing of his interest therein, and by reason thereof had lost his right to rescind said partnership agreement; (d) that at the time of filing his complaint, plaintiff O. D. Thomas had conveyed his interest in and to the real property described in his complaint, and had assigned his interest in the partnership, and had no interest in said partnership or real property; and that he was not the real party in interest.

In support of the motion to dismiss, defendant Martell filed his affidavit, in which he alleged that on October 4, 1954, plaintiff Thomas and Mary H. Barnett Thomas, his wife, had assigned all their right, title, and interest in and to the partnership existing between Thomas and Martell, and had conveyed by deed all the real property involved in this action, including partnership real property, to Victor Chatten and Louise Chatten (giving the book and page number and date of recordation). A photostatic copy of said deed and assignment was attached to said affidavit, and is included in the Clerk's Transcript. Cancelled internal revenue stamps affixed to said deed indicate the consideration therefor was $5,000.

Motions to strike and dismiss the first amended complaint on the grounds stated were denied and a demurrer thereto on the same grounds was sustained with leave to amend. A demurrer to the second amended complaint contained about the same allegations as the first, but in more particularity. It was sustained without leave to amend.

In support of the court's ruling defendant makes the same contentions advanced in the demurrer and motion to strike and argues that a suit for dissolution of a partnership can only be brought by a partner, citing Behlow v. Fischer, 102 Cal. 208, 36 P. 509; and Corporations Code, § 15022; that if one partner sells his interest in the firm to a stranger, the right to the control and disposition of the firm assets vests in the remaining partner; that the sale does not dissolve the partnership; and that the buyer is not entitled to interfere in the management or administration of the partnership business or affairs or to require any informa-

tion or account of partnership transactions or to inspect partnership books, but is merely entitled to receive, in accordance with his contract, the profits to which the selling partner would otherwise be entitled, citing Corporations Code, § 15027; and Mervyn Inv. Co. v. Biber, 184 Cal. 637, 644, 194 P. 1037; that the court cannot permit a person to be substituted as plaintiff in place of the then plaintiff on the ground that the person substituted was the real party in interest at the commencement of the action, citing Dubbers v. Goux, 51 Cal. 153; Altpeter v. Postal Telegraph-Cable Co., 26 Cal.App. 705, 708, 148 P. 241; and 149 A.L.R. 848, 849; that after an absolute assignment, the assignor has no cause of action upon the claim assigned, citing Burkett v. Doty, 176 Cal. 89, 167 P. 518; National Reserve Co. v. Metropolitan Trust Co., 17 Cal.2d 827, 832, 112 P.2d 598; that in order to rescind a partnership contract on the ground of fraud, it is essential to tender to the other party anything of value received under the contract, citing 37 Cal.Jur.2d 684, sec. 80; that where the gravamen of an action for rescission or cancellation involves fraud or mistake the three-year statute relating to those grounds is applicable, citing 9 Cal.Jur.2d 587, sec. 34; Code Civ.Proc. § 338, subdivision 4; that one partner cannot maintain an action against his copartner for the delivery of personal property belonging to the partnership, citing Dukes v. Kellogg, 127 Cal. 563, 60 P. 44; and that a grantor cannot claim a trust results in himself when he has executed a deed without consideration, citing Tillaux v. Tillaux, 115 Cal. 663, 47 P. 691.

Which reason or reasons the court adopted for sustaining the demurrer without leave to amend is not indicated. Plaintiff now says the question involved on appeal is whether the court erred in holding that the fraud complained of in plaintiff's second amended complaint could only properly be determined by a suit for an accounting and dissolution of the partnership between the defendant John Martell and the estate of O. D. Thomas, the original partner, rather than his assignee and purchaser, Victor Chatten, even though the assignment was executed prior to the death of the original defrauded partner. He cites the general rule of law that one partner may not sue another partner at law on account of partnership transactions and that all such matters between them must be determined in connection with an accounting and dissolution, and that there is a well-recognized exception permitting a suit for fraud exercised by one party upon the other, independent of any accounting or dissolution, citing Johnstone v. Morris, 210 Cal. 580, 292 P. 970, and Laughlin v. Haberfelde, 72 Cal.App.2d 780, 165 P.2d 544. He claims that even though the court did recognize this rule, it erred in holding that the action could only be brought by the estate of the orginal partner, Thomas, since an assignee may be substituted as a party plaintiff in place of the assignor, citing Macmillan Petroleum Corp. v. Griffin, 99 Cal. App.2d 523, 222 P.2d 69; Highsmith v. Crista, 66 Cal.App.2d 808, 153 P.2d 180; Potts v. Paxton, 171 Cal. 493, 499, 153 P. 957; Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.2d 643; and secs. 15027 and 15032 of the Corporations Code. It is then argued that since the original plaintiff has assigned his rights to plaintiff, Victor Chatten, the cause of action for accounting, dissolution and fraud is now the property of the assignee and he should be permitted to have his day in court.

[1] An assignee of a partnership is entitled to those remedies for settlement of partnership affairs that existed in favor of his assignor unless otherwise provided by law. Hooper v. Barranti, 81 Cal.App.2d 570, 184 P.2d 688; 37 Cal.Jur.2d 681, sec. 79. Section 15027, subdivisions 1 and 2 of the Corporations Code provides: "(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it

merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled. (2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners."

[2, 3] The general rule stated in 68 C.J.S. Partnership § 346, p. 852, is that a sale, conveyance, transfer or assignment by a partner of his interest in the partnership or in the partnership property to a copartner or to a third person does not of itself dissolve the partnership, although the entire circumstances connected with such a transfer may be sufficient to bring about the dissolution. A dissolution of a partnership may be brought about, unless otherwise provided by agreement, by the sale or assignment of a partner's interest to a third person, citing authorities, including Firpo v. Piper, 111 Cal.App. 403, 295 P. 886.

Under section 2450 of the Civil Code as it existed in 1925, a general partnership was dissolved as to all the partners by the transfer to a person, not a partner, of the interest of any partner in the partnership property. As a general rule, in jurisdictions where the Uniform Partnership Act has been adopted and where the partnership is one at will, any partner may, in good faith, dissolve it at any time, without the consent of his copartner, upon notice. 68 C.J.S. Partnership § 330 et seq, p. 841.

[4–7] Misconduct of a partner to the extent that it is injurious to the partnership constitutes grounds for judicial dissolution of a partnership. 68 C.J.S. Partnership § 349, p. 856. Ordinarily, the purchaser or assignee of a partner's interest is entitled to a partnership accounting subject to certain qualifications. 68 C.J.S. Partnership § 382, p. 894. It is likewise true that in determining what rights or interests pass under an assignment, the intention of the parties as manifested in the instrument is controlling. An unqualified assignment of a contract or chose in action, however, with no indication of the intent of the parties, vests in the assignee the assigned contract or chose and all rights and remedies incidental thereto. These incidental rights include certain ancillary causes of action arising out of the subject of the assignment and accruing before the assignment is made. Thus, the assignment of a contract passes from an assignor to the assignee an accrued cause of action for rescission. National Reserve Co. v. Metropolitan Trust Co., 17 Cal.2d 827, 832, 112 P.2d 598.

Under the original complaint filed herein, the partner, O. D. Thomas, alleged that his partner wrongfully applied partnership money and profits to his own use, and committed certain alleged fraudulent acts in connection therewith. He sought a decree of distribution, accounting, and other relief indicated. As a partner, he may well have been entitled to dissolution of the partnership, an accounting, and the other relief sought. Secs. 15022, 15031, 15032 and 15043, Corporations Code; Crosby v. McDermitt, 7 Cal. 146; Cottle v. Leitch, 35 Cal. 434.

[8–11] Assuming these rights were assignable and enforceable by the assignee (Jackson v. Deauville Holding Company, 219 Cal. 498, 27 P.2d 643), the next question is whether plaintiff Chatten, assignee, could be and was properly substituted as party plaintiff in said action. As far as the original plaintiff's complaint was concerned it did not, at the time of its filing affirmatively appear therefrom that he had assigned all of his right, title and interest in or to the partnership and its assets as well as to the claimed causes of action pleaded. Apparently this claimed fact was called to the attention of the trial court when defendant's demurrer to the original complaint was interposed. The record before us, in this respect, is not clear. The minutes of January 14, 1957, show an order for the substitution of Victor Chatten as party plaintiff, and the court ordered an amended complaint to be filed accordingly. Such amended complaint was filed by Chatten as party plaintiff, setting forth about the same claimed causes of action but with more particularity, and defendant was served with a copy of said

amended complaint. There is authority to the effect that under Code of Civil Procedure, §§ 385 and 473 [1875], the court could not permit a person to be substituted as plaintiff in place of the then plaintiff, on the ground that the person substituted was the real party in interest at the commencement of the action where another and different cause of action was set up in the amendment. Dubbers v. Goux, 51 Cal. 153. A partner who has parted with his interest cannot join in an action for dissolution of a partnership of which he has ceased to be a member. Behlow v. Fischer, 102 Cal. 208, 36 P. 509; Loftus v. Fischer, 114 Cal. 131, 45 P. 1058. Section 367 of the Code of Civil Procedure provides that "Every action must be prosecuted in the name of the real party in interest, except as provided" in section 369 of the Code of Civil Procedure. Apparently the effect of the former decisions above mentioned, and the application of section 473 of the Code of Civil Procedure in reference to the substitution of parties plaintiff has been set at rest by the decision in Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 910, 135 A.L.R. 318. It is there said, in effect, that it was within the discretionary power of the trial court to permit the amendment of the complaint, which, in effect, substituted the proper plaintiff in the action; that this statutory provision giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state; and that this position is clearly in accord with the modern theories of code pleading, which would permit amendment in the discretion of the court *unless an attempt is made to present an entirely different set of facts by way of the amendment.* It then stated that the court's power to permit amendments of pleadings is not unlimited; that it has generally been said that an amendment may not be permitted where the effect of such amendment is to state "another and distinct cause of action", citing Dubbers v. Goux, 51 Cal. 153, 155. To the same effect is 39 Am.Jur. p. 966, sec. 98, citing the Klopstock case. The facts in the instant case appear to come within the rule announced in the Klopstock case, since there was no material change in the cause of action pleaded. In substituting parties plaintiff, while it is better practice to give notice, there is no requirement that notice of application for substitution under section 473, supra, be given. Macmillan Petroleum Corp. v. Griffin, 99 Cal.App.2d 523, 222 P.2d 69; Highsmith v. Crista, 66 Cal.App.2d 808, 153 P.2d 180.

The claimed defense of estoppel, laches, the application of the statute of limitations which would bar a recovery, together with the other claimed defenses, do not affirmatively appear upon the face of the second amended complaint.

We conclude that the trial court erred in sustaining the demurrer without leave to amend.

Judgment reversed.

MUSSELL and SHEPARD, JJ., concur.

166 Cal.App.2d 598

William SWEET and Theodore McKenzie, Plaintiffs and Respondents,

v.

Axel ERICKSON and Buck Mountain Logging Co., a corporation, Defendants and Appellants.

Civ. 9430.

District Court of Appeal, Third District, California.

Dec. 29, 1958.

Hearing Denied Feb. 25, 1959.

Action for damages for alleged taking by defendants of logs situated on plaintiffs' property. The Superior Court, Humboldt County, William G. Watson, Jr., J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Peek, Acting P. J., held that testimony by county timber cruiser from books in his

custody relative to amount of timber assessed on property for the year previous to and the year in which defendants allegedly removed the cut timber, was admissible since the report was prepared by a county official as part of his official duties and was introduced as evidence of footage of timber on the land and was relevant to the issues then before the court.

Judgment affirmed.

1. Trover and Conversion ⇐36
Witnesses ⇐258

In action for damages for alleged taking by defendants of logs situated on plaintiffs' property, testimony by county timber cruiser from books in his custody relative to amount of timber assessed on property for the year previous to and the year in which defendants allegedly removed the cut timber was admissible over objection that it was immaterial, had no proper foundation, and was self-serving and hearsay, since the report was prepared by a county official as part of his official duties and was introduced as evidence of footage of timber on the land and was relevant to the issues then before the court. West's Ann.Code Civ.Proc. § 1920.

2. Evidence ⇐333(4)

Entries by a county timber cruiser in a cruise book, being a public writing, were properly received in evidence in a civil action. West's Ann.Code Civ.Proc. § 1920.

3. Witnesses ⇐275(6)

In action for damages for alleged taking by defendants of logs situated on plaintiffs' property, cross-examination in regard to price paid by plaintiffs for acreage in question was improper in view of fact answer to such questions would have involved the price of timber on land and hence have raised collateral issue of apportionment of price between the land and the timber.

4. Trover and Conversion ⇐67

In action for damages for alleged taking by defendants of logs situated on plaintiffs' property, question of treble damages was properly submitted to jury even though complaint charged conversion of logs, and even though the charge to the jury did not use the word "logs", since under the circumstances it did not appear that the jury could have been confused by reference to timber and trees in the charge rather than logs, which were the only trees involved in the action. West's Ann.Code Civ.Proc. § 733; West's Ann. Civ.Code, § 3346.

5. Trover and Conversion ⇐40(4)

In action for damages for taking by defendants of logs situated on plaintiffs' property, evidence, including testimony that a defendant knew boundaries of his property, and knew that he did not acquire either the land or the timber on plaintiffs' land in a purchase of adjoining property, sustained finding that defendants willfully and maliciously took logs from plaintiffs' land. West's Ann.Code Civ.Proc. § 733; West's Ann.Civ.Code, § 3346.

6. Appeal and Error ⇐882(17)

Defendants could not question finding of jury as to an issue, where such issue was presented as a question of fact by defendants' own instruction.

A. D. McNeil, John T. Sweeney, San Francisco, for appellants.

Hilger & Thomas, Eureka, for respondents.

PEEK, Acting Presiding Justice.

Defendants appeal from an adverse judgment entered pursuant to a verdict of the jury in favor of plaintiffs in the sum of $10,000 as damages for the alleged taking by defendants of logs situated on plaintiffs' property.

During the summer of 1953 defendants' predecessor, Bear River Lumber Company, sent a faller onto the property involved and cut and bucked out, but did not log out the trees thereon. At this time Bear River was conducting logging operations on land adjacent to plaintiffs' property, but it had no interest therein or to the timber which it had cut. In April of 1954 plaintiffs ac-

quired title to the 40 acres involved. In September of 1954 Bear River sold to defendants certain land and timber rights described as including "* * * all felled and/or bucked timber and logs as same presently lie within the logging operations of the seller * * *." In the Spring of 1955 defendants removed the cut timber from what was then plaintiffs' property.

[1, 2] It is defendants' contention that the court erred in overruling their objections to testimony by the county timber cruiser from books in his custody relative to the amount of timber assessed on the property for the years 1954 and 1955; that the court erred in sustaining objections to questions asked of plaintiff McKenzie concerning a price paid by plaintiffs for 40 acres, and that the court also erred in submitting the issue of treble damages to the jury.

The specific testimony attacked by defendants in their first contention was given by the witness McCutcheon, the official timber cruiser for Humboldt County, who stated that it was his duty to verify the accuracy of timberland assessments or make cruises upon which such assessments were made; that he was familiar with the particular tract involved, as it was recorded in the timber cruise book; that it had been recorded in the ordinary and regular course of operation of the Humboldt County Assessor's office by one Stamm who had preceded him in office. These records reveal that the volume of timber assessed upon the 40 acres for the years 1954 and 1955 was 600,000 feet. Defendants' objection to his testimony was that it was incompetent, irrelevant and immaterial; that no proper foundation had been made; that the particular record was a self-serving document and hearsay; and that the same had not been prepared by the witness. The report was prepared by a county official as a part of his official duties and was introduced as evidence of the footage of timber on the land and obviously relevant to the issue then before the court. There can be no question that the entries in the cruise book, being public writing, were properly received in evidence. Code Civ.Proc. sec. 1920. We find no merit in defendants' further argument that the issues were confused since the timber, having been severed as of the date of the report, was hence personalty and the report itself spoke in terms of realty.

[3] Defendants' next contention is that the court erred in sustaining their objections to questions asked plaintiff McKenzie on cross-examination seeking to elicit the price paid by plaintiffs for the acreage in 1954. In the recent case of County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680, the court reversed certain prior holdings and held that evidence of purchase price is admissible to prove fair market value at a particular time and place. However, the court qualified its holding by stating that such sales should be sufficiently close in time to the evaluation date and sufficiently similar in all characteristics to be relevant, and that "manifestly, the trial judge in applying so vague a standard must be granted a wide discretion." 48 Cal.2d at page 678, 312 P.2d at page 684. While the court under a proper foundation, as noted in the Faus case, might well have allowed such testimony into evidence, nevertheless it would appear that in view of the highly fluctuating value of timber, and the fact that the answer to the excluded question would have involved the price of timber on land and hence have raised the collateral issue of the apportionment of price between the land and the timber, we cannot say that there was an abuse of discretion in denying the evidence sought by defendants.

[4] Defendants' final contention, although somewhat confusing, appears to be that the court erred in submitting the question of treble damages to the jury, since the complaint charged conversion of personal property, namely logs, but that nowhere in the charge to the jury was the word "logs" used, nor does the word appear in Code of Civil Procedure, section 733, or Civil Code, section 3346, which authorize treble damages for injuries to trees. Under

the facts of the case it would not appear that the jury could have been confused by reference to "timber and trees" rather than "logs," as the only trees involved in the action were those which had been cut and bucked and were on the plaintiffs' property. The code provisions specifically provide:

> "Any person who cuts down or carries off any wood or underwood, tree, or timber * * * is liable to the owner of such land, * * * for treble the amount of damages which may be assessed therefor, * * *." Sec. 733, Code Civ.Proc.

[5] Although defendants further contend that the complaint did not allege nor prove that the defendants moved the logs from plaintiffs' land knowing them to be plaintiffs' property, it does appear that at the conclusion of the case plaintiffs were allowed to amend their complaint by inserting the words "wilfully and maliciously" in accordance with instructions previously requested by defendants.

[6] In this connection the testimony given by the defendant Erickson that lines had been run denoting the boundaries of the property; that he knew he did not acquire either the land or the timber unless the same were described in his contract; that the contract involving adjoining lands did not include the land in question; that he maintained no production records and could produce no maps for the area, although he could produce maps for the adjoining areas, was of sufficient substantiality to support the finding that defendants wilfully and knowingly took the logs. Moreover, the defendants are in no position to question the finding of the jury in this regard, since this particular issue was presented as a question of fact by defendants' own instruction. See Shumate v. Johnson Publishing Co., 139 Cal.App.2d 121, 130, 293 P.2d 531.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

MORRO PALISADES COMPANY,
Plaintiff and Appellant,

v.

The HARTFORD ACCIDENT AND INDEMNITY COMPANY and Ralph R. Westfall, Defendants and Respondents. *

Civ. 23251.

District Court of Appeal, Second District, Division 1, California.

Jan. 5, 1959.

Rehearing Denied Jan. 26, 1959.

Hearing Granted March 4, 1959.

Action against surety on bond assuring that principal would improve all of streets and roads situate within a certain tract. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., rendered judgment of dismissal after sustaining amended demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, Fourt, J., held that complaint was not subject to infirmity of disclosing on its face that it had been prematurely filed.

Judgment reversed with directions.

1. Pleading ⇐225(2)

Rule, making it abuse of discretion to sustain without leave to amend a demurrer to an original complaint unless complaint shows on its face that it is incapable of amendment, applies irrespective of whether leave to amend is requested.

2. Municipal Corporations ⇐348

In action against surety on bond assuring that principal would improve all of streets and roads situate within a certain tract, complaint was not subject to infirmity of disclosing on its face that it had been prematurely filed.

3. Pleading ⇐225(2)

In action against surety on bond assuring that principal would improve all of streets and roads situate within a certain tract, it was an abuse of discretion to sustain amended demurrer to complaint without leave to amend.

* Opinion vacated 340 P.2d 628.

Charles E. Ogle, Morro Bay, for appellant.

A. H. Brazil, San Luis Obispo, for respondents.

FOURT, Justice.

This is an appeal from a judgment of dismissal filed subsequent to a minute order sustaining an amended demurrer without leave to amend.

No amendments had been filed to the initial complaint, which was for damages on a faithful performance bond and for reformation of said bond. Plaintiff and appellant Morro Palisades Company instituted the action as assignee of the County of San Luis Obispo, against The Hartford Accident and Indemnity Company as surety on a faithful performance bond and against Ralph R. Westfall as principal. The bond was to assure that Westfall would improve all of the streets and roads situate within a certain tract as shown on a certain map which was accepted by ordinance adopted by the Board of Supervisors of the County of San Luis Obispo.

In the amended demurrer it was contended that the compaint did not state sufficient facts to constitute a cause of action; that the complaint is defective in that it appears on the face thereof that the said complaint has been prematurely filed; and that the complaint was uncertain in various particulars.

The order of dismissal specified that "the complaint does not state facts sufficient to constitute a cause of action and it appears therefrom as a matter of law that a cause of action could not be pled."

The original complaint unquestionably is uncertain in various of the particulars specified, and in our opinion the trial court properly sustained the amended demurrer. Whether the trial court abused its discretion in sustaining the amended demurrer without leave to amend is a more difficult problem.

[1] "The general rule is that it is an abuse of discretion to sustain without leave to amend a demurrer to an original complaint unless the complaint shows on its face that it is incapable of amendment. Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, 107, 280 P.2d 1; King v. Mortimer, 83 Cal.App.2d 153, 158, 188 P.2d 502; C. Dudley De Velbiss Co. v. Kraintz, 101 Cal.App.2d 612, 617, 225 P.2d 969. This rule applies irrespective of whether leave to amend is requested or not. MacIsaac v. Pozzo, 26 Cal.2d 809, 816, 161 P.2d 449; King v. Mortimer, 83 Cal.App.2d 153, 158, 188 P.2d 502, supra; Code of Civil Procedure, Sec. 472c." Phillips v. Phillips, 137 Cal.App.2d 651, 653, 290 P.2d 611, 612.

It is succinctly stated in 2 Witkin, California Procedure, at pages 1496 and 1497, "An order sustaining a demurrer without leave to amend is followed by a *final judgment of dismissal* of the action, reviewable on appeal. Such a drastic step is unwarranted, and ordinarily constitutes an abuse of discretion, if there is a reasonable possibility that the defect can be cured by amendment. This rule is chiefly applied in the following situations:

"(a) Where the defect is one of *form,* raised by *special demurrer,* and the elements of a cause of action are stated. * * *

"(b) Where the defect, whether of form or substance, relates only to a part of the complaint and at least one count is good. * * *

"(c) Where the defect, though one of *substance,* may possibly be cured by supplying omitted allegations, and the plaintiff has not had a fair opportunity to do so, as where the demurrer was sustained to his first complaint. * * *

"(d) Where the action is 'favored', this, alone or in connection with any of the other reasons stated above, may influence the appellate court to reverse the judgment of dismissal and allow the plaintiff to try again. * * *"

[2] We cannot agree with the trial court that the complaint is fatally defective because it appears on the face thereof to have been prematurely filed in view of the statement of the law appearing in Pierce v. Wright, 117 Cal.App.2d 718,

728, 256 P.2d 1049, 1054, as follows: "In Ceremony v. Drummond, 37 Cal.App. 446 (174 P. 696) [* * *] it was held that the contractor's bond is a contract of *indemnity against liability rather than one of indemnity against loss sustained and paid,* * * *." (Emphasis added.)

From the record before us, we cannot say that appellant cannot correct the defects in its complaint by amendment so as to state a proper cause of action upon some theory. It may be that appellant can allege facts to bring it within the scope of those intended to be protected by the bond in question; and it may be that appellant can develop some theory upon which it is presently entitled to be indemnified against some type of existing liability.

[3] We are of the opinion that the interests of substantial justice will be served by affording appellant an opportunity to clarify the uncertainties and to supply the deficiencies appearing in its original complaint by amendment thereof.

The judgment is reversed with directions to the trial court to permit the appellant to amend its complaint if it be so advised.

WHITE, P. J., and LILLIE, J., concur.

166 Cal.App.2d 627

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Isiah CHATMAN, Defendant and Appellant.

Cr. 2875.

District Court of Appeal, Third District, California.

Dec. 30, 1958.

Hearing Denied Feb. 25, 1959.

Prosecution for possession of heroin which received by inspector who had received information from a confidential informant and police officers when they forcibly entered defendant's room without a warrant for arrest and search, wherein inspector testified as to reliability of informant by checking prior information given to him. From adverse judgment of the Superior Court, Sacramento County, Raymond T. Coughlin, J., the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that it was error not to permit cross-examination of inspector as to identity of a person concerning whom informant had given information a month prior to defendant's arrest and as to inspector said he found the information reliable, when prosecution had put credibility of inspector in issue by relying upon it to justify the entry, search and seizure.

Judgment reversed and cause remanded.

1. Arrest ⇐63(3), 71

Where police officers on information received from an informer forced their way into defendant's room without a warrant for arrest and search and at time of entry they saw defendant and three other individuals "capping up" narcotics, arrest of defendant was legal and seizure of the equipment being used was proper. West's Ann.Pen. Code, §§ 836, 837, subd. 1.

2. Arrest ⇐63(4), 68, 71

A peace officer may make an arrest without a warrant when he has reasonable cause for believing person arrested has committed a felony, and in doing so he may make a forcible entry for purposes of arrest and incidental to the arrest he may search the person arrested and the premises where he is found. West's Ann.Pen.Code, §§ 836, 837, subd. 1.

3. Arrest ⇐63(4)

Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at trial on issue of guilt. West's Ann.Pen.Code, §§ 836, 837, subd. 1.

4. Arrest ⇐63(4)

Reasonable grounds for believing that a person has committed a felony justifying his arrest is often a question of fact for trial court, and in cases where reliability of con-

fidential informer is in question, issue turns mainly on credibility of officer, soundness of his reasons for relying upon informant, and nature of informant's disclosure. West's Ann.Pen.Code, §§ 836, 837, subd. 1.

5. Arrest ⇐63(4), 68

Where police inspector had been told by confidential informant a few minutes before he and other police officers forced their way into defendant's room, that defendant was in his room at that time with others and that they were "capping up" heroin and such informant had on prior occasions given inspector information about narcotic infringements and such information had been checked and found to be reliable, reasonable cause existed to believe that defendant was committing a felony justifying forcible entry to make the arrest.

6. Witnesses ⇐216

In prosecution for possession of heroin which was seized by inspector when he and police officers forcibly entered defendant's room without a warrant for arrest and search when they received information from a confidential informant that defendant had heroin, wherein inspector testified as to reliability of informant by checking prior information given to him, it was error not to permit cross-examination of inspector as to identity of a person concerning whom informant had allegedly given reliable information a month prior to defendant's arrest since prosecution had put credibility of inspector in issue by relying upon such information to justify the entry, search and seizure. West's Ann.Health & Safety Code, § 11500.

Howard A. Potts, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and William O. Minor, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

[1] This is an appeal from a judgment declaring appellant guilty of violating Section 11500 of the Health and Safety Code. On February 3, 1958, appellant was the tenant of a room in a Sacramento hotel. About 10 P.M. four Sacramento police officers and one inspector of the Bureau of Narcotic Enforcement forced their way into the room. They had no warrant for arrest or search. In the room they saw appellant and three others who were then engaged in "capping" a white powder containing heroin. On a bedside table was a package containing 44 grains of the powder and various items being used in the "capping" operation. There was also a hypodermic needle, an eye dropper and 14 paper bindles containing powder. The officers arrested appellant and he was later charged with possession of heroin. They seized the articles listed above and they were introduced in evidence at the trial. There was also introduced an extra judicial statement made by appellant to the officers in which he said that one of the four persons arrested had asked him for permission to use his room to cap some heroin; that this person asked appellant to help him with that work; that appellant agreed and was to receive therefor a small amount of the narcotic. At the trial appellant neither took the stand himself nor offered evidence in his own behalf. The trial court found appellant guilty.

The first witness for the prosecution was a chemist who testified that he had analyzed the white powder found in defendant's room and that the same contained heroin. He was followed by the inspector who testified that when the officers forced their way into the room they found appellant and the others there with the articles above described The articles were then offered in evidence and objection was made to their admissibility as having been unlawfully seized. Counsel for the prosecution then further examined the inspector to determine the circumstances that lay back of the forcible entry into the appellant's room and the seizure of

the articles found there. He testified that a few minutes before he entered the room he met an informer near the Sacramento police station who told him that appellant was in his room at that time with others and that they were then "capping up", that is, placing the narcotic in caps or bindles; that he gathered the police to aid him and went to the room and broke in; that the informant had told him an hour before that one Nolen, who was in the room when the officers arrived there, had just returned from southern California with a large quantity of heroin; that he had known the informer for about a month; that prior to this occasion the informer had several times given him information about narcotic law infringements; that he had checked the information and found it to be reliable. At this point the witness was cross-examined by defense counsel. He was asked to identify the informant, but before the question could be answered counsel for the prosecution asked permission to examine further on voir dire. That was granted and the inspector further testified as follows: When he talked to the informer, the informer knew that he was a state narcotic inspector and he had told the informant he intended to use the information in his work. The informant, from the first, had asked if anyone would be told that he was giving information and had been assured that they would not and that the officer would not reveal the informer's identity. It was the policy of the bureau to receive information on those terms. Having gone that far, counsel for the prosecution informed the court that he believed the search and seizure had been justified; that the articles ought to be admitted in evidence, but that if the court ruled otherwise then the People were prepared to drop the prosecution of appellant rather than reveal the identity of the informer. Counsel for appellant then again took the witness under cross-examination. He asked the witness as to whom the informer had given information. Objection was interposed that to permit the answer would tend to identify the informer. The objection was sustained. Counsel for appellant then asked the witness if, on the first occasion he had received information, it had been about appellant, and the answer was negative. The inspector repeated, however, that he had checked the reliability of that first information although he had made no arrest, believing that he had not enough information to justify it. He said his investigation as to reliability had been accomplishd by talking to other people and their answers had satisfied his mind that the person informed against was dealing in narcotics. The inspector testified further that he had paid the informer an award of $40 for the last information he had supplied; that on one other occasion he had made an arrest based upon the information of the informer. At this point counsel for appellant offered a general objection to any testimony concerning what the officers had seen in appellant's room and to the introduction in evidence of the articles seized there. The objections were overruled, the testimony of the inspector was admitted and the articles seized were received in evidence.

Appellant challenges the legality of his arrest and the resulting search and seizure. He says the evidence showed that the only and sole basis for the arrest of appellant was information given to Inspector Best by an informant to the effect that appellant and three other individuals were in the aforementioned hotel "capping up" narcotics. In this appellant is mistaken. Regardless of the conduct of the officers in entering the room, when they were there they saw the offense of possession of narcotics being committed in their presence. At that moment, regardless of all else, it was their duty to make the arrest. Under such circumstances, any person may make an arrest, be he officer or private person. Penal Code, § 836, as to peace officers; Penal Code, § 837, subd. 1, as to private persons. As to the officers, therefore, the duty to make the arrest and, as an incident thereto, to seize and preserve the evidence of the offense was immediate and paramount. If an officer, how-

ever he comes upon the scene, sees A shoot and kill B, it is duty to arrest A and to seize the murder weapon. He is no less a policeman because he came upon the scene unlawfully. The contention that the evidence seized and the testimony as to what the officer saw is inadmissible by reason of the conduct of the officers in entering appellant's room presents a different question. The lack of warrant and the forcible entry may exclude the evidence unless the entry, search and seizure rested upon a reasonable cause to believe appellant had committed a felony.

[2–5] Appellant contends that the information on which the inspector acted in going to appellant's room with the other officers for the purpose of arresting appellant was insufficient. A peace officer may make an arrest without a warrant when he has reasonable cause for believing the person arrested to have committed a felony (Penal Code, § 836; People v. Smith, 50 Cal.2d 149, 323 P.2d 435), and in doing so may make a forcible entry for purposes of arrest. Incidental to the arrest he may search the person arrested and the premises where he is found. 4 Am.Jur., Arrest, sec. 84. Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. What are reasonable grounds for believing that a person has committed a felony is often a question of fact for the trial court and in cases where the reliability of a confidential informer is in question the issue turns mainly on the credibility of the officer, the soundness of his reasons for relying upon the informant, and the nature of the informant's disclosure. People v. Boyd, 162 Cal.App.2d 332, 327 P.2d 913; People v. White, 159 Cal.App.2d 586, 324 P.2d 296. We have heretofore related the facts testified to by the inspector concerning the information he had received and the effort he had made to check the reliability of his informant and we hold that the ruling of the trial court that the evidence showed reasonable cause for an arrest of the appellant based thereon is sufficiently supported.

[6] Appellant next contends that his right of cross-examination of the inspector concerning the information he had received was prejudicially restricted. Defense counsel for appellant asked the inspector to identify a person concerning whom the informant had given information a month prior to appellant's arrest, and as to whom the inspector had said he had found the information reliable. The objection of the prosecution that the public interest would suffer by the disclosure, since it would lead to the identity of the informer, was sustained. This was error. The prosecution put the credibility of the inspector in issue when they relied upon it to justify the entry, search and seizure. The identity of the person whom the inspector said the informer had told him about might have led to evidence severely impeaching the inspector's testimony. For instance, the answer might have disclosed either that the inspector had no such person in mind or if a name was given that no such person existed.

It appears from the foregoing that appellant's counsel had made it clear to the court that he wished to learn the identity of the informer as a part of his challenge to the proof offered by the prosecution in discharge of the burden to show that the officers had reasonable ground to believe appellant had committed a felony. The court refused to permit disclosure of the identity of the informer, but, over objection, permitted use in evidence of what the search and seizure revealed.

> "* * * If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action

depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. * * *

"In sum, when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant." (Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, 43.)

In view of the fact that the court had sustained objections as above noted and that the State had taken the position that if disclosure were compelled it would dismiss the action in preference to such disclosure being made, we think this record sufficiently demonstrates that the court thoroughly understood the situation and that the court erred in admitting the testimony of the inspector as to what he saw in the appellant's room and in admitting into evidence the articles there seized. It is quite apparent from this record that had a motion been made to strike such testimony it would have been denied.

The judgment appealed from is reversed and the cause is remanded.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

166 Cal.App.2d 519

The FIRESTONE TIRE & RUBBER COMPANY, a corporation, Petitioner and Respondent,

v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, Burton Chace, Chairman, Warren Dorn, John Anson Ford, and Kenneth Hahn, Consolidated County Fire Protection District and Keith Klinger, Appellants.

The FIRESTONE TIRE & RUBBER COMPANY, a corporation, Petitioner,

v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, Burton Chace, Chairman, Warren Dorn, John Anson Ford, and Kenneth Hahn, Consolidated County Fire Protection District and Keith Klinger, Respondents.

Civ. 23433, 23365.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1958.

Rehearing Denied Jan. 19, 1959.

Hearing Denied Feb. 18, 1959.

Owner of realty, which board of supervisors of county had annexed to consolidated county fire protection district, filed a petition for writ of certiorari and writ of mandate against board of supervisors, district, and chief engineer of district. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment adverse to board of supervisors, district, and chief engineer, and they appealed. The owner of the realty also brought original prohibition proceeding in the District Court of Appeal against the board of supervisors, district, and chief engineer to prohibit them from proceeding with subsequent annexation proceedings. The District Court of Appeal, Nourse, J. pro tem., held that annexation of territory to district did not deprive owners of realty within annexed territory of any property or impose on them liability for any public improvement, but only rendered their realty subject to general ad valorem tax, and that therefore the Legislature, without denying due process, could have omitted from statute any provision for notice to owners of proposed

annexation or hearing and could have empowered board of supervisors of county to initiate and complete annexation without notice, and that hence Validating Act cured any defects as to notice of proposed annexation.

Judgment reversed with directions, and peremptory writ of prohibition issued.

1. Counties ⇐18

Appeal by board of supervisors of county, consolidated county fire protection district, and chief engineer of district from judgment annulling resolution of board of supervisors annexing certain territory to district would not be dismissed by District Court of Appeal, on ground that they accepted benefits of the judgment and waived their right to appeal therefrom by commencing a subsequent proceeding to annex the same territory.

2. Counties ⇐18

Appeal by board of supervisors of county, consolidated county fire protection district, and chief engineer of district from judgment annulling resolution of board of supervisors annexing certain territory to district would not be dismissed by District Court of Appeal, on ground that, by instituting subsequent proceeding for annexation of the same territory, they violated lower court's order staying proceedings and therefore were in contempt of the lower court and were not entitled to seek aid by appeal, where lower court's order only stayed action in that court on the proceedings to be reviewed by that court and did not purport to enjoin board of supervisors or district from instituting new and separate annexation proceedings.

3. Counties ⇐18

Power of board of supervisors of county to act on proposed annexation of territory to consolidated county fire protection district was dependent on substantial compliance with provisions of statute as to notice and hearing, and the statute was the measure of the power of the board of supervisors. West's Ann.Health & Safety Code, §§ 14480, 14513.

4. Counties ⇐18

Where notice of hearing by board of supervisors of county on proposed annexation of territory to consolidated county fire protection district did not comply with statute because not published in a newspaper distributed within the territory to be annexed and because description of territory was not one which would put a person reading it on notice that his property was within boundaries as described, annexation was void, unless Validating Act validated the annexation. West's Ann.Health & Safety Code, §§ 14480, 14513; St.1958, 1st Ex.Sess., c. 10.

5. Counties ⇐18

Validating Act validating all annexation proceedings theretofore completed other than those as to which any legal proceeding was at the effective date of the act pending and undetermined, or which might be pending or undetermined during period of 30 days from and after the date of the act does not validate ordinance or resolution annexing territory to consolidated county fire protection district, if ordinance or resolution is void because of lack of due process, but only if ordinance or resolution is invalid because of defects or omissions in carrying out statutory provisions which the Legislature could have omitted from the law under which ordinance or resolution was adopted or proceeding had. West's Ann.Health & Safety Code, §§ 14480, 14513; St.1958, 1st Ex. Sess., c. 10.

6. Evidence ⇐43(1)

It is common knowledge that a landowner is rarely informed of proceedings against his property by mere newspaper publication.

7. Counties ⇐18

The furnishing of fire protection is a function of the government of the state to be performed by the State in unincorporated territory, and the State may by general law provide for the formation of a munici-

pal corporation, such as consolidated county fire protection district, to perform that function. West's Ann.Health & Safety Code, §§ 14440, 14500.

8. Constitutional Law ⇐278(2)
Counties ⇐2

Annexation of territory to consolidated county fire protection district did not deprive owners of realty within annexed territory of any property or impose on them liability for any public improvement, but only rendered their realty subject to general ad valorem tax, and therefore the Legislature, without denying due process, could have omitted from statute any provision for notice to owners of proposed annexation or hearing and could have empowered board of supervisors of county to initiate and complete annexation without notice, and hence Validating Act cured any defects as to notice of proposed annexation. West's Ann.Health & Safety Code, §§ 14440, 14480, 14500, 14513; St.1958, 1st Ex.Sess., c. 10.

9. Counties ⇐18

Petition of owner of realty, which was included in territory annexed to consolidated county fire protection district by board of supervisors of county, to withdraw the realty from the district after completion of annexation proceedings, and after assessor had levied assessment for district taxes on owner's realty did not constitute a "legal proceeding" within meaning of Validating Act validating all annexation proceedings theretofore completed other than those as to which any "legal proceeding" was at effective date of the act pending and undetermined or which might be pending or undetermined during period of 30 days from and after date of act. West's Ann.Health & Safety Code, §§ 14560–14567; St.1958, 1st Ex.Sess., c. 10.

See publication Words and Phrases, for other judicial constructions and definitions of "Legal Proceeding".

10. Prohibition ⇐6(2)

Where annexation proceedings whereby board of supervisors of county annexed territory to consolidated county fire protection district were valid, so that board of supervisors had no power to act on subsequent proceedings for annexation of the same lands, writ of prohibition would issue to prevent board of supervisors from acting on subsequent proceedings.

Harold W. Kennedy, County Counsel, Los Angeles, and David D. Mix, Deputy County Counsel, Granada Hills, for Board of Supervisors.

Trippet, Yoakum, Stearns & Balantyne, Oscar A. Trippet and Thomas H. Carver, Los Angeles, for Firestone Tire & Rubber Co.

NOURSE, Justice pro tem.

The first matter named in the caption involves an appeal by Consolidated Fire Protection District, hereinafter called "District," the Board of Supervisors of the County of Los Angeles and one Keith Klinger who is the chief engineer of the District, from a judgment annulling a resolution of the Board of Supervisors annexing certain territory to the District in a proceeding known as Annexation 47–57.

The second matter named in the caption involves a petition by Firestone Tire & Rubber Company, a corporation, hereinafter called Firestone, for a writ of prohibition directed to the Board to enjoin it from taking further action under a proceeding known as Annexation Number 34–58, by which proceeding it is sought to annex to the District the same territory which was included in Annexation Number 47–57, which proceeding was annulled by the judgment appealed from.

We have permitted these two matters to be submitted for decision upon a combined record and briefs and we will dispose of both by this opinion treating them separately.

The District's Appeal

[1] We have before us, in addition to the appeal, the motion of Firestone to dismiss the appeal. The motion is made upon

two grounds. The first ground is that by the commencement of proceeding 34–58 the appellants have accepted the benefits of the judgment appealed from and thereby affirmed the validity of that judgment and waived their right to appeal therefrom. This contention is devoid of merit. Undoubtedly if appellants are correct in their contention that the judgment appealed from is erroneous and as a matter of law the original proceedings were valid, the Board did not have the power to act under the later proceedings for it could not order annexed territory which was already a part of the District. If, however, the Board's contentions on the appeal are not well founded and the judgment of the trial court is correct, then the original proceedings were no bar to the second. City of San Pablo v. City of Richmond, 148 Cal.App. 2d 358, at pages 361–362, 306 P.2d 949, at pages 951–952.

The appellants by initiating the second proceedings did not concede the invalidity of the first proceeding and were entitled as a precautionary measure to commence a second proceeding which would be effective only in the event that the judgment of the lower court was affirmed. If appellants had proceeded to complete their annexation under the second proceeding then it might be doubtful that they would be in a position to attack the first judgment for it would only be upon the basis of the invalidity of the order annulled by the judgment that they could again act to annex the same territory.

[2] The second ground of the motion is that by instituting the second proceeding, the appellants have violated an order made by the lower court staying proceedings and therefore are in contempt of that court and not entitled to seek aid from this court by their appeal. This contention is also without merit. The stay order made by the superior court in connection with a writ of review issued by it only stayed action by the respondents in that court (appellants here) upon the proceedings to be reviewed by that court. It did not purport to enjoin the Board of Supervisors or the District from instituting new and separate annexation proceedings. The motion to dismiss is denied.

Firestone has also moved for an affirmance of the judgment upon the grounds that a mere inspection of the record indicates the correctness of the trial court's judgment. This motion goes to the merits of the appeal and is disposed of by our decision.

The Facts

The facts relevant to the disposition of the appeal are: The District is a duly organized fire protection district. The Board of Supervisors of Los Angeles County is the governing board of that district. On July 9, 1957, at a regular meeting of the Board, it determined that certain territory should be annexed to the District and ordered a hearing had in the matter of the proposed annexation on Thursday, August 8, 1957. It directed the clerk of the Board to publish a notice once a week for two successive weeks in the Florence Messenger, which the Board found to be a newspaper circulated in the territory proposed to be annexed and the newspaper which the Board determined most likely to give notice to the inhabitants of said territory. A notice was published as directed in the designated newspaper. This notice did not name any person, and the boundaries of the territory to be annexed were described as follows: "Beginning at the most westerly northwesterly corner of Tract No. 3233, as shown on map recorded in Book 36, Page 70 of Maps, in the office of the Recorder of the County of Los Angeles; thence northerly along the boundary of Consolidated County Fire Protection District, as same existed on May 29, 1957, and following the same in all its various courses and curves to the boundary of the City of South Gate, as same existed on said date; thence northerly in a direct line to the point of beginning. Containing: 0.079 square miles."

Firestone is the owner and occupant of all but a small portion of the real property within the territory sought to be an-

nexed and maintains a large manufacturing plant thereon. The fact of its ownership and occupancy were known to the Board and to the officers of the District. On August 8, this annexation proceeding together with 12 other proposed annexations were taken up by the Board for action. No one appeared at the meeting to protest any of the annexations. The Board thereupon took the evidence of one Hughes, a fire rating inspector for the county, his evidence being as follows: "Q. Are you familiar with the territory sought to be annexed to the various Fire Protection Districts? A. I am. Q. In each instance, in your opinion, would the territory [proposed to be annexed] be benefited by the annexation if consummated? A. It would." The Board thereupon adopted the resolution for the annexation of the territory in question and the Board thereafter, pursuant to section 14480, Health & Safety Code, levied an ad valorem tax upon the property of Firestone.

Firestone had no knowledge of the proposed annexation and did not acquire any knowledge of the proceeding until after the resolution of annexation had been passed and the tax assessed. It then filed a petition with the Board requesting the withdrawal of the territory included within the annexation from the District upon two grounds: First, that the annexation proceedings were invalid, and, second, that Firestone would receive no benefit from the annexation. Proceedings upon this petition were had before the Board at a number of meetings thereof and at the fourth meeting at which the matter was considered, held on April 17, 1958, the hearing upon the request of counsel for Firestone was continued for a period of 90 days in order that Firestone might commence an action to test the validity of the initial annexation.

On April 7, 1958, the Legislature passed an act validating all annexation proceedings theretofore completed other than those as to which any legal proceeding was at the effective date of the act pending and undetermined or which might be pending or undetermined during a period of 30 days from and after the date of the act. This act was effective as of April 7, 1958. See Statutes 1958, First Extraordinary Session, Chapter 10.

On May 14, 1958, Firestone filed its petition for writ of certiorari and writ of mandate in the present action.

At the trial of the action the evidence received showed without substantial conflict that the Florence Messenger in which the notice of annexation was published, was a publication which had no subscribers but was distributed by being delivered gratis to habitations and places of business within a defined area outside of the territory sought to be annexed and that it was not circulated or distributed within that territory. The evidence further showed that the boundaries of the Consolidated County Fire Protection District referred to in the published notice of the territory to be annexed, were not a matter of public record and that the only means that a property owner would have of determining whether the boundaries of the territory to be annexed as given in the published notice encompassed his property would be to, with the aid of the county engineer, search the minutes of the Board of Supervisors so as to ascertain the boundaries of the District as those were contained in numerous proceedings for annexations to the original District or for the consolidation of that district with other districts.

The trial court found that the Florence Messenger was not, at the time of the publication of the notice of annexation, circulated or distributed in the territory proposed to be annexed; that it was not the newspaper most likely to give notice to the inhabitants of the territory proposed to be annexed (the evidence showed that five newspapers of general circulation were distributed in the area); that Firestone had no notice whatsoever of the proposed hearing on the annexation or of the proposed annexation and that the notice as published failed to designate the property proposed to be annexed. It concluded that the Board acted without and in excess of its jurisdic-

tion and that the resolution authorizing the annexation of the territory in question was void. It rendered judgment accordingly.

The findings of fact made are, as we have indicated, fully supported by the evidence.

[3, 4] The power of the Board to act upon the annexation proceedings was dependent upon substantial compliance with the provisions of the statute as to notice and hearing. The statute was the measure of its power. Williams v. Bergin, 108 Cal. 166, at page 170, 41 P. 287, at page 288; Keller v. City of Oakland, 54 Cal.App. 169, 172, 201 P. 618. The notice here was vitally defective as a statutory notice. It was defective as a notice complying with the statute because not published in a newspaper distributed within the territory to be annexed. It was defective as a statutory notice because the description was not one which would put a person reading it upon notice that his property was within the boundaries as described. It is evident from the mere reading of the description that no one reading the notice would have any cause to believe that his property fell within the exterior boundaries described nor could he by reference to monuments or records, reference to which is ordinarily made in the description of real property, have applied the description so as to determine whether his property was affected but could only ascertain this by an independent search of records that were only available through the assistance of a public officer. Such description, in our opinion, does not meet the requirement of section 14513 of the Health & Safety Code that the notice "shall designate the territory proposed to be annexed."

The judgment of the trial court must therefore be affirmed unless the Validating Act of 1958 (Stats. 1958, First Extraordinary Session, Chapter 10) validated the annexation.

[5] The Validating Act could not and does not purport to validate any ordinance or resolution which is void because of lack of due process, but only ordinances or resolutions which are invalid because of defects or omissions in carrying out statutory provisions which the Legislature could have omitted from the law under which such ordinance or resolution was adopted or the proceeding had. See Section 6(a) and (b) Validating Act of 1958, First Extraordinary Session, Chapter 10; Miller v. McKenna, 23 Cal.2d 774, at page 782, 147 P.2d 531, at page 536.

[6] If the owner of property within the proposed annexation had a constitutional right to notice and an opportunity to be heard, the notice herein given did not satisfy the constitutional requirements of due process. Here notice published did not contain the names of the owners of the property within the District or the names of the persons to whom that property was assessed. The names of these persons were known and the places at which notice would reach them by mail was known. The property to be affected by the annexation was not described and the exterior boundaries of the proposed annexation were not such as to put an owner of property within the territory upon inquiry as to whether his property was within the territory to be annexed. The newspaper chosen was not one of general circulation but one which had no regular subscribers and was not a publication designed to bring notice of the proceedings to those affected thereby. The notice given here was not one of a character designed to bring home to the persons affected knowledge of the proceedings or to put them upon inquiry but was apparently designed as a mere token compliance with the statute without regard as to whether it was in fact reasonably certain to inform those affected. Such notice does not comport with due process within the rationale of the recent decisions of the Supreme Court of the United States. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, at pages 657–660, 94 L.Ed. 865, at pages 874–876; Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, at pages 201–202, 1 L.Ed.2d 178, at pages 181–182; Wisconsin Electric Power

Co. v. City of Milwaukee, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241.[4] The rationale of these decisions, as we understand it, is that in order to comport with due process a notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests and that a newspaper publication alone is not adequate where the person affected is known and it is feasible to give him notice by personal service or by mail or if his address be unknown, by posting his property. It is common knowledge[2] that a land owner is rarely informed of proceedings against his property by mere newspaper publication and to assert that the notice as published here was reasonably calculated to inform Firestone of the proceedings is the purest sophistry.

Appellant urges upon us the impracticability in many proceedings of giving notice in any other manner than by publication. It may be that in certain proceedings notice by mail to or by personal service on all affected persons might be impractical or even impossible. We are not concerned with such a situation here and if one should arise then the character of the notice given and the likelihood of its being reasonably certain to inform those affected under the conditions which then exist may be examined to determine whether in that case they constituted due process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, at page 657, 94 L.Ed. 865, at page 874. That the Legislature does not consider it impractical to give written notice by mail to the owners of property within territory to be annexed whose names appear upon the assessment roll in addition to giving notice by publication is well illustrated by the provisions of section 35311 of the Government Code which require service by mail of such written notice in case of annexation to a city of uninhabited territory.

The question of due process only presents itself, however, if the proceeding is one through which a person affected may thereby be deprived of property or a property right. Whether the annexation in question here is one through which Firestone is deprived of its property depends upon the nature of Fire Protection Districts. If they are but public corporations formed as an agency of the State with limited powers to perform a function of the State, i. e., are public corporations in the nature of municipalities, then the annexation of territory does not deprive the owners of the property annexed of that property or of any interest therein or charge them with the payment of any assessment for the benefit of other persons within the territory annexed, and they are not, as a matter of constitutional right, entitled to notice or hearing. If, on the other hand, the District is in the nature of a special

1. Appellant has directed our attention to certain earlier decisions of the Supreme Court of the United States holding that notice by publication is sufficient to constitute due process, to-wit: Wight v. Davidson, 181 U.S. 371, 21 S.Ct. 616, 45 L.Ed. 900; Paulsen v. City of Portland, 149 U.S. 30, 13 S.Ct. 750, 37 L.Ed. 637; Lent v. Tillson, 140 U.S. 316, 11 S.Ct. 825, 35 L.Ed. 419; Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369, and contends that as those cases are not referred to in the cases we have cited, it was not the intent of the Supreme Court to over-rule them. We are of the opinion, however, that the Supreme Court has by its later decisions, further defined those matters *which do not constitute due process.* We think this is emphasized by the fact that the cases of Wight v. Davidson, supra, and Walker v. City of Hutchinson, supra, both involved condemnation proceedings in which the notice was given by publication and that while in the Wight case the Court upheld publication as due process, in the Hutchinson case it emphatically announced the contrary. It may be further noted that in his dissent in the Hutchinson case, Justice Burton directed attention to earlier decisions of the Court in which it had been held that notice by publication comported with due process.

2. Walker v. City of Hutchinson, 352 U.S. at page 116, 77 S.Ct. at page 202, 1 L.Ed.2d at page 182.

assessment district created for the primary purpose of assessing upon private lands the benefits to be derived from a public improvement for the construction of which the district is formed, persons whose lands are within the proposed district are deprived of their property without due process of law unless they have proper notice and an opportunity to be heard upon the question of whether their property will benefit and if so the extent of those benefits. In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004; People v. Town of Ontario, 148 Cal. 625, 84 P. 205; Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369.

[7] No citation of authority is needed for the proposition that the furnishing of fire protection is a function of the government of the State to be performed by it in unincorporated territory and that it may by general law provide for the formation of municipal corporations with limited powers to perform that function. Appellant District is such a municipal corporation. Its powers are limited to the furnishing of fire protection to and the elimination of fire hazards in the territory within its boundaries. Sec. 14440, Health & Safety Code. It may acquire the property necessary for the exercise of its limited power but title to that property vests in the county. § 14500. It may, with the consent of the electors residing within its boundaries, issue bonds payable solely out of revenues derived from taxation of the property within the district and must each year levy an ad valorem tax upon all taxable property, real and personal, within the district sufficient to defray the cost of operation and maintenance and to pay the principal and interest upon any bonds that may be issued. It has no power, however, to erect any public improvement and to make an assessment therefor, based upon the benefits conferred thereby, against any property in the district. The annexation of property to a Fire Protection District does not therefore deprive the owners of the property within the annexed territory of any property or impose upon them liability for any public improvement but only renders their property subject to a general ad valorem tax which is levied on all property in accordance with its value and irrespective of the benefits conferred. This tax is of no different effect from that of any tax levied by a city for general municipal purposes. In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004.

[8] The Legislature, therefore, without violating any constitutional provisions, might have omitted from the act any provision for notice or hearing and empowered the Board to initiate and complete the annexation without notice. In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004; People v. Town of Ontario, 148 Cal. 625, 84 P. 205.

Our attention has been directed to Norman v. Cogswell, 82 Cal.App. 159, 255 P. 251, 252, in which the court stated that a fire protection district compares "logically with an assessment district for a certain definite and particular improvement." We believe that the language used by the court there was not necessary to its decision and the Supreme Court, without mention of Norman v. Cogswell, in Johnson v. Fontana County Fire Protection Dist., 15 Cal.2d 380, 101 P.2d 1092, 1096, arrived at the opposite conclusion stating; "There is not much similarity between such a district [a fire protection district] and an assessment district which carries on no continuous function and exists solely for the purpose of paying for a public improvement. In a very real sense the district is not only performing functions but performing a well recognized governmental function in furnishing protection against fire."

It follows that as the Legislature could have originally provided for an annexation without notice or hearing the Validating Act of 1958 established the annexed territory as a part of the fire protection and cured any defects as to notice or hearing in the proceedings.

[9] Firestone asserts that the petition filed by it with the Board after the completion of the annexation proceedings and af-

ter the assessor had levied an assessment for district taxes upon the subject property constituted legal proceedings contesting the legality of the annexation proceedings and that therefore by section 6(c) of the 1958 Validating Act the annexation proceedings in question were not included within the validating provisions of the act. With this contention we cannot agree. While the Board acted in a quasi-judicial capacity in conducting the hearing had on August 8th when it concluded that hearing and adopted its resolution for the annexation of the property, it exhausted its judicial powers. Williams v. Bergin, 108 Cal. 166, at page 170, 41 P. 287, at page 288; see also Olive Proration Program Committee, etc. v. Agricultural Prorate Comm., 17 Cal.2d 204, at page 209, 109 P.2d 918, at page 921; Heap v. City of Los Angeles, 6 Cal.2d 405, at page 407, 57 P.2d 1323, at page 1324; Vernon v. Board of Supervisors, 142 Cal. 513, at page 516, 76 P. 253, at page 255. The only judicial power conferred upon the Board which it might exercise after the completion of the annexation was the power to act upon a petition to withdraw property from the district and if it found as a fact that the territory sought to be withdrawn would not benefit by remaining in the district to grant the petition and exclude the subject territory from the district but if it failed to so find to deny the petition. Health & Safety Code, §§ 14560–14567. Such a proceeding is clearly not one contesting or inquiring into the legality of the original proceedings but is one dependent upon the legality of those proceedings, for otherwise the Board would have no power to act to grant a withdrawal. Firestone by its petition to the Board sought withdrawal of its property upon the grounds that its property would not benefit by remaining as a part of the district. It thus invoked a power of the Board which the Board could only have if its original proceedings were valid, and the fact that Firestone also sought to have the Board declare its original proceedings void does not turn the matter into a legal proceeding attacking and contesting the validity of the annexation for the Board had no power to make such an adjudication but was limited to a determination of the question as to whether Firestone's property would benefit by remaining a part of the district. It undoubtedly was the intent of the Legislature under paragraph (c) of section 6 of the Validating Act of 1958 to only exclude annexation proceedings which were being contested or inquired into in a proceeding before a court having the power to render a final judgment decreeing the invalidity of the proceedings. Cf. Griem v. Fidelity & Casualty Co., 99 Wis. 530, 75 N.W. 67.

The trial court was therefore in error in decreeing that the annexation proceedings in question were invalid. The judgment is reversed with directions to the trial court to enter a judgment decreeing that the annexation proceedings known as Annexation 47–57 are valid, and that the lands of Firestone as those lands are described in its complaint on file in this matter are within the boundaries of the Consolidated Fire Protection District.

The Writ of Prohibition, Civil No. 23365.

[10] Inasmuch as we have held that Annexation proceedings 47–57 are valid and as by that proceeding Firestone's lands became part of the Consolidated Fire Protection District the respondent Board of Supervisors has no power to act upon any further proceedings for the annexation of the same lands and if it should attempt to do so it would be acting in excess of its jurisdiction. The writ prayed for must therefore issue.

Let a peremptory writ of prohibition issue.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; SCHAUER, J., dissenting.

166 Cal.App.2d 763

Doris S. BRYAN, Plaintiff and Appellant,

v.

Jo SMALLEY, Defendant and Respondent.

Civ. 18057.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1959.

Rehearing Denied Feb. 5, 1959.

Hearing Denied March 4, 1959.

Action for injuries sustained in a rear end automobile collision. From an adverse judgment in the Superior Court, County of Santa Clara, Robert E. Cassin, J., the plaintiff appeals. The District Court of Appeal, Draper, J., held that an instruction which unduly increased the burden of plaintiff of showing that her conduct in stopping her automobile was justifiable or excusable was error.

Judgment reversed.

Automobiles ⇐246(60)

In action for injuries sustained in a rear end automobile collision, where it was alleged that plaintiff as preceding motorist violated the statute respecting signals, instruction that jury could assume that a person of ordinary prudence would reasonably endeavor to obey the law, and that to prove that a violation of statute was excusable, evidence must support a finding that violation resulted from causes beyond the control of the plaintiff, was improper as unduly increasing burden of plaintiff to show that her conduct was justifiable or excusable. West's Ann.Vehicle Code, §§ 544(c), 546.

Lewis, Scher & Fernandez, Sunnyvale, for appellant.

Campbell, Custer, Warburton & Britton, San Jose, George A. Strong, of counsel, for respondent.

DRAPER, Justice.

In this personal injury action, plaintiff appeals from judgment upon jury verdict in favor of defendant. Automobiles driven by plaintiff and defendant were south-bound on a two-lane highway, with plaintiff's car in the lead. Traffic was heavy. When the vehicles ahead of her stopped, plaintiff stopped her car, which was then struck from the rear by defendant's car.

Th court's instruction quoted to the jury the language of Vehicle Code, § 544(c), providing that no person shall "stop or suddenly decrease the speed of a vehicle" without giving a signal, and of Vehicle Code Section 546, specifying the method of giving such a signal by hand and arm. The court then gave BAJI 149, which states that violation of a statute requires a presumption of negligence, but that the presumption may be overcome by evidence showing that such conduct was "excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence." However, the court also gave the two optional paragraphs of this instruction, which read:

> "In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.
>
> "To prove that a violation of a statute, such as that charged in this case, was excusable and justifiable so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation."

Although these two paragraphs of the instruction were supported by authority when they were given, they have since been specifically disapproved by the Supreme Court. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897. Thus we must hold the giving of these instructions to have been error. Emerton v. Acres, 160 Cal.App.2d 742, 325 P.2d 685. In Alarid the instructions were not prejudicial since the party whose burden it was to justify his violation of a statute prevailed. Here it was plaintiff who assertedly violated a statute. The final paragraph of the in-

struction unduly increased her burden of showing that her conduct was justifiable or excusable. Since verdict and judgment were against her, we must hold the error prejudicial.

Judgment reversed.

KAUFMAN, P. J., and DOOLING, J., concur.

166 Cal.App.2d 554

Patricia Jean HENLEY and Robert Maynard Henley, Jr., by his Guardian ad litem, Patricia Jean Henley, Plaintiffs and Respondents,

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, G. M. Daniels and Wallace Smith, Defendants and Appellants.

Civ. 5792.

District Court of Appeal, Fourth District, California.

Dec. 23, 1958.

Action for wrongful death of decedent who was killed by defendants' train while he was lawfully attempting to assist a driver in getting stalled cement mixer truck across railway track. The Superior Court of Orange County, Claude M. Owens, J. pro tem., entered judgment for plaintiff, and the defendants appealed therefrom and from an order denying motion for judgment notwithstanding verdict. The District Court of Appeal, Mussell, J., held that evidence raised question for jury as to whether decedent exercised reasonable and ordinary care and watchfulness.

Judgment and order affirmed.

1. Railroads ⇐350(13)

In action for wrongful death of decedent who was killed by defendants' train while he was lawfully attempting to assist driver in getting stalled cement mixer truck across railway tracks, evidence raised question for jury as to whether decedent exercised reasonable and ordinary care and watchfulness.

2. Appeal and Error ⇐1064(1)

In action for wrongful death of decedent who was killed by defendants' train while he was lawfully attempting to assist driver in getting stalled cement mixer truck across railway tracks, there was no reversible error in giving instruction that law presumed that decedent took due care for his own concern, where plaintiffs produced no direct evidence as to conduct of decedent immediately prior to or at precise time of accident and testimony of driver indicated that he did not see the train approaching and that he was not watching decedent for an appreciable time before accident.

3. Trial ⇐28(2)

In action for wrongful death of decedent who was killed by train while he was lawfully attempting to assist driver in getting stalled cement mixer truck across railway tracks, permitting jurors to view the scene was not abuse of discretion, where jury was instructed to disregard changes made by railroad since the accident.

Robert W. Walker, Richard K. Knowlton, Los Angeles, and Charles D. Swanner, Santa Ana, for appellants.

Penney & Penney, Newport Beach, for respondents.

MUSSELL, Justice.

This is an action for damages for wrongful death brought pursuant to section 377 of the Code of Civil Procedure by Patricia Jean Henley in her own behalf and as guardian ad litem for her minor son, Robert Maynard Henley, Jr., as the result of the death of her husband, Robert Maynard Henley.

The case arose from a collision between a disabled cement mixer truck, upon the

exterior of which the decedent was situated, and a railway freight train of appellant, The Atchison, Topeka and Santa Fe Railway Company (hereinafter called "Santa Fe"), at the intersection of the Santa Fe main line tracks and Jefferson Road in the township of Atwood, county of Orange, on June 21, 1955. A jury returned a verdict in favor of plaintiffs for the sum of $29,000 and the defendants appeal from the judgment which followed and from an order denying their motion for a judgment notwithstanding the verdict.

The accident occurred at the intersection of Jefferson Road with the main line of the Santa Fe at approximately 4:00 p. m. The general area of the crossing was open, undeveloped country, and there were no climatic obstructions to vision. The Santa Fe train was approaching Jefferson Road from the east on the northerly main line tracks, which extend generally east and west and intersect Jefferson Road, which runs generally north and south. Jefferson Road is approximately 2,000 feet west of the Atwood depot. Paralleling the railroad track at a distance of approximately 25 feet to the north thereof is Placentia Road, into which Jefferson Road deadends. Between Atwood depot and Jefferson Road the railroad tracks curve to the left for westbound trains and the westerly end of the curve is approximately 750 feet from Jefferson Road. The easterly end of the curve was approximately 1,700 feet east of the Jefferson Road crossing. For northbound traffic on Jefferson Road a crossarm signal and a highway stop sign were located just south of the railroad tracks.

Vincent Yorba, the operator of the cement mixer truck involved, was traveling north on Jefferson Road. When he attempted to cross the Santa Fe railroad tracks, his motor stalled, and the truck came to a stopped position with its rear set of dual wheels between the rails of the Santa Fe main line and the truck cab was completely north of the tracks. Yorba testified that he remained in the cab and attempted to rock the truck out of the depression between the rails by the use of the starter. While he was so engaged, the decedent, driving a similar cement mixer truck, stopped behind Yorba's truck, got out and walked over to it on the east side and asked what was wrong. When Yorba stated he could not get his truck started, Henley opened up the hood, took off the air cleaner, and stood with one foot on the fender and his other foot on top of the carburetor, helping Yorba to get the truck started. Yorba testified that he did not know whether Henley was in this position at the time of the accident and presumed that he was. Within five minutes after Henley came up to Yorba's truck a Santa Fe freight train, approaching the crossing from the east at a speed of approximately 55 to 60 miles per hour, struck Yorba's truck. Yorba testified that while Henley was working on the truck he asked him (Yorba) to keep a lookout for him and that he (Yorba) did keep a lookout for train traffic; that he heard no warning of the approaching train, did not hear any bells ringing or any whistles, did not hear any sound at all; and did not know at the time of the accident that he had been hit by a train.

The railway train approaching the crossing from the east came to a stop approximately 1,100 feet west of the intersection and certain wheels of the locomotive were derailed by the impact. The testimony of the engineer, fireman, and the brakeman, who were riding in the engine cab prior to the accident, indicated that the train was proceeding from San Bernardino to Los Angeles at a speed of approximately 55 miles per hour; that both headlights were on, the automatic bell was ringing, and the engineer had sounded a regular crossing whistle series while approaching Van Buren crossing (approximately 1,700 feet east of Jefferson Road) and that immediately thereafter a similar series was started and blown until the locomotive was approximately 150 feet from the point of impact. The engineer and fireman testified that they could not pinpoint or distinguish the Jefferson Road crossing until the locomotive had proceeded practically through

the left hand curve just east of the crossing; that when the mixer was noted stalled on the main line, the emergency brakes were applied some 600 to 800 feet east of the crossing; that thereafter the engineer remained at his post, sounding the whistle, until the impact was imminent, at which time he fled toward the rear of the cab.

A Santa Fe road foreman of engines testified that under the conditions prevalent at the time of the accident 2,500 to 2,600 feet would be necessary to bring the train to a stop, absent the derailment.

Witness Charles Peltzer, who was called as a rebuttal witness by the plaintiffs and was also under subpoena by the defendant, testified that he was working as a ranch hand approximately one-quarter of a mile south of the scene of the accident, in an open field, and had watched the train as it crossed the intersection of Van Buren; that he heard no bell or whistle blown at all from Van Buren to the Jefferson Road crossing until the train was approximately 500 feet from the Jefferson Road crossing and that "There was absolutely only two short blasts, and extremely short"; that he estimated the speed of the train at 60 miles per hour or better and that he observed no noticeable reduction of speed of the train from the time he first observed it at Van Buren crossing to the point of impact.

The witness Yorba testified that he could see a half a mile up the track from his position in the cab; that there was nothing to obstruct his view at all and that there was nothing to obstruct the vision of Henley when he was on the cab. A portion of Yorba's deposition was read into the record wherein he recalled a conversation near the intersection with the fireman and engineer as follows: "I laid back down and I can remember the engineer coming up and I said 'Why in the heck didn't you blow the whistle?' He said, 'We didn't have time.' He (the fireman) said, 'The engineer would never have seen you if I hadn't have said something.' "

[1] Appellants first contend that the court should have granted their motions for nonsuit, directed verdict and judgment notwithstanding the verdict on the ground that the sole cause of the death of Robert Maynard Henley was as a matter of law his own negligence. We do not agree with this contention.

In Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, it was held that

> "The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697–699. True contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. (Citing many cases.)"

In Merlino v. Southern Pac. Co., 132 Cal.App.2d 58, 67, 281 P.2d 583, the court reiterated the rule stated in Anthony v. Hobbie, supra.

In Balthrop v. Atchison, T. & S. F. Ry. Co., 142 Cal.App.2d 823, 825, 299 P.2d 341, 343, the rule is stated that " 'where it is shown that a (driver) has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury.' " Citing Startup v. Pacific Electric R. Co., 29 Cal.2d 866, 871, 180 P.2d 896. See also Murphy v. Atchison, T. & S. F. Ry. Co., 139 Cal.App.2d 792, 797, 294 P.2d 458.

In Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 237, 238, 239, 282 P.2d 69, 77, it is said that it has long been recognized that "'* * * where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case. (Citing cases.)"; that to arbitrarily adopt as a standard of negligence *per se* the rule that if one may be charged with a knowledge, past or present, of a danger, he is precluded from recovery for injuries sustained therefrom and let the rule rest there for all cases would be to establish a doctrine dangerous in its application and unsound in principle and one not warranted by the present weight of authority; that whether forgetfulness of a known danger constitutes contributory negligence is a question for the trier of fact, giving consideration to the circumstances even though there is no sudden disturbance or peril confronting the plaintiff and causing the lapse of memory; to forget is not negligence unless it shows a want of ordinary care; and that generally the question is one for the jury.

In Jones v. Southern Pacific Co., 74 Cal. App. 10, 239 P. 429, 434, which was an action to recover damages for the death of plaintiff's husband, who was an employee of the Southern Pacific Company and was struck by defendant's train while he was on the tracks making repairs, the court held that "* * * it may be said that negative testimony of witnesses who are in a position to hear and to observe, who declare they heard no signals and saw none, even as opposed to positive testimony that signals were given, presents a question to be submitted to the jury, and it has been held such negative evidence may be sufficient to sustain a verdict."

In the instant case the decedent was lawfully attempting to assist Yorba in getting his truck across the railway tracks. The cab of the truck was north of the tracks when the accident happened. Yorba heard no warning of the approaching train and was attempting to rock the rear wheels of the truck out from between the rails when the accident occurred and he did not know that a train had hit the truck until after the accident happened. There was no direct testimony as to what the decedent was doing at the precise time of the accident, as to whether he heard or saw the approaching train and attempted to leap from the truck or as to what part of the train or truck struck him. He could not keep a constant lookout for approaching trains and at the same time continue with his efforts to start the motor of the truck. Obviously Yorba did not see the train and was not able to testify as to how the decedent met his death.

The question of whether or not the decedent exercised reasonable and ordinary care and watchfulness was, under the circumstances, a question of fact for the jury and we cannot hold as a matter of law that the sole cause of his death was his own negligence or that appellants were entitled to the direction of a verdict against respondents.

[2] The trial court instructed the jury as follows: "You are instructed that the law presumes that the decedent, Robert Henley, took due care for his own concern and you are to follow this presumption unless it is overcome by the evidence which is convincing to your minds by a preponderance of the evidence." Appellants claim that the giving of this instruction constituted prejudicial error, asserting that substantial evidence was placed before the jury by respondents, that the decedent failed to exercise ordinary care in watching and listening for an approaching train. In Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 736, 306 P.2d 432, 437, the court, in ruling that it was not improper to give an instruction on the presumption of due care in that case, said:

> "While under some circumstances there is no room for the presumption where the party whose claimed negligence is at issue either himself testifies

or introduces evidence in his own behalf as to his acts and conduct immediately preceding and at the time of the accident (Speck v. Sarver, 20 Cal. 2d 585, 587–588, 128 P.2d 16; Zollars v. Barber, 140 Cal.App.2d 502, 506, 295 P.2d 561), the benefit of the presumption is available if such person be deceased and the testimony of plaintiffs' witnesses respecting the deceased's acts and conduct at the time involved is not 'wholly irreconcilable' with such presumption. Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809."

In Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809, 814, the court said:

"Although there is no room for the presumption where the driver or other person whose claimed negligence is at issue himself testifies to his actions at the time involved (see Speck v. Sarver (1942), 20 Cal.2d 585, 587–588, 128 P.2d 16), the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption sought to be invoked.' (Westberg v. Willde (1939), 14 Cal.2d 360, 365–368, 94 P.2d 590; Mar Shee v. Maryland Assurance Corp. (1922), 190 Cal. 1, 9, 210 P. 269; Chakmakjian v. Lowe (1949), 33 Cal. 2d 308, 313, 201 P.2d 801.)"

In Swanson v. Bogatin, 149 Cal.App.2d 755, 757, 308 P.2d 918, 920, it is said that "It has often been decided that the question as to whether or not the giving of such an instruction as this on the presumption of due care is prejudicial must be determined upon the facts of the particular case."

In the instant case the plaintiffs produced no direct evidence as to the conduct of the decedent immediately prior to or at the precise time of the accident. The testimony of witness Yorba indicates that he did not see the train approaching and that he was not watching the decedent for an appreciable time before the accident. Under the circumstances, plaintiffs were entitled to the benefit of the presumption. The testimony of plaintiffs' witnesses was not wholly irreconcilable with it and there was no reversible error in the giving of the instruction. Duehren v. Stewart, 39 Cal.App.2d 201, 208, 102 P.2d 784.

[3] Appellants further argue that they were prejudicially detrimented by the jurors' view of the scene and that the jury was improperly allowed to observe subsequent precautions taken by the railway company at the crossing. However, in Nunneley v. Edgar Hotel, 36 Cal.2d 493, 501–502, 225 P.2d 497, 502 it was held that:

"The question as to whether the jury should be allowed to view the premises where an accident occurred is governed by section 610 of the Code of Civil Procedure, and is committed to the sound discretion of the trial judge. An appellate court will not reverse a judgment because of a ruling in that regard unless the record clearly shows an abuse of that discretion. Brown v. Lemon Cove Ditch Co., 36 Cal.App. 94, 171 P. 705; see, also, People v. Pompa, 192 Cal. 412, 422, 221 P. 198."

In that case, as here, the court properly instructed the jury that the changes made since the accident were to be disregarded by it. No abuse of discretion appears in this connection.

Judgment and order denying motion for judgment notwithstanding the verdict affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur

166 Cal.App.2d 121

Mary L. GONZALES, Plaintiff and Respondent,

v.

PACIFIC GREYHOUND LINES, Lester R. Bertleson, The City and County of San Francisco, a municipal corporation, et al.

Civ. 18078.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1958.

Action for injuries sustained in an automobile collision. From an order granting plaintiff's motion for a new trial in the Superior Court, City and County of San Francisco, John P. McMurray, J., the defendants appealed. The District Court of Appeal, Kaufman, P. J., held that the trial court did not abuse its discretion in granting a new trial.

Order affirmed.

1. Appeal and Error ⇐933(1, 4)

On an appeal from an order granting a new trial, all presumptions are in favor of the order, and it will be affirmed if it is sustainable on any ground.

2. Appeal and Error ⇐977(3)
New Trial ⇐6

The granting of a motion for a new trial is discretionary with the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion appears.

3. New Trial ⇐71

Court in considering a motion for new trial is not bound by a conflict in evidence and does not abuse its discretion in granting a new trial when there is any evidence which would support a judgment in favor of the moving party.

4. New Trial ⇐68

Where conflicting inferences are deducible from uncontradicted probative facts, the trial court may draw inferences opposed to those accepted by the jury.

5. New Trial ⇐68

In action for injuries sustained by passenger in automobile which collided with a bus on an intersection, record did not indicate that trial court abused its discretion in granting plaintiff's motion for new trial on the ground that the evidence failed to establish that the accident was solely and proximately caused by negligence of plaintiff's driver.

Carroll, Davis, Burdick & McDonough, San Francisco, for appellants.

Bernard Allard, Kessler & Kessler, Oakland, Leon G. Seyranian, Richard J. Moore, Oakland, of counsel, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from an order granting plaintiff's motion for a new trial in a personal injury action. Plaintiff Mary Gonzales brought this action against defendant Pacific Greyhound Lines, its employee, the defendant Bertleson and the City and County of San Francisco, for personal injuries sustained on May 28, 1955, in a collision at the intersection of 7th and Folsom Streets in the City of San Francisco. Plaintiff was a passenger in an automobile operated by her son-in-law, Alexander Gallegos. It was a clear day, traffic was not heavy. Mr. Gallegos was driving west in the right lane of Folsom Street, a two-way street. The defendant Bertleson was driving a Greyhound bus north on 7th Street, a one-way street with four lanes of traffic. The traffic signals at the northeast and southwest corners controlled traffic on Folsom Street; the signals at the northwest and southeast corners controlled traffic on 7th Street. The Gallegos' vehicle and the bus collided in the northwest portion of the intersection.

The complaint alleged that the accident was proximately caused by the negligent operation and maintenance of the Greyhound bus, and the failure of the City of San Francisco to maintain, inspect and control the electrical traffic signals at the intersection of Folsom and 7th Streets. A jury

trial resulted in a verdict in favor of all defendants. Judgment on the verdict was entered on August 12, 1957. On August 20, 1957, the plaintiff moved for a new trial against all defendants. On August 30, 1957, the court granted plaintiff's motion for a new trial against the defendants Pacific Greyhound Lines and its employee, defendant Lester R. Bertleson on the ground of insufficiency of the evidence. The sole issue on appeal is the propriety of the order granting a new trial against these defendants. Defendants contend that the trial court abused its discretion in granting a new trial, as the accident was solely and proximately caused by the negligence of the driver of the vehicle in which the plaintiff was riding.

[1–3] On an appeal from an order granting a new trial, all presumptions are in favor of the order, and it will be affirmed if it is sustainable on any ground. The granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. Britton v. Gunderson, 160 Cal.App.2d 66, 324 P.2d 938. A trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. Where conflicting inferences are deducible from uncontradicted probative facts, the trial court may draw inferences opposed to those accepted by the jury. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465. "It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." Butler v. Hopewell, 163 Cal.App. 2d 106, 328 P.2d 862, 864; Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689.

[4, 5] The record reveals conflicting evidence on the following matters: whether the traffic signal was on "go" for the Gallegos' vehicle or for the Greyhound bus; the speed of the two vehicles; and whether the car or the bus entered the intersection first. The defendant Bertleson testified that he did not see the car at all before the impact. We conclude that no abuse of discretion appears in the instant case as there is substantial evidence to support a judgment for the plaintiff.

In view of the foregoing, the order for a new trial must be affirmed.

Order affirmed.

DRAPER and DOOLING, JJ., concur.

166 Cal.App.2d 668

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Wendell THOME, Defendant and Appellant.

Cr. 6299.

District Court of Appeal, Second District, Division 3, California.

Dec. 31, 1958.

Defendant was convicted of the unlawful possession of marijuana with previous convictions and from a judgment of the Superior Court of Los Angeles County, Joseph M. Maltby, J., the defendant appeals. The District Court of Appeal, Parker Wood, J., held that contention with respect to illegal search and seizure would not be considered on appeal and that the evidence sustained conviction.

Affirmed.

1. Criminal Law ⇐1036(1)

In narcotics prosecution, contention that officers did not have a search warrant

and that they obtained the marijuana by illegal search and seizure would not be considered on appeal where no objection was made to the evidence at trial.

2. Poisons ⇐9

In prosecution for the unlawful possession of marijuana, evidence sustained conviction.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with unlawful possession of marijuana. In a nonjury trial, he was convicted. Allegations in the information that he had been convicted previously of two felonies (robbery and unlawful possession of narcotics) were found to be true. He appeals from the judgment.

Appellant contends that the officers obtained the marijuana by illegal search and seizure; and that the evidence was insufficient to support the judgment.

Officer Faulkner testified that on the morning of December 10, 1957, he received confidential information that defendant would have narcotics in his possession when he returned to his home between 9 a. m. and 11 a. m. on that day. About 10 a. m. of that day, Officers Faulkner and McMahon went to defendant's home, and about five minutes thereafter defendant drove his car (two-door car) into the yard and parked the car. Officer McMahon went to the driver's side of the car and asked defendant to get out. Officer Faulkner (witness) opened the right door of the car and, as he pushed the back of the right front seat forward, a hand-rolled cigarette fell to the floor back of the seat. The cigarette resembled a marijuana cigarette. When Officer McMahon called defendant's attention to the cigarette, defendant said, "If there is anything in that car, it don't belong to me." The officers went to defendant's house, which was about 30 feet from defendant's car. Then defendant grabbed Officer Faulkner's arm and attempted to prevent the officer from entering the house. The officers entered and searched the house. Officer Faulkner found, on a kitchen shelf, a jar in which there were 11 hand-rolled cigarettes, 3 packages of cigarettes wrapped in tinfoil, and 2 paper sacks. In one sack there were seeds, and in the other sack there was a leafy substance. On another shelf he found 2 hand-rolled cigarettes. Defendant said that he owned the car which he drove into the yard. Defendant also said that the cigarettes and sacks, which were found by the officers, "must belong to a J. C. Moss." Later, on the way to the police station, defendant said that a man had stated that he would "plant marijuana" on defendant. Officer Faulkner (witness) knew the defendant and had arrested him previously upon a charge of sale and possession of narcotics.

Officer McMahon testified that when defendant was at the police station, after the arrest, defendant said he would tell where he got the marijuana if the officers would not "use it against" him. After the officer had said that such a promise could not be made, the defendant said that he got it from Bob Buckner.

Officer Castillo testified that, in a conversation with defendant at the police station on December 11, the defendant said that he had the narcotics in his house about five days, he obtained them from a man by the name of Buckner, and that defendant and Tony Tangery had rolled the cigarettes at defendant's house.

The cigarettes and leafy substance were received in evidence. The leafy substance was marijuana, and the cigarettes contained marijuana. The officers did not have a search warrant, or a warrant for the arrest of defendant.

Defendant testified that he told the officers, at the police station, that the marijuana was not his and he did not know how it got into his house or car; and he also told them that if there was any mari-

juana in his house or car, it had been planted there.

G. Blair, called as a witness by defendant, testified that Dick Jacob paid him $75 to plant marijuana in defendant's house; that he (witness) went into defendant's house and, without the knowledge of defendant, put marijuana in a jar and then put the jar on a shelf in the kitchen; that Jacob told him that he (Jacob) would put a cigarette in defendant's car.

On cross-examination, Blair testified that he had been convicted of violating section 503 of the Vehicle Code (taking automobile without consent of owner), and that he was "doing time on that now."

[1] Appellant argues that since the officers did not have a search warrant, they obtained the marijuana by illegal search and seizure. When the marijuana was offered in evidence at the trial, there was no objection to the offer. At the trial it was stipulated that the exhibits that were introduced at the preliminary hearing might be considered by the court. Those exhibits included the marijuana which was obtained by the officers. Since no objection to such evidence was made at the trial, an asserted point on appeal that such evidence was erroneously received will not be considered. People v. Kelsey, 140 Cal.App.2d 722, 723, 295 P.2d 462.

[2] Appellant argues, with respect to his claim of insufficiency of the evidence, that the direct and positive evidence on his behalf showed that he had no knowledge of marijuana being in his house or car; and that he was convicted irrespective of such evidence on his behalf. The direct and positive evidence, so referred to, apparently is the denial by appellant that he had such knowledge, and the testimony of Blair that he planted the marijuana in the house, and that Jacob said he would plant a cigarette in the car. The sum of appellant's argument is that the judge should have believed the testimony presented by and on behalf of appellant. The credibility of the witnesses and the weight of the evidence were matters for the determination of the trial judge. The judge said that he did not believe the testimony of Blair. The question as to whether defendant knew that the marijuana was in his house or in his car was a question of fact for the trial judge. The evidence was sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 608

LAWRENCE BLOCK CO., Inc., a corporation, Plaintiff and Appellant,

v.

Harry L. SCHOLER, Defendant and Respondent.

Civ. 22633.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1958.

Rehearing Denied Jan. 20, 1959.

Hearing Denied Feb. 25, 1959.

Action to recover real estate broker's commission. From a judgment of the Superior Court, Los Angeles County, George A. Dockweiler, J., in favor of defendant the plaintiff appealed. The District Court of Appeal, Parker Wood, J., held inter alia that evidence supported findings that there were negotiations between broker and owner regarding sale of property after expiration of time limit under listing agreement, that such negotiations were not pursuant to such agreement, that owner refused broker's request that owner sign another exclusive listing, that after expiration of agreement date all efforts of broker to sell the property were pursuant to brochures distributed by owner, and that expiration date was not extended or waived by owner.

Affirmed.

1. Brokers ⇐88(3)

Whether there has been a waiver of time limit fixed by listing agreement with broker depends on particular facts and circumstances.

2. Brokers ⇐86(1)

In action to recover real estate broker's commission, evidence supported findings that there were negotiations between broker and owner regarding sale of property after expiration of time limit under listing agreement, that such negotiations were not pursuant to such agreement, that owner refused broker's request that owner sign another exclusive listing, that after expiration of agreement date all efforts of broker to sell the property were pursuant to brochures distributed by owner, and that expiration date was not extended or waived by owner.

3. Brokers ⇐50

If a broker fails to perform the services required of him within time limited by contract, or within such extension of time as may be granted by the principal, he is not entitled to a commission, unless the time limit is waived.

4. Brokers ⇐88(14)

In action to recover real estate broker's commission on sale of owner's property, since court determined upon substantial evidence that owner did not extend or waive time limit of listing contract, it was not necessary to find whether broker produced the buyer for owner's property.

5. Brokers ⇐88(14)

In action to recover real estate broker's commission, wherein trial judge, after having made a definite finding that there was no extension or waiver of time limit of listing contract proceeded to make further finding that "even if" agreement had been extended or if expiration date had been waived such agreement was orally modified, the indefinite finding as to oral modification was of no significance and was not inconsistent with finding that there was no extension or waiver.

6. Appeal and Error ⇐931(7)

If one finding, sustained by sufficient evidence, will support trial court's judgment, an appellate court will presume that judgment was predicated on such finding, and questions relative to other findings become immaterial upon appeal and may be disregarded.

Osburn & Osburn, Los Angeles, for appellant.

Brand & Livingston, Beverly Hills, for respondent.

PARKER WOOD, Justice.

Action to recover real estate broker's commission. In a nonjury trial, judgment was for defendant. Plaintiff appeals from the judgment.

Appellant contends that the court erred in failing to find on certain material issues; that the findings do not support the judgment; that certain findings are inconsistent; and that the court erred in rulings as to admissibility of evidence, and erred in granting defendant's motion to amend his answer to conform to proof.

With respect to asserted failure to find on material issues, appellant argues that the court erred in failing to find (1) whether defendant negotiated with plaintiff regarding a sale of the property after the time limit fixed by the listing agreement, and (2) whether plaintiff produced the buyer. He argues further that findings on those issues, in accordance with the evidence, would have required judgment in favor of plaintiff.

On May 19, 1955, defendant signed a "listing" which provided in part that plaintiff, a real estate broker, had the exclusive right, for 90 days, to sell the defendant's house and lot, and furniture in the house, for $150,000. The property was not sold during the 90-day period (which expired August 17, 1955). Plaintiff advertised the property for sale from May 22, 1955, to and including August 14, 1955.

About September 9, 1955, Mr. Gocio, a salesman for plaintiff, requested that de-

fendant sign another listing which also provided that plaintiff had the exclusive right, for 90 days, to sell the property for $150,000. Defendant refused to sign the proposed listing, and the listing was modified, at his request, to provide that plaintiff had the exclusive right, for 30 days, to sell the property for $150,000. The listing provided further that if the property was sold within 30 days from the date thereof, or if defendant sold the property within 60 days after the expiration of the "agency period" to a person with whom plaintiff had negotiated, defendant would pay a commission of five per cent to plaintiff. The listing also provided that plaintiff would diligently endeavor to find a purchaser for the property upon the terms specified and would advertise said property weekly at no charge to defendant. On September 9, 1955, the defendant, and Gocio as "Sales Representative" of plaintiff, signed the modified listing. Plaintiff advertised the property for sale from September 11, 1955, to and including October 15, 1955, which was the approximate period of the second listing. The property was not sold within the 30-day period provided in the second listing, or within 60 days after the expiration of the 30-day period. (The 30-day period expired October 9, and the 60-day period expired December 8.)

In December, 1955, defendant prepared a brochure with reference to the property, and he mailed copies of it to approximately 200 real estate brokers, including plaintiff. The price of the property without the furniture, as stated in the brochure, was $115,000. Soon after the brochures were mailed, Gocio talked to defendant on the telephone and said that he had received a brochure, and he requested that defendant give another exclusive listing of the property to plaintiff. Defendant refused the request and told Gocio that he (Gocio) would have to handle a sale of the property the same as any other broker. In January, 1956, defendant prepared a revised brochure and mailed copies of it to approximately 200 real estate brokers, including plaintiff. The price of the property (without the furniture), as stated in the brochure, was $110,000; and the price of the property with the furniture was $125,000.

Salesmen for plaintiff, and salesmen for other brokers, took prospective buyers to the property after October 9, 1955 (the expiration date of the 30-day period provided in the second listing).

On February 27, 1956, Gocio showed the property to Mr. and Mrs. Cole. Later, on that day, the defendant, Mr. Cole, Mr. Gocio, and Mrs. Tremaine (a broker who was present at the request of Mr. Cole) had a conversation regarding a purchase of the property by Cole; and, at that time, Gocio tendered to defendant, upon behalf of Cole, a written offer of $100,000 for the property (including the furniture). Defendant rejected the offer and said that he would not sell the property for less than $110,000. On February 29, defendant told Gocio and Mrs. Tremaine that he would sell the property (including the furniture) for $105,000, net to him, and that Mrs. Tremaine and plaintiff would have to obtain their commission from Cole. Mrs. Tremaine and Gocio said that "that was agreeable." Later, on that day, Cole told Mrs. Tremaine and Gocio that he would pay $105,000 for the property, including the furniture, and that, in addition to that amount, he would pay to Gocio and Mrs. Tremaine one-half of the regular commission of five per cent on the $105,000 price amounting to $2,625. Gocio testified that later, on that day (February 29), he talked to defendant by telephone, and he told defendant that defendant was "getting the deal that he had asked for" and that Cole had volunteered to pay the commission. Defendant testified that Gocio did not talk to him by telephone, later on that day; that he (defendant) talked with Mrs. Tremaine by telephone, later that day, and she said, "I have made a deal on your terms. You have a deal."

On March 5, escrow instructions were prepared at a bank. The instructions provided that the purchase price of the house and lot was $90,000; the purchase price of

the furniture was $15,000; and no commission was payable through the escrow.

Before the instructions were signed, a controversy arose between Gocio and Cole regarding the amount of commission to be paid to plaintiff. Thereupon defendant talked by telephone to Mr. Barnett, vice-president of plaintiff, regarding the controversy. Defendant testified that Barnett said (in that conversation) that anything Gocio agreed to was acceptable to plaintiff; and that Barnett requested that defendant obtain a written agreement from Cole that he would pay to plaintiff the amount that was agreed upon by Cole and Gocio.

Cole testified that Gocio told him (after that conversation) that he would accept $1,125, instead of $1,312.50, from Cole as plaintiff's commission. A written memorandum was prepared which provided that Cole agreed to pay $1,125 to plaintiff, upon the consummation of the escrow, in full payment for plaintiff's services pertaining to the sale of the property. Cole and defendant signed the memorandum. Then Cole requested Gocio to obtain the signature of one of plaintiff's officers on the memorandum, in a space provided thereon for acceptance by plaintiff. Cole testified that Gocio said that he would obtain the signature; and that Gocio took the memorandum and left the bank. Defendant and Cole signed the escrow instructions. The memorandum was retained by plaintiff and was not signed by any one upon behalf of plaintiff. There was no communication between plaintiff and defendant thereafter until the present action was commenced. The sale was consummated; and the escrow was closed April 5, 1956. The present action to recover $5,250 commission was commenced March 29, 1956, prior to the close of the escrow.

The complaint alleged, in part, as follows: Plaintiff and defendant entered into the agreement of September 9, 1955, referred to above. After the expiration of the 30-day period provided by the agreement, plaintiff, at the request of defendant, continued its efforts to find a purchaser for the property and, with the knowledge and approval of defendant, negotiated with Cole regarding the purchase of the property. Plaintiff performed all obligations required to be performed by it under the agreement of September 9, 1955, "as extended by Defendant * * *." Plaintiff "produced" Cole as a buyer, and on March 5, 1956, defendant and Cole entered into an agreement wherein defendant agreed to sell and Cole agreed to buy the property for $105,000.

Cole was a defendant in the action and, in the second cause of action which was against Cole only, the plaintiff alleged that Cole assumed and agreed to pay plaintiff's commission on the sale. At the commencement of the trial, Cole deposited his check for $1,125 (payable to plaintiff) with a clerk of the court as a tender of the amount to be paid as commission. Plaintiff did not accept the check, but dismissed the action as to Cole. At the conclusion of the trial, the check was returned to Cole.

Defendant filed an answer in which he admitted that he executed the listing agreement of September 9, 1955, and that he sold the property; and he denied the other above-mentioned allegations of the complaint.

The court made findings which were substantially in accordance with the facts above stated regarding the agreements, the negotiations and sale. It also made findings, as follows: After December, 1955, all of plaintiff's efforts to sell defendant's property were made pursuant to the mimeographed brochures. After December, 1955, defendant was "dealing" with plaintiff "pursuant to the mimeographed brochures in the nature of open listings." That defendant, by allowing plaintiff to show and attempt to sell the property after December, 1955, did not extend the "September 9, 1955, agreement or waive the expiration date of October, 1955, contained therein." "Even if the September 1955 written agency agreement between plaintiff and defendant had been extended, or if the October 9, 1955 expiration date had been waived by defendant * * * said agreement was orally modified by plaintiff

and defendant on February 29, 1956 to provide for a sale only at a net price of $105,000. to defendant with plaintiff to receive its commission only out of the excess above this amount that the buyer would pay * * *." Plaintiff agreed to accept $1,125 from Cole in full payment of its commission. Under the oral modification, if defendant had sold the property to Cole for $105,000 and if Cole had been unwilling to pay any more than that amount, plaintiff would not have been entitled to receive any commission. After the oral modification of February 29, 1956, plaintiff "stood by and allowed" defendant to make a sale to Cole for $105,000 with knowledge that defendant was relying on "the said oral modification." As a result of plaintiff's silence, and as a result of Gocio's statement to defendant at the bank that the payment of $1,125 to plaintiff by Cole in payment of the commission was satisfactory, plaintiff is estopped to deny "the legal efficacy of the said oral modification." Gocio was the agent of plaintiff and had authority to enter into the agreement of September 9, 1955, and to modify the agreement.

The court concluded, among other things, that the written agency agreement dated September 9, 1955, expired under its terms October 9, 1955; the expiration date was not extended by mutual agreement, and it was not waived by defendant.

[1, 2] Appellant (plaintiff) contends, as above stated, that the court erred in failing to find whether or not defendant continued negotiations with plaintiff after the time limit fixed by the listing agreement; and contends that, in view of the nonconflicting evidence as to negotiations, the court should have found that defendant continued negotiations with plaintiff regarding the sale after such time limit, and that defendant thereby waived the time limit. It seems to be appellant's argument that negotiations to any extent between the owner and the broker, regarding the sale of the property, after the expiration of the time limit fixed by the listing agreement, constitute a waiver of the time limit as a matter of law without regard to any other factors. Whether or not there has been a waiver of the time limit fixed by a listing agreement depends on the facts and circumstances of the particular case. Filante v. Kikendall, 134 Cal.App.2d 695, 700, 286 P.2d 448. It is true that the findings do not include an express statement that defendant did continue, or did not continue, negotiations with plaintiff after the expiration of the time limit. There were findings, however, as to conversations and acts of the parties, regarding the property, after the expiration date. It is apparent from those findings that the court found in effect that there were negotiations between plaintiff and defendant, regarding the sale of the property, after the expiration of the time limit but that such negotiations were not pursuant to the listing agreement. Some of those findings were that defendant refused plaintiff's request that defendant sign another exclusive listing; that defendant told plaintiff that plaintiff would have to handle a sale the same as any other broker; that after the expiration date defendant sent brochures, which were in the nature of open listings, to many brokers; that approximately at the expiration date plaintiff ceased advertising the property for sale; that after December all the efforts of plaintiff to sell the property were pursuant to the brochures. The evidence supports those findings and the finding that the expiration date was not extended or waived by defendant.

[3, 4] Appellant contends that the court erred in failing to find whether or not plaintiff produced the buyer to whom defendant sold the property; and contends that the court should have found that plaintiff produced the buyer. Under the circumstances here the question whether plaintiff produced the buyer was immaterial. If a broker fails to perform the services required of him within the time limited by the contract, or within such extension of time as may be granted by the principal, he is not entitled to a commission, unless the time limit is waived. Ridgway v. Chase, 122 Cal.App.2d 840, 265

P.2d 603. Since the court determined upon substantial evidence, as above stated, that defendant did not extend or waive the time limit, it was not necessary to find whether or not plaintiff produced the buyer.

[5] Appellant contends that the finding that the listing agreement of September 9 was modified on February 29 by an oral agreement is inconsistent with the finding and conclusion that the time limit fixed by the agreement of September 9 was not extended or waived. Appellant argues to the effect that if the agreement of September 9 had terminated there was no agreement to modify. As above shown, the court made a finding that the time limit fixed in the listing agreement had not been extended or waived. Thereafter, in the findings, the court made the alleged inconsistent finding regarding an oral modification. That finding was indefinite in that it was made upon a hypothetical basis. That further finding was in part, as follows: "*Even if* the September 1955 written agency agreement * * * had been extended, or if the * * * expiration date had been waived by defendant * * * said agreement was orally modified * * * on February 29, 1956 to provide for a sale only at a net price of $105,000 * * * plaintiff to receive its commission only out of the excess above this amount that the buyer would pay * * *." (Italics added.) It thus appears that the trial judge, after having made a definite finding that there was no extension or waiver, proceeded to make a further finding upon the hypothetical basis of assuming facts contrary to his previous finding. The words "Even if," at the beginning of the further finding, show that the judge was proceeding to set up an assumed state of facts as a basis for forecasting what his decision would be if the facts had been different from what he had found them to be. Under such circumstances, the indefinite finding as to oral modification is of no significance, and it is not inconsistent with the finding that there was no extension or waiver.

[6] Appellant contends that "some" of the findings are not supported by the evidence; that some of the alleged findings do not constitute findings for the reason they are summary statements of evidence and not ultimate findings of fact, and they are uncertain, and conjectural. "If one finding, sustained by sufficient evidence, will support the trial court's judgment * * * an appellate court will presume that the judgment was predicated on such finding, and questions relative to other findings become immaterial upon appeal and may be disregarded." Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730, 739. As above stated, the court found that defendant did not extend or waive the time limit fixed by the listing agreement. That finding supports the judgment.

Appellant contends that the court erred in granting defendant's motion for permission to file an amendment to his answer to conform to proof; that the amendment filed by defendant does not conform to proof but alleges new affirmative defenses; that the court erred in overruling plaintiff's objections to the introduction of certain evidence regarding such affirmative defenses; and that the court erred in making findings regarding such defenses. As above shown, plaintiff sought (by its complaint) to recover a commission on the basis that the time limit fixed by the listing agreement had been extended or waived. In view of the above conclusion that the evidence was sufficient to support the finding that the time limit was not extended or waived, it is not necessary to determine these contentions regarding the ruling on the motion to amend to conform to proof, and regarding the rulings and findings as to the affirmative defenses.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Abbie F. LEEPER and Thomas B. Leeper, Plaintiffs and Appellants,

v.

William BELTRAMI, as an Individual and as Executor of the Estate of Frank Weber, Deceased; Hazel Scarlett, as an individual and as Special Administratrix of the Estate of Frank Weber, Deceased; Shriners Hospital for Crippled Children, San Francisco, California; Masonic Childrens Home at Covina, California; IOOF Childrens Home at Gilroy, California; Athens Masonic Lodge at Davis, California; Yolo Lodge of IOOF at Davis, California; Rebecca Lodge, Davis, California; The Grand Lodge of Free & Accepted Masons of the State of California; The Grand Lodge of IOOF of the State of California; LaVerne Charles Scheidel and et al., Defendants and Respondents.*

Civ. 9425.

District Court of Appeal, Third District, California.

Dec. 22, 1958.

Rehearing Granted Jan. 16, 1959.

For Opinion on Rehearing see 335 P.2d 968.

Action was brought to recover money paid to certain of the defendants under compulsion created by their allegedly wrongful conduct and to recover realty. The Superior Court, Sacramento County, Albert H. Mundt, J., entered judgment dismissing the action following an order sustaining general demurrer to the complaint, and the plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that complaint alleging plot or conspiracy between two of the defendants, who were the executor and special administratrix of deceased mortgagee, to compel plaintiff-mortgagor to pay over again debts secured by mortgage on ranches, and that those defendants acted with knowledge that debts had been paid, and that they implemented their scheme by filing suit to foreclose discharged mortgage, and clouded title to ranches by recording lis pendens, and that when need of one of the plaintiffs arose to save her home from forced sale under bond judgment, they exerted compulsion inherent in defect in title to ranches, which they created, and that they continued to exert wrongful compulsion, knowing all circumstances, until they received certain sums as condition of relinquishment of their allegedly false claims, stated a cause of action for duress.

Judgment reversed.

1. Limitation of Actions ⇐180(3)

Demurrers seeking to raise bar of three-year limitation statute applicable to an action to recover for fraud should have been overruled, where there was but one count in the complaint, and, though alleged wrongful conduct of certain of the defendants formed basis of the action, in sense that allegations as to alleged wrongful conduct were required to be proved by plaintiffs before any relief could be obtained, plaintiffs nevertheless by the action sought recovery of possession of realty and quieting of their title to realty, and to that extent the action was for recovery of possession of realty within meaning of five-year limitation statute. West's Ann.Code Civ.Proc. §§ 318, 338, subd. 4.

2. Limitation of Actions ⇐182(2)

If it was a contention of any defendant that action was barred in part by statute of limitations, defense of statute was required to be raised by answer, rather than by demurrer. West's Ann.Code Civ.Proc. § 338, subd. 4.

3. Pleading ⇐406(8)

Defendants, by failing to object to complaint, on ground that there was more than one cause of action stated without being separately stated, would be deemed to have waived their right to do so and to have consented to go to trial on the complaint as being sufficient to enable court and parties to try fully all issues presented.

4. Threats ⇐10

Complaint alleging plot or conspiracy between two of the defendants, who were the executor and special administratrix of deceased mortgagee, to compel plaintiff-mortgagor to pay over again debts secured by mortgage on ranches, and that those defendants acted with knowledge that debts

* Opinion vacated 335 P.2d 968.

had been paid, and that they implemented their scheme by filing suit to foreclose discharged mortgage, and clouded title to ranches by recording lis pendens, and that when need of one of the plaintiffs arose to save her home from forced sale under bond judgment, they exerted compulsion inherent in defect in title to ranches, which they created, and that they continued to exert wrongful compulsion, knowing all circumstances, until they received certain sums as condition of relinquishment of their allegedly false claims, stated a cause of action for duress.

5. Deeds ⇐71

If defendant, who purchased ranch for what was allegedly only one third of its value, drove a harsh bargain with plaintiff-vendor, knowing that she was acting under alleged duress exerted by other defendants, court of equity would be justified in declaring that such defendant be compelled to suffer cancellation of the deed.

6. Money Received ⇐8

If beneficiaries under will were the beneficiaries of allegedly tortious conduct of executor and special administratrix, who represented interests of beneficiaries in handling of the estate, and who allegedly exerted duress on the plaintiffs, beneficiaries ought, in equity and good conscience, to be required to give back what they had thus obtained.

7. Compromise and Settlement ⇐8(3)

Payment made to executor and special administratrix of estate of deceased mortgagee, in settlement of foreclosure suit brought by executor and special administratrix, was not an adjudication that their claims were valid, if payment was made under duress.

Thomas B. Leeper and Abbie Leeper in pro. per., for appellants.

Chalmers & Sans, Woodland, for Hazel Scarlett.

Downey, Brand, Seymour & Rohwer, Sacramento, for Shriners Hospital.

Thos. E. Reynolds, Davis, for Rebecca Lodge.

Driver, Driver & Hunt, Sacramento, for LaVerne Scheidel.

VAN DYKE, Presiding Justice.

This is an appeal taken by plaintiffs from a judgment dismissing their action following an order sustaining demurrers to their complaint as amended without leave to amend further.

The demurrers of the various defendants were general. They also pleaded various statutes of limitations.

The complaint and the amendments thereto are prolix, but for the purposes of this appeal may be summarized as follows: During the lifetime of Frank Weber, plaintiff Thomas B. Leeper, hereinafter called Thomas, who was an attorney at law, borrowed from Weber $10,150 and to secure the payment of his note therefor mortgaged two different ranches owned by him, one being in Sutter County and the other in Sacramento County. During Weber's lifetime, Thomas served Weber as his attorney and the fees so earned were, by agreement between the two, applied by Weber to the payment of Thomas's note which, by said applications, was completely paid, although Weber never executed any satisfaction of the mortgage. During the year 1951, plaintiff Abbie F. Leeper, hereinafter called Abbie, executed an undertaking for the appearance of one Greene for trial in a criminal action. He failed to appear, his bond was forfeited, and demands were made upon Abbie and her fellow bondsman which were not responded to. An action was brought to obtain judgment for the amount of the forfeiture. Judgment was obtained and execution was levied on Abbie's home. Thereupon, Thomas deeded the two ranches to Abbie and her fellow bondsman for the purpose of enabling them to raise the money necessary to discharge the bond judgment. William Beltrami and Hazel Scarlett, defendants in this action and respondents herein, were executor and special administratrix respectively of the estate of Weber, who had died. Notwithstanding

that they knew the $10,150 debt had been paid and that Thomas had become thereby entitled to a satisfaction of the mortgage, these two plotted together to compel Thomas to pay the debt a second time and to that end brought an action in Sacramento County to foreclose the mortgage, recording notice of action in that county and in Sutter County. The complaint was filed August 18, 1952, and the notices were recorded at about that date. October 28, 1952, Abbie and her fellow bondsman procured a purchaser for the Sutter County ranch for the sum of $18,000 which would have yielded money sufficient to pay off the bond judgment and release Abbie's home from the levy. But the suit to foreclose the mortgage clouded the title to the Sutter County ranch and prevented the consummation of the sale. Beltrami and Scarlett were informed of the prior payment of the obligation on which they had sued and yet refused to dismiss the action or otherwise clear the title except only on payment to them for the estate of Weber of the amount they claimed to be owing on the mortgage debt. The result was that Abbie, unable by the sale of the Sutter County ranch to obtain sufficient moneys to clear her home, was compelled to make a forced sale of the Sacramento ranch to defendant and respondent LaVerne Charles Scheidel. Acting under the compulsions created by the wrongful acts of Beltrami and Scarlett she proceeded to sell the Sacramento County ranch to Scheidel for $10,760, about one-third of its value. Both sales were consummated. Abbie and her fellow bondsman conveyed the two ranches, the bond judgment was paid off, Beltrami and Scarlett for the Weber estate were paid $12,500 in settlement of their claims and there was left for Abbie over and above all demands the sum of about $4,000. Abbie and Thomas began this action November 30, 1957.

The relief prayed for was for the recovery of the money paid to Beltrami and Scarlett under the compulsions created by their wrongful conduct and also for the recovery from Scheidel of the Sacramento County ranch. Various remedies as to interest, rents, profits and the like, incidental to the main relief asked, were also contained within the prayer. The residuary legatees under the will of Weber were made parties defendant and by the prayer plaintiffs sought to recover from each the portion of the $12,500 which each had received.

Appellants contend that the action was an action to regain title to the Sacramento County ranch and that the right to bring it is to be measured by the five-year statute of limitations. Respondents contend that the action was to recover for fraud and that the right to bring it is to be measured by the three-year statute.

[1, 2] We shall first treat of the issues presented by the demurrer based on the statute of limitations. Although the alleged wrongful conduct of Beltrami and Scarlett forms the basis of the action in the sense that the allegations as to that wrongful conduct must be proved before any relief can be obtained, nevertheless by the action plaintiffs seek the recovery of the possession and the quieting of their title to the Sacramento County real property and to that extent the action is for the recovery of the possession of real property within the meaning of Section 318 of the Code of Civil Procedure and is governed by the five-year limitation provided in that section. Murphy v. Crowley, 140 Cal. 141, 73 P. 820. Clearly the action to recover the Sacramento real property is not barred. Beltrami and Scarlett are proper parties to the action for the recovery of that property, for it was their wrong which gives rise to the cause of action which eventuated in the sale at sacrifice of the Sacramento property and its transfer to Scheidel. It may be that equitable considerations may defeat the plea of the plaintiffs that the transfer be set aside and the property restored to them, in which event equity can give the alternative relief of money damages. If such relief be not sufficiently prayed for by the prayer for general relief a simple amendment will suffice to cover the matter. If appellants have stated a cause of action for the wrong alleged to

have been committed by Beltrami and Scarlett then the fact that plaintiffs also seek the recovery of the $12,500 obtained by them through their wrongful conduct does not convert the action to one governed by Section 338, Subdivision 4, Code of Civil Procedure, as argued by respondents. There is but one count in the complaint. The demurrer seeking to raise the bar of the statute is general in the sense that it asserts that on the face of the pleading the action is wholly barred. If it be contended by a defendant that the action is barred in part, the defense of the statute must be raised by answer. 31 Cal.Jur.2d, p. 660, sec. 244; Lewis v. Fahn, 113 Cal.App.2d 95, 103, 247 P.2d 831. The demurrers, therefore, of Scheidel and of Beltrami and Scarlett which seek to raise the bar of the statute of limitations ought to have been overruled.

Six residuary legatees under the will of Weber, made parties hereto, are alleged to have received equal parts of the $12,500 paid into the estate of Weber by virtue of the wrongful conduct of Beltrami and Scarlett. Plaintiffs seek to follow the funds into their hands. These distributees also plead the bar of the statute of limitations, arguing that the relief demanded as to them is governed by Section 338, Subdivision 4, Code of Civil Procedure. What has been heretofore said disposes of this contention. Their demurrers likewise ought to have been overruled.

[3] Each of the defendants, respondents here, demurs generally to the complaint. No special demurrers were interposed. If there be more than one cause of action stated without being separately stated, no demurrer has been addressed to that defect. The same must be said as to any objection that might have been raised by demurrer upon grounds of misjoinder. By failing to object to the pleading upon such special grounds, the parties are deemed to have waived their right to do so and to have consented to go to trial upon the pleading as drawn as being sufficient to enable the court and the parties to fully try all issues presented. Smith v. McLaughlin, 81 Cal. App.2d 460, 462–463, 184 P.2d 177; Shahabian v. Najarian, 14 Cal.App.2d 435, 441, 58 P.2d 396.

[4] We will first consider the demurrers of Beltrami and Scarlett. As to them plaintiffs relied upon the concept of illegal business compulsion, which is a type of duress. The doctrine is stated and discussed in McNichols v. Nelson Valley Building Co., 97 Cal.App.2d 721, 218 P.2d 789; Lewis v. Fahn, supra; Wake Development Company v. O'Leary, 118 Cal.App. 131, 4 P.2d 802; and Young v. Hoagland, 212 Cal. 426, 431, 298 P. 996, 75 A.L.R. 654. We think the complaint states a cause of action. It alleges the plot or conspiracy between Beltrami and Scarlett to compel a payment over again of the debts secured by the mortgage upon the ranches; that they acted with knowledge that the debt had been paid; that they implemented their scheme by filing a suit to foreclose the discharged mortgage, and clouded the title to the ranches by recording lis pendens in the counties where the land lay; that when the need of Abbie arose to save her home from forced sale under the bond judgment they exerted the compulsion inherent in the defect in the title to the ranches which they had created by refusing, although knowing her situation, to withdraw from their illegal demands; that they continued to exert their wrongful compulsion, knowing all the circumstances until thereby they received $12,500 as a condition of their relinquishment of their false claims.

It is alleged that the effect of their unlawful compulsion upon Abbie was to so frighten and confuse her that she sold the Sacramento County ranch to Scheidel for some $20,000 less than its value. If these things be true, and we must at this stage in the proceedings take it that they are, then a cause of action for duress is stated. Whether or not there was in the alleged wrongful acts of Beltrami and Scarlett sufficient illegal compulsion to make them responsible for the loss arising is a question for the trier of fact. McNichols v. Nelson Valley Building Co., supra. It is stated in 17A American Jurisprudence, "Duress and Undue Influence", pages 571–572:

"Under the modern view, there is no legal standard of resistance with which the person acted upon must comply at the peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such a contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby so obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party, are all merely evidentiary of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously what will accomplish this result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress."

As this court said in Lewis v. Fahn, supra, 113 Cal.App.2d at page 101, 247 P.2d at page 835, "given an unlawful demand, a threat of groundless litigation unless the unlawful demand be met presents a situation where courts should not too readily listen to a claim by the party extorting the payment that his victim ought to have been a braver man and should have resisted his attack." The complaint states a cause of action in duress.

[5] As to Scheidel it is alleged that he dealt with Abbie, knowing the compulsions under which she labored and under those circumstances negotiated a deal with her whereby, for one-third the value of a $30,000 ranch, he obtained the ranch. It is fairly inferable, even if not expressly stated by the pleader, that from the very circumstances of Abbie's willingness to make so great a sacrifice she was in no condition to be bargained with fairly. If knowing all these things, Scheidel drove the harsh bargain alleged, a court of equity would be justified in declaring that he be compelled to suffer a cancellation of the deed he so procured.

[6] We come now to the general demurrers interposed by the six distributees. They are the beneficiaries of the tortious conduct of Beltrami and Scarlett, who represented their interests in the handling of the estate of Weber. They have received the fruits of extortion. Their very resistance against a demand that they account places them in the position of being accessory to the extortion. In equity and good conscience they ought to give back what they have thus obtained.

The rule is stated in Restatement, Restitution, Section 123, as follows:

"A person who, non-tortiously and without notice that another has the beneficial ownership of it, acquires property which it would have been wrongful for him to acquire with notice of the facts and of which he is not a purchaser for value is, upon discovery of the facts, under a duty to account to the other for the direct product of the subject matter and the value of the use to him, if any, and in addition, to:

"(a) return the subject matter in specie, if he has it;

"(b) pay its value to him, if he has non-tortiously consumed it in beneficial use;

"(c) pay its value or what he received therefor at his election, if he has disposed of it."

See California Annotations to Restatement of Restitution, citing, inter alia, People v. Houghtaling, 7 Cal. 348; Curran v. Kennedy, 89 Cal. 98, 26 P. 641; Freitas v. Freitas, 31 Cal.App. 16, 159 P. 611.

[7] Finally, respondents all argue that the payment of $12,500 to Beltrami and

Scarlett in settlement of the foreclosure suit was an adjudication that the claims therein presented by the plaintiffs in that action were valid. We do not agree. There was no real adjudication of any issue in that action. Abbie was under the same compulsions which compelled her to sell the Sacramento County ranch. The tortious conduct of the plaintiffs in the foreclosure suit operated extrinsically and the same equitable principles that invalidate the land transfer are equally potent to strike through the purported settlement of the false claims. 29 Cal.Jur.2d 109.

The judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.

Romeo A. RODRIGUEZ and Fred J. LaVigne, Plaintiffs and Respondents,

v.

J. P. BARNETT, Defendant and Appellant.*

Civ. 23217.

District Court of Appeal, Second District, Division 2, California.

Dec. 18, 1958.

Rehearing Denied Jan. 14, 1959.

Hearing Granted Feb. 11, 1959.

Action by purchasers of real estate against vendor for money had and received. From adverse judgment of the Superior Court, Los Angeles County, A. Curtis Smith, J., and from order denying motion for new trial, the vendor appealed. The District Court of Appeal, Fox, P. J., held that under contract for purchase of realty requiring purchasers to furnish vendor with certain listed items within six months and if they failed to do so then deposit made by purchasers could be retained by vendor as consideration for executing agreement, and providing that if purchasers failed to pay balance of purchase price or complete purchase, sum paid thereon, at option of vendor, could be retained as consideration for execution of agreement, but providing that items required to be furnished should be subject to approval of purchasers and that agreement should be contingent upon their approval, vendor had right to retain deposit made by purchasers when purchasers elected to avail themselves of escape clause by refusing to approve subdivision map as proposed by city authorities.

Purported appeal from order denying motion for new trial dismissed and judgment reversed.

1. Vendor and Purchaser ⇐3(4)

Written agreement for purchase of realty providing that purchasers would subdivide property and that final subdivision map as approved by necessary governmental bodies should be subject to approval of purchasers and purchasers should have six months within which to furnish certain listed items to vendor, otherwise money deposited was to be forfeited at option of vendor, and that if purchasers failed to pay balance of purchase price or to complete purchase, sum paid could, at option of seller, be retained as consideration for execution of agreement, was a valid bilateral contract to purchase property and not merely an option.

2. Vendor and Purchaser ⇐334(1)

Under contract for purchase of realty requiring purchasers to furnish vendor with certain listed items within six months and if they failed to do so then deposit made by purchasers could be retained by vendor as consideration for executing agreement, and providing that if purchasers failed to pay balance of purchase price or complete purchase, sum paid thereon, at option of vendor, could be retained as consideration for execution of agreement, but providing that items required to be furnished should be subject to approval of purchasers and that agreement should be contingent upon their approval, vendor had right to retain deposit made by purchasers when purchasers elected to avail themselves of escape clause by refusing to approve subdivision map as proposed by city authorities.

Adelman & Schwartz, Beverly Hills, for appellant.

* Opinion vacated 338 P.2d 907.

Wadsworth, Fraser & McClung, Los Angeles, for respondents.

FOX, Presiding Justice.

In October, 1956, plaintiffs filed an action in the municipal court against the defendant for money had and received in the amount of $1,500. The defendant answered and cross-complained for $15,000 for breach of contract, whereupon the case was transfered to the superior court. The plaintiffs answered the cross-complaint and after a pretrial conference the case was tried and judgment rendered for plaintiffs on their complaint for the sum of $1,500 and against defendant-cross-complainant [1] on the cross-complaint. Defendant appeals from the judgment and order denying his motion for a new trial. The appeal is on the judgment roll.

[1] On March 16, 1956, plaintiffs entered into a written agreement for the purchase of certain real property from the defendant in Riverside County. Pertinent provisions of the agreement are as follows: (1) "It being understood that the purchasers named herein will subdivide the subject property and the final subdivision map as approved by the necessary governmental bodies, shall be subject to the approval of the purchasers herein, it being further understood that said government bodies shall allow a minimum of 6,000 square feet per lot or a maximum of 9,000 square feet per lot, which the purchasers herein agree to accept." (2) "The purchasers agree to furnish for the approval of the seller documentary evidence of the following items:

"1. Approval of the subdivision by necessary Government agencies.

"2. Construction loan commitments by recognized lending institution.

"3. Permanent financing by recognized lending institution.

"4. Veteran Administration and or FHA approval of site.

"5. Buyers and sellers herein to determine which type of financing shall be acceptable.

"6. Improvement Bond for on site improvements.

"7. Recording of approved subdivision map."

"All above items subject to approval of buyers, this agreement is contingent upon their approval." (3) "It is further understood that the purchasers herein shall have six months from date to comply with the above demand of the seller to furnish said items listed in the preceding paragraph [Nos. 1–7], otherwise, at the option of the seller, the monies deposited herewith shall be forfeited and retained by the seller as consideration for executing this agreement." (4) "Should purchasers herein fail to pay the balance of said purchase price or complete said purchase as herein provided, the sum paid hereon may, at the option of the seller, be retained as consideration for the execution of this agreement," and (5) "We agree to purchase the above described property on the terms and conditions herein stated."

Pursuant to the agreement, plaintiffs deposited $1,500 with the defendant and thereafter unsuccessfully sought to obtain the approval by the Riverside Planning Commission of plaintiffs' tentative subdivision map. The subdivision map proposed by the Planning Commission was not acceptable to plaintiffs. Defendant was notified of these facts and on July 13, 1956, plaintiffs served a notice of rescission upon the defendant in which a demand was made for the return of the $1,500 deposit. The defendant did not return the deposit, consequently plaintiff instituted the present action for money had and received.

In his cross-complaint, defendant alleged that he complied with all terms and conditions of the agreement but that plaintiffs refused to complete the agreement to the damage of defendant in the sum of $15,000. In their answer to the cross-complaint, plaintiffs alleged that the agreement was expressly conditioned upon the approval by plaintiffs of the final subdivision map and

1. For convenience the parties will be referred to as plaintiffs and defendant.

that such condition failed to occur and the agreement was thereby rendered impossible to perform and that on or about May 22, 1956, the defendant abandoned the agreement.

The pertinent findings of fact are as follows: "That it is true that" * * * (1) "plaintiffs * * * deposited the sum of fifteen hundred dollars ($1,500.00) with the defendant * * * as a deposit on the purchase price provided for in the above agreement," (2) "said written agreement provided that the obligation of the purchasers to complete the purchase was conditional upon the approval by the purchasers of the final subdivision map as approved by the City of Riverside," (3) "the Planning Commission of the City of Riverside, California, refused to approve the tentative subdivision map presented by the plaintiffs * * * and that plaintiffs * * * did not approve the subdivision map contemplated by the City of Riverside," (4) "the refusal of plaintiffs * * * to approve the subdivision map proposed by the City of Riverside, California, was reasonable," (5) "upon such failure to approve by the City of Riverside, California, plaintiffs * * * were under no duty to proceed with the purchase * * * according to the provisions of the aforesaid written agreement," (6) "by the terms of the aforesaid written agreement, plaintiffs * * * are entitled to the return of the deposit of fifteen hundred dollars ($1,500.00) from the defendant," (7) "on July 13, 1956, and within a reasonable time after the ascertainment of the above facts, plaintiffs * * served upon defendant * * * a notice of rescission of the aforesaid written agreement and a notice that the plaintiffs * * had not been able to secure the approval of the City of Riverside, California, of the subdivision map and a demand for the return of the fifteen hundred dollars ($1,500.00) deposited with the defendant," and (8) "the above set forth terms and conditions of the written agreement have been determined by a consideration of the agreement itself without regard to the parol evidence admitted at the trial." The court further found "that it is not true that plaintiffs * * * refused and failed to perform any of the terms of the written agreement. * * *"

Defendant argues that the instant agreement was not a bilateral contract but rather an option, and the $1,500 was consideration for the option and such consideration cannot be recovered merely because the optionee fails to exercise the option. Defendant predicates his argument on the fact that plaintiffs reserved to themselves the right to approve or disapprove the final subdivision map and, this being the case, they were under no enforceable obligation to purchase the property. This fact, coupled with the provisions for the retention of the deposit (provisions 3 and 4 quoted above), according to defendant, compels a conclusion that the written agreement was an option and not a bilateral contract to purchase the property. Defendant cites Caras v. Parker, 149 Cal.App.2d 621, 623, 309 P.2d 104, 106, where the following language was held to have given rise to an option as support for his position that an option existed in the case at bar: "This escrow is contingent upon Buyer securing approval of city of Manhattan Beach of property described above to be divided into eight lots." The recent decision in Mattei v. Hopper, 51 Cal.2d 119, 330 P.2d 625, fully disposes of defendant's reliance on the reasoning in the Caras case. In the Mattei case, plaintiff, a real estate developer, entered into a written agreement to purchase the defendant's property. The concluding paragraph of the deposit receipt provided: "Subject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser." Defendant refused to perform. Our Supreme Court found a binding contract and held in effect that an otherwise enforceable contract is not vitiated by the inclusion of either a satisfaction or approval clause.[2] In view of the deci-

2. Lawrence Block Co. v. Palston, 123 Cal. App.2d 300, 266 P.2d 856, 858, which held illusory a contract providing "O. P. A. Rent statements to be approved by

sion in Mattei v. Hopper, supra, the writing in the instant case was not merely an option but constituted a valid bilateral contract.

[2] We come now to a consideration of the effect of provisions 3 and 4 of the agreement relative to the disposition of the $1,500 deposit in the event the transaction was not consummated. Initially, it should be pointed out that although the word "forfeited" is used in provision 3 it does not appear that either of these provisions when applied to the instant factual situation constituted a forfeiture clause in any proper legal sense. By provision 3 the purchasers were given six months within which to fulfill the requirements of paragraphs 1 to 7 under provision 2, supra. If, however, the purchasers acting in good faith failed to furnish the items and fulfill the requirements set forth in paragraphs 1 to 7 within six months, then the deposit could be "retained by the seller as consideration for executing this agreement." This thought is emphasized by provision 4, which does not use the word "forfeited" and merely says: "Should purchasers herein fail to pay the balance of said purchase price or complete said purchase as herein provided, the sum paid hereon may, at the option of the seller, be retained as consideration for the execution of this agreement." Thus it appears from the face of the agreement that if plaintiffs because of inability to furnish the items mentioned in provision 2 did not go through with the deal the seller was entitled to retain the $1,500 deposit as consideration for executing the agreement.

The last portion of provision 2 is essentially an escape clause: "All above items subject to approval of buyers, this agreement is contingent upon their approval." The purchasers utilized this provision as justification for their failure to complete the purchase. If they acted in good faith in refusing to approve the subdivision map as proposed by the Riverside authorities, their utilization of the "escape" clause constituted no breach of the agreement. But when the purchasers elected to avail themselves of the escape clause the seller had the right on the face of the agreement to retain the $1,500 deposit.

In this case we are only called upon to determine whether the agreement in question, taken by its four corners, supports the findings and judgment of the trial court. The basic finding on which the judgment rests is that *"by the terms of the aforesaid written agreement,* plaintiffs are entitled to the return of the deposit of $1,500 from the defendant." (Emphasis added.) It is apparent from what we have said that the agreement does not on its face so provide and therefore there is no support in the agreement for this finding. As a consequence, the judgment must be reversed.

In his memorandum decision, the trial judge indicated that what he termed "the forfeiture clauses" of the contract, vis., provisions 3 and 4, *supra,* were not "as clear as they might be." Our examination of the writing leads us to the conclusion that some aspects of the agreement are not entirely clear. Upon a retrial it would be proper, under the principles stated in Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 297 P.2d 428, for the trial court to receive and consider any pertinent extrinsic evidence that may be offered that would tend to aid in the interpretation of the agreement.

The purported appeal from the order denying motion for new trial is dismissed. The judgment is reversed.

ASHBURN and HERNDON, JJ., concur.

Buyer" and "subject to buyer's inspection and approval of all apartments" was disapproved in the Mattei case as was Pruitt v. Fontana, 143 Cal.App.2d 675, 300 P.2d 371, 377, which held illusory a written instrument with a provision making the sale of land subject to the convenants and easements being "approved by the buyers."

166 Cal.App.2d 579

Thomas T. KENT, William Kent, Jr., Adeline Kent Howard, Sherman Kent and Roger Kent, Plaintiffs and Respondents,

v.

Harold M. KOCH, Defendant and Appellant.

Civ. 17856.

District Court of Appeal, First District, Division 1, California.

Dec. 29, 1958.

Rehearing Denied Jan. 28, 1959.

Hearing Denied Feb. 25, 1959.

Action to enforce building restriction in subdivision and to restrain lot owner therein from erecting a certain fence on his property. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment restraining house owner from erection of fence and he appealed. The District Court of Appeal, Bray, J., held that where party had created a subdivision out of a larger tract of land that he owned and recorded certain restrictions on subdivision with recital that restrictions were for the reciprocal benefit of each and every lot as shown on recorded map, and party sold all of lots owned in subdivision except a certain small parcel which was not suitable for building purposes, party was not entitled to bring action to enforce building restriction.

Reversed.

1. Covenants ⇦77

Where owner of tract created a subdivision thereof and recorded declaration setting forth certain building and other restrictions affecting such subdivision and declaration stated that it was for the direct benefit of each and every lot as shown on recorded map, declaration did not disclose intention to make restrictions for benefit of any property other than that referred to in declaration.

2. Covenants ⇦78

Restrictive covenants made for benefit of other property retained by grantor cannot be enforced by grantor after he no longer owns any property benefited.

3. Covenants ⇦78

Where owner of large tract of land created a subdivision therein and recorded declaration placing certain restrictions on lots of subdivision for the benefit of each and every lot as shown by recorded map and owner no longer retained any lots in subdivision except one small parcel which was unsuitable for building purposes, owner, even though owning some adjacent land, was not entitled to bring action to enforce building restrictions respecting lot in subdivision.

4. Covenants ⇦49

Any provisions of an instrument creating or claiming to create a servitude will be strictly construed and any doubt resolved in favor of free use of land.

5. Covenants ⇦77, 84

Restrictions in a deed cannot be enforced by one lot owner in a tract against another lot owner between whom there is neither privity of contract nor privity of estate.

6. Covenants ⇦78

Where owners of large tract of land created a subdivision therein and recorded declaration setting forth certain restrictions respecting all lots in subdivision and in declaration tract owners declared that they would restrict the sale, ownership, use and occupancy of adjoining contiguous property offered for public sale at time property is offered in such a way as in their opinion will not impair value or desirability of property shown on map for residential purposes, such provision did not give owners, who no longer held any land in the particular subdivision, right to enforce restrictions as to such subdivision.

Morris M. Grupp, San Francisco, for appellant.

Freitas, Allen, McCarthy & Bettini, San Rafael, for respondents.

BRAY, Justice.

Defendant appeals from a judgment restraining him from constructing a green

fiberglass panel fence on his property without conforming to a certain declaration of restrictions, conditions, covenants and agreements.

Question Presented.

Defendant raises many questions. However, determinative of the appeal is the question of the right of plaintiffs, owning no lots in subdivision 1 (in which defendant's property is situated) to complain.

Facts.

The facts are undisputed. In 1936 plaintiffs owned a large tract of land in Marin County which they called Kent Woodlands. That year they commenced to subdivide it. Since then they have been continuously developing it and selling lots. In 1936 they recorded the declaration of restrictions which is the basis for this action. The project started with subdivision 1 and then successive units were developed. At the present plaintiffs are preparing the 13th unit. Kent Woodlands is a high-class, single family dwelling residential area, lots selling from $4,750 to $25,000 each. Because of restrictions the minimum priced house and lot is $25,000, ranging from there to $200,000. As each unit was opened a declaration of restrictions as to it was recorded. The restrictions were similar to those in the declaration involved here. However, each declaration subsequent to that of subdivision 1 expressly provided that it was for the benefit not only of the property within the specific unit but for all of the property in Kent Woodlands. Plaintiffs have enforced all restrictions since the beginning. At first, applications for building were made to plaintiffs. Thereafter an Architectural Supervising Committee provided for in declarations other than the subdivision 1 declaration, was appointed by plaintiffs from property owners in Kent Woodlands (none from subdivision 1). There have been approvals and rejections of applications over the period. Plaintiffs contend that if the restrictions in subdivision 1 are not enforced the sales and values of all properties in all the units would be adversely affected. Plaintiffs have sold all lots in subdivision 1, but still own "Parcel A" as shown on the map thereof, retained as an entrance to Kent Woodlands. Apparently a lot is a plot of land sufficient to have a building erected thereon; a "parcel" is a plot of ground insufficient in size to be used for building purposes. Lot 32 in that unit was originally sold to one Spalding who did not build upon it. In 1955 defendant purchased it from Spalding. In November, 1955, he applied to the Architectural Supervising Committee for permission to construct a 6 foot green fiberglass fence around his property line. Contending that such fencing was inappropriate in Kent Woodlands, that it looked like a neon sign, and would have a commercial appearance, the committee denied defendant's application. The committee had denied 11 applications for fences in Kent Woodlands, one of which was in subdivision 1. Some of these denials were on account of color. There are no fiberglass fences in Kent Woodlands.

The trial court found that defendant's lot is subject to the restrictions contained in the first declaration of restrictions; that plaintiffs own and are developing and selling lots in Kent Woodlands, that plaintiffs own no lots but do own a parcel in subdivision 1 known as parcel A and that the lots in the entire Kent Woodlands were sold in accordance with a general plan of restrictions which were for the benefit of all lots in the tract and of plaintiffs.

The Declaration.

The "Declaration of Restrictions, Conditions, Covenants and Agreements Affecting Real Property Known as Kent Subdivision No. 1, Marin County, California," states that the plaintiffs are the owners of and about to sell the land shown on the recorded *"Map of Kent, Subdivision No. 1,"* and desire to subject the property "pursuant to a general plan of improvement, to certain restrictions, conditions, covenants and agreements between them and the several purchasers of *said property* and between the several purchasers of

said property as between themselves as hereinafter set forth, Now, Therefore, the undersigned declare that *the property shown on said map* is held and shall be sold, conveyed, leased, occupied, resided upon, hypothecated and held subject to the following restrictions, conditions, covenants and agreements between them and the several owners and purchasers of *said property* and between the several owners and purchasers of *said property* as between themselves, and their heirs, successors and assigns: 1. All of said restrictions, conditions, covenants and agreements shall be made for the direct and mutual and reciprocal benefit of each and every lot *shown on said recorded map* and shall be intended to create mutual and equitable servitudes upon each of said lots in favor of each other lot *shown on said map,* and to create reciprocal rights and obligations between the respective owners of all of the lots *shown on said map* and to create a privity of contract and estate between the grantees of *said lots,* their heirs, successors and assigns, and shall, as to the owners of *each lot in said tract,* his heirs, successors and assigns, operate as covenants running with the land for *the benefit of all other lots in said tract* and the same shall exist and be binding until the 1st day of January, 1966, at which time they may be continued in force and effect by vote of the owners of the *majority of the property,* for additional periods of twenty years * * *" (Emphasis added.) Then follow a number of restrictions: "4. No structure, either residence or outhouse, tennis court, swimming pool, wall, fence or other improvements shall be constructed upon any of the said lots without the approval as to location, height and design first having been obtained from the undersigned, their successors and assigns * * 7. Violation of any of the restrictions, conditions, covenants and agreements herein contained, shall give to the undersigned, their successors and assigns, the right to enter upon the property upon or as to which said violation or breach exists, and to summarily abate and remove at the expense of the owner, any erection, thing or condition that may be or exist thereon contrary to the provisions hereof, without being deemed guilty of trespass * * * 12. *All purchasers of property shown on said map* shall, by the acceptance of contracts or deeds for *any lot or lots shown thereon,* or any portion thereof, thereby be conclusively deemed to have consented and agreed to all the restrictions, conditions, covenants and agreements. The undersigned further declare that they will restrict the sale, ownership, use and occupancy of adjoining and contiguous property offered by them for public sale at the time when said property is so offered in such a way as, in their opinion shall not impair the value of desirability of the property shown on said map, for residential purposes." (Emphasis added.)

Plaintiffs' Right to Complain.

[1] A mere perusal of said agreement shows that it did not intend to make the restrictions for the benefit of any property other than that referred to in it, namely, the lots shown on the map of subdivision 1. It expressly says that it is for the direct benefit of "each and every lot shown on said recorded map." Time and again it refers to "said lots" meaning the lots shown on that map. There is not the slightest ambiguity in the document. It is impossible to read into such clear language any intent to make the restrictions applicable to any other property. Plaintiffs contend that the last line of paragraph 12 above quoted shows such intention. On the contrary it strongly indicates that the restrictions are for the benefit of subdivision 1 lots only. That sentence instead of stating that plaintiffs would subject the new units (the adjoining and contiguous property) to be opened by them to the same restrictions as required of subdivision 1, or would make any restrictions upon the new units applicable to subdivision 1 lots, merely states that plaintiffs will restrict the sale and use of such property "in such a way as, in their opinion shall not impair the value or desirability of the

property shown on said map, for residential purposes." This language discloses that plaintiffs intended the new units to be completely independent of the first unit, except only that they would be restricted in such manner as in plaintiffs' opinion not to impair the desirability for residential purposes of the lots in subdivision 1.

[2, 3] It is well settled in this state that restrictive covenants made for the benefit of other property retained by the grantor can not be enforced by the grantor after he no longer owns any of the property benefited. In Blodgett v. Trumbull, 1927, 83 Cal.App. 566, 257 P. 199, the grantors deeded to the plaintiff a certain lot subject to certain conditions and restrictions in the deed. Although these were not made for the benefit of the adjoining lots which belonged to the grantors, the court held (83 Cal.App. at page 571, 257 P. at page 202): "* * * the grantors did reserve for themselves, their successors, or assigns the right to enjoin, abate, or remedy by appropriate proceedings any breach of any of the restrictions. The right so reserved would be enforceable, in the absence of fraud, while the defendant Trumbull [the surviving grantor] remained owner of the adjoining lots; but after she had parted with the property which would derive benefit from a continuance of the restrictions, she would have no standing, in a court of equity at least, to complain of a breach." In Townsend v. Allen, 114 Cal.App.2d 291, at page 297, 250 P.2d 292, at page 296, 39 A.L.R.2d 1108, the court stated: "However, it does not follow that the grantor retains said right of enforcement even though he has disposed of all land he had retained without making any such restriction. The contrary is shown by cases relating to building and occupation restrictions on subdivisions in which cases the right of enforcement of grantor is considered lost when he has lost all interest in the property to be benefited. In Firth v. Marovich, 160 Cal. 257, 260, 116 P. 729, 731 [Ann.Cas.1912D, 1190] it is said (obiter): 'It is not open to question that building restrictions of the kind contained in the deed * * * are valid and enforceable at the suit of the grantor *so long as he continues to own any part of the tract for the benefit of which the restrictions were exacted.*'" (Emphasis ours.)

In Marra v. Aetna Construction Co., 1940, 15 Cal.2d 375, 378, 101 P.2d 490, 492 the court said: "The doctrine of equitable servitudes has been invoked chiefly in cases where uniform building restrictions have been imposed pursuant to a general plan for improving an entire tract or real estate subdivision * * *. It is true, however, that a servitude cannot exist in gross, but must be appurtenant to other benefited property."

Plaintiffs rely on language in Weston v. Foreman, 108 Cal.App.2d 686, 692, 239 P.2d 513, 517, to the effect that each new purchaser becomes "equally interested with the subdividers * * * in the continued functioning of the committee" whose duty it was under the restrictive covenants to effectuate the general plan of development of the declared restrictions. From this language plaintiffs deduce that the court was holding that the subdividers would continue after all the lots in the subdivision were sold to have the right to enforce the restrictions. That language contains no such implication. There is nothing in the case to indicate that the subdividers had disposed of all their property in the tract (if they had it is clear that such fact was not before the court and that the court was not passing upon such a situation). The footnote on page 693 of 108 Cal.App.2d on page 517 of 239 P.2d would indicate that the subdividers still owned lots in the tract. Moreover, the dissenting opinion in construing the terms of the restrictive declaration states (108 Cal.App.2d at page 695, 239 P.2d at page 518) that the agreement contemplated that the subdividers desired to retain control of the types of structure to be erected in the tract until they had sold all the lots in it, after which "they contemplated that they would have no further interest therein."

Hannula v. Hacienda Homes, Inc., 34 Cal.2d 442, 211 P.2d 302, 19 A.L.R.2d 1268, cited by plaintiffs, deals solely with the question of whether a restriction attempted to be imposed upon a lot owner by the subdivider came within the purview of the restrictive covenant. The plaintiff conceded that she must submit for the defendant's approval the plans for her proposed residence, but contended that the rejection of her plans went beyond the terms of the covenant. No contention was made that the defendant did not own property in the tract for the benefit of which the covenant was made, nor that the defendant could not enforce the covenant.

[4] It must be remembered in construing the declaration of restrictions that "any provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land." Wing v. Forest Lawn Cemetery Ass'n, 1940, 15 Cal.2d 472, 479, 101 P.2d 1099, 1103, 130 A.L.R. 120; Werner v. Graham, 181 Cal. 174, 181, 183 P. 945. Thus, plaintiffs having disposed of all the lots in subdivision 1, do not have any property to be benefited by the enforcement of the restrictions and have no standing in a court of equity. Actually, plaintiffs do own a small portion of subdivision 1. However, admittedly this "parcel," so-called on the map, is too small for residence purposes and was reserved for the special purpose of parking for the tract office which adjoins it, as an entrance to the tract, and as a location for the tract's signboard. It is obvious that this parcel would in nowise be benefited by the enforcement of the restrictions. Blodgett v. Trumbull, supra, 83 Cal.App. 566, 571, 257 P. 199, points out that after a grantor has parted with the property which would derive benefit from a continuance of the restrictions, such grantor has no standing in court to enforce the restrictions.

[5] Restrictions in a deed cannot be enforced by one lot owner in a tract against another lot owner between whom there is neither privity of contract nor privity of estate. "The leading case on this subject, and the one that is determinative of this appeal, is Werner v. Graham, 181 Cal. 174, 183 P. 945. In that case, among other things, it was specifically held that such servitudes will be enforced only when part of a general plan expressed in the deed, and when the deed expressly provides such restrictions are for the benefit of the other lots in the tract. In other words, unless specifically stated to be for the benefit of other lot owners, such covenants or restrictions are enforceable only as between the original parties to the deed, or their heirs or assigns." Fees v. Williams, 212 Cal. 688, 690, 300 P. 30, 31; see also Townsend v. Allen, 114 Cal.App.2d 291, 297, 250 P.2d 292, 39 A.L.R.2d 1108.

[6] Plaintiffs' contention that the provision in paragraph 12 to the effect that plaintiffs will restrict the use of property in the units other than subdivision 1 gives them, as owners of property in the other subdivisions, a right to enforce the restrictions on subdivision 1, is answered by Werner v. Graham, supra, 1919, 181 Cal. 174, 183 P. 945, which the court says in Wing v. Forest Lawn Cemetery Ass'n, supra, 15 Cal.2d 472, 480, 101 P.2d 1099, 130 A.L.R. 120, "has oft been cited as the leading case in this state defining the manner in which an equitable servitude may be established." There restrictive conditions were placed in a deed of one lot in a tract which the owner was subdividing according to a map on file. No express statement was included to the effect that they were for the benefit of the other lots in the tract. In selling these other lots the grantor placed similar restrictions in the deeds thereto. The court held that the failure to state in the deed that the restrictions were for the benefit of the other lots in the tract, although most probably the grantor intended them to be, made the restrictions unenforceable by owners of any other lots. It said (181 Cal. at pages 183–184, 183 P. at page 949): "It is undoubted that, when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing ap-

propriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others. The agreement between the grantor and each grantee in such a case as expressed in the instruments between them is both that the parcel conveyed shall be subject to restrictions in accordance with the plan for the benefit of all the other parcels and also that all other parcels shall be subject to such restrictions for its benefit. In such a case the mutual servitudes spring into existence as between the first parcel conveyed and the balance of the parcels at the time of the first conveyance. As each conveyance follows, the burden and the benefit of the mutual restrictions imposed by preceding conveyances as between the particular parcel conveyed and those previously conveyed pass as an incident of the ownership of the parcel, and similar restrictions are created by the conveyance as between the lot conveyed and the lots still retained by the original owner. Of this character is Alderson v. Cutting, 163 Cal. [503], 504, 126 P. 157, Ann.Cas.1914A, 1.

"The difference between such a case and the one at bar is that here there is no language in the instruments between the parties—that is, the deeds—which refers to a common plan of restrictions, or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan."

"While the decisions in other states upon the question now before us are in conflict, it is recognized by the law writers that the majority view is to the effect that such restrictions and conditions as those now before us can be enforced only by the owner of a part of the land for the benefit of which the restrictions and conditions were created." Young v. Cramer, 38 Cal. App.2d 64, 68, 100 P.2d 523, 525.

See also Alexander v. Title Ins. & Trust Co., 48 Cal.App.2d 488, 492, 119 P.2d 992, 994, where the court stated, referring to the evidence, "It discloses a situation in which the reversionary right is held by an entity which is not the owner of the land in the same tract and cannot claim that its right as a landowner would be adversely affected as to use or value by removal of the restriction. It is held by a corporation as trustee for the syndicate which has disposed of all the property in the tract under restrictions as to use. These obviously had as their basis the benefit to be conferred on other property in the same tract." Just as in our case. Both parties cite Los Angeles University v. Swarth, 9 Cir., 1901, 107 F. 798, 54 L.R.A. 262. There the complainants and others owned large tracts of land adjoining the city of Los Angeles. They joined in a deed to Los Angeles University, a corporation, of 7½ acres of land. The deed provided that the land was to be used exclusively as a campus for the university proposed to be located thereon, and that if prior to a certain date the land was not so used title would revert to the grantors. The court held (at page 806): "In general terms, the benefit of a condition in a grant is reserved to the grantor and his heirs without regard to the ownership of other property; but, where the grant contains a restriction in the nature of a covenant that has relation to a benefit to adjoining property, the restriction can only be enforced in favor of the title to such adjoining property", and that as the complainants failed to show ownership in the land they could not maintain the action to restrain the defendant from using the lands for drilling for oil. The court stated that it was alleged in the complaint that the complainants and the others who had conveyed the land relied upon certain representations that the land would be used exclusively for university purposes to the benefit of the adjoining lands owned by the complainant and others. It then stated that as the complainants had no interest in these adjoining lands, they were no longer interested in the benefit arising from the restriction in the deed and therefore were not in a

position to maintain the action. This case upholds the principles we have heretofore discussed and in no way supports the contention that mere ownership of adjoining lands gives the right to enforce restrictions in a deed that does not provide that the restrictions are for the benefit of those adjoining lands.

As plaintiffs have no interest in any property to be benefited by the restrictions, they may not maintain this action.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

166 Cal.App.2d 386

Geraldine HOWARD, Plaintiff and Appellant,

v.

Frank S. HOWARD, Defendant and Respondent.

Civ. 23102.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1958.

Hearing Denied Feb. 16, 1959.

Wife, having obtained a final decree of divorce, levied upon disability benefits payable to divorced husband in order to enforce payment of allowance made by divorce decree for support of minor child. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered orders granting exemption claimed by divorced husband, quashing writ and levy of execution, and releasing funds seized thereunder, and former wife appealed. The District Court of Appeal, Fox, P. J., held that under West's Annotated Code Civil Procedure, Sections 690.22 and 690.23, disability benefits payable by city to disabled member of fire department were not subject to attachment or execution.

Orders affirmed.

1. Statutes ⇐176

Courts may interpret, but may not rewrite or disregard statutes.

2. Exemptions ⇐76

Statutory exemption of pension and disability payments from attachment or execution was not subject to any exception which would authorize levy upon such payments in order to enforce provision in divorce decree for support of minor child. West's Ann.Code Civ.Proc. §§ 690, 690.1 to 690.25, 690.22, 690.23.

3. Exemptions ⇐62

Statute exempting earnings from attachment or execution for express purpose of providing for the "family" from such earnings uses quoted word as including a divorced wife and the minor children of the marriage. West's Ann.Code Civ.Proc. § 690.11.

See publication Words and Phrases, for other judicial constructions and definitions of "Family".

4. Exemptions ⇐37

Disability benefits payable by city to disabled member of city fire department were not subject to attachment or execution to enforce allowance made by divorce decree for support of minor child. West's Ann.Code Civ.Proc. §§ 690, 690.1 to 690.25, 690.22, 690.23, 710, and (c).

Marcus, Rabwin, Nash & Naiditch, Sidney R. Shiffman, Los Angeles, for appellant.

Desser & Rau and David M. Hoffman, Beverly Hills, and Robert B. Smith, Los Angeles, for respondent.

FOX, Presiding Justice.

Plaintiff appeals from the orders granting defendant's motions to quash writ and levy of execution and for release of funds thereunder. Plaintiff, on October 23, 1952, secured a final decree of divorce from the defendant and, by the terms thereof, as modified by order of court on December 10, 1952, he was to pay to plaintiff $50 on the 20th and 5th days of each month for the support and maintenance of their minor

child. Subsequently, as a result of an alleged disabling injury, defendant was taken off the active list as a Captain of the Los Angeles Fire Department and thereafter received monthly disability payments. In order to enforce payment of the child support allowance, plaintiff, on or about July 1, 1957, pursuant to section 710 of the Code of Civil Procedure, levied on defendant's disability payments in the hands of the City Comptroller. The funds seized, consisting of $60.85, were deposited with the clerk of the superior court. Defendant asserted a claim of exemption to the above funds based on sections 710(c), 690.22, and 690.23 of the Code of Civil Procedure, and filed a motion, dated July 17, 1957, for an order granting the exemption, quashing said levy, and releasing said funds to the defendant. After a hearing and argument, orders were filed on October 24, 1957, granting the above motions. It is from such orders that the instant appeal is taken.

Sections 690.22 and 690.23 of the Code of Civil Procedure expressly exempt pensions and disability payments from attachment or execution.[1] It is plaintiff's position, however, that as exemption statutes are created for the benefit of the husband's family as well as for himself, such statutes do not apply against claims for alimony or child support. There is nothing in the exemption statutes involved in this appeal which lends support to this position. Sections 690.22 and 690.23 are completely silent regarding any exceptions to the exemptions therein established. Furthermore, section 690 of the Code of Civil Procedure[2] provides in clear, unambiguous, and unmistakable language that the only exceptions to the exemptions provided by sections 690.1 to 690.25 are those which are specially set out in those sections themselves.

[1] In order to sustain plaintiff's position, it would be necessary for this court to either rewrite sections 690.22 and 690.23 or to disregard section 690. This court may do neither. Any changes to be made with respect to these sections must come from the legislature. The courts may interpret but not rewrite statutes.

[2] In re Smallbone, 16 Cal.2d 532, 106 P.2d 873, 131 A.L.R. 222, is the only California case dealing with these sections and an alimony judgment. Petitioner was found guilty of contempt for failure to pay support money to his former wife. He was receiving $100 a month pension as a retired city employee. The court held that petitioner's exempt property could be considered in determining whether he was able to pay past due alimony. The court further stated, however, 16 Cal.2d at page

1. C.C.P., § 690.22 reads: "All money received by any person, a resident of the State, as a pension, or retirement or disability or death or other benefit, from the United States Government, or from the State, or any county, city, or city and county, or other political subdivision of the State, or any public trust, or public corporation, or from the governing body of any of them, or from any public board or boards, whether the same shall be in the actual possession of such pensioner or beneficiary, or deposited, loaned or invested by him, is exempt from execution or attachment."

C.C.P., § 690.23, reads: "All money held, controlled or in process of distribution by the State or a city, city and county or other political subdivision of the State, or any public trust, or public corporation, or by the governing body of any of them, or by any public board or boards, derived from the contributions by the State or such city, county, city and county, or other political subdivision, or such public trust, public corporation, governing body, or public board or boards, or by any officer or employee thereof for retirement or pension purposes or the payment of disability, death or other benefits, or benefits payable under the provisions of 'An act to establish a system of unemployment reserves for this State, and making an appropriation therefor,' approved June 25, 1935, are exempt from attachment or execution."

2. C.C.P., § 690, reads: "The property mentioned in Sections 690.1 to 690.25, inclusive, this code, is exempt from execution or attachment except as therein otherwise specially provided, when claim for exemption is made to the same by the judgment debtor or defendant as hereinafter in Section 690.26 provided."

534, 106 P.2d at page 873, that "[t]here is no exception in the exemption laws which would authorize the satisfaction of an alimony judgment out of exempt property belonging to the husband and it is not the province of the courts to read such an exception into the law, in the absence of waiver of the exemption by the husband." This language is applicable to the instant case and justifies the ruling made by the trial court.

Plaintiff relies upon a number of California cases to support her position. Upon analysis, however, the authorities do not sustain her contentions.

Plaintiff cites Bailey v. Superior Court, 215 Cal. 548, 11 P.2d 865, for the proposition that alimony and child support claims may be enforced by execution or attachment. The court in this case only held that *exempt property could be taken into consideration* when determining whether the defendant was able to pay child support, not that it was subject to execution or attachment.

Avilla v. Avilla, 81 Cal.App.2d 210, 183 P.2d 668, also cited by plaintiff, does not support her position. Here, instead of making a judicial exception in favor of alimony and child support, the court actually granted the full exemption provided for by section 690.10 (seamen's earnings).

Plaintiff cites several California cases where the exemption provision relative to wages [3] apparently has been held inapplicable to claims founded on alimony or child support, and argues that such exception should be likewise applied to the sections presently under consideration. See Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953, 106 A.L.R. 580; Lawson v. Lawson, 158 Cal. 446, 111 P. 354; Avilla v. Avilla, supra; Rankins v. Rankins, 52 Cal.App.2d 231, 126 P.2d 125.

[3] Whether or not special status has been accorded to alimony and child support claims under the earnings exemption provision (§ 690.11) is not decisive in the instant case. The language of the earnings exemption section is entirely different from that found in the pension sections. The former has express provision for exceptions to its coverage while the latter make no provision for any exception whatsoever. Furthermore, one purpose of the earnings exemption, as expressly declared by the legislature in the statute, is to provide for the family from such earnings. The courts have given "family" a broad interpretation so as to include a divorced wife and minor children of that marriage. See Yager v. Yager, 7 Cal.2d 213, 220, 60 P.2d 422, 106 A.L.R. 664. Therefore, to hold the husband's earnings exempt from such a claim would defeat the announced purpose of such exemption. The language of sections 690.22 and 690.23 is not open to such interpretation.

Lastly, plaintiff points out that this court in Rankins v. Rankins, supra, stated that the Supreme Court in the Smallbone case did not intend to reverse the policy which permits attachment or execution of earnings in favor of an alimony or child support judgment. This may well be true when the question involves earnings. However, when the above quoted language from the Smallbone decision is applied to the present case, it serves as a clear limitation upon the courts.

[4] In the instant case we only hold that under the code sections here involved the disability funds payable by the city to the defendant are not subject to attachment or execution. This is not to say that plaintiff does not have other remedies available to her to enforce her claim. See In re Smallbone, supra; Bailey v. Superior Court, supra.

The orders appealed from are affirmed.

ASHBURN and HERNDON, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

3. Code Civil Procedure, section 690.11, formerly 690, subd. 10.

166 Cal.App.2d 399

Clarence BRAXDALE, Plaintiff and Respondent,

v.

Agnes BANGE, Defendant and Appellant.

Civ. 23295.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1958.

Action for breach of contract to form partnership for purpose of constructing, operating and selling residential income units on real property owned by defendant who subsequently sold property. The Superior Court of Los Angeles County, Paul Nourse, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained finding that plaintiff had undertaken burden of financing project, that 60 days would not be more than a reasonable time to perform and that plaintiff in less than 60 days had virtually accomplished that task when defendant notified him of sale of property and thus made accomplishment of venture impossible.

Affirmed.

1. Partnership ⇐21

An action at law will lie for breach of an agreement to form partnership when its terms are not void for uncertainty or want of mutuality.

2. Partnership ⇐21

Provision in agreement to form partnership that agreement should not be binding unless adequate finances were assured to support the entire endeavor did not render agreement unenforceable but operated to afford a reasonable time for the arranging of necessary finances.

3. Partnership ⇐21

In action for breach of contract to form partnership for purpose of constructing residential income units on real property owned by defendant, evidence sustained finding that plaintiff had undertaken burden of obligation of raising finances, that 60 days was not more than a reasonable time to perform and that plaintiff in less than 60 days had virtually accomplished the task when defendant notified him of sale of her lot and thus made accomplishment of venture impossible.

4. Partnership ⇐21

Award allowing $800 to building contractor for getting bids of subcontractors, arranging financing and the like in connection with proposal to form partnership with real estate owner for purpose of constructing, operating and selling residential income units on property and allowing $200 for preliminary plans made by contractor was not excessive. West's Ann. Bus. & Prof.Code, § 5537.

5. Work and Labor ⇐14(2)

Where building contractor was obligated by agreement to render services in connection with formation of partnership with real estate owner, owner actually or impliedly requested those services and contractor was entitled to recover therefor from owner when owner sold property and thus prevented further performance on part of contractor.

6. Brokers ⇐8(3)
Partnership ⇐21

In action for breach of contract to form partnership for purpose of constructing, operating and selling residential income units on real property of defendant, evidence sustained finding that real estate broker who procured original agreement for plaintiff, who was associated with plaintiff and who acted as agent in setting up the deal was not plaintiff's agent for purpose of rescission of contract or waiver of breach of contract and evidence sustained implied finding that there was no rescission or acquiescence by plaintiff in defendant's breach occurring when she sold property.

Jos. M. Wapner, Los Angeles, for appellant.

Saul B. Miners, Hollywood, for respondent.

ASHBURN, Justice.

Action for damages for breach of contract to form a partnership. The court awarded plaintiff damages of $1,000 and defendant appeals.

The basic agreement was in writing and reads:

"Proposal to Form a Partnership

"September 28, 1956

"We propose to form the Bange Development Company, a partnership, for the purpose of constructing, operating and selling residential income units on the real property known as 5327 Santa Monica Blvd.

"The partnership shall consist of the following:

"1. Clarence Braxdale, general contractor, who herewith agrees to provide plans, construct and manage the proposed structure in the capacity of general partner with the right to one-half of the net profit of the project for his services.

"2. Agnes Bange, present owner of subject property, who herewith agrees to invest her unencumbered lot at an expressed value of $25,000.00. This sum to represent her investment, and upon sale of the completed units she shall be reimbursed in this amount before any division of the net profits—of which she shall also receive her proportionate share.

"3. Any individual or individuals whose financial aid must be secured to the full completion of the project and who will share in the profit according to the amount of their investment.

"This proposal shall not be binding upon any parties signing unless adequate finances are assured to support the entire endeavor.

"Date: Sept. 28, 1956 Clarence Braxdale
"Clarence Braxdale

"Date: _____ Agnes W. Bange
"Agnes Bange"

The trial judge made findings which, in paragraphs I, II, III and IV, are a paraphrasing of the above quoted agreement. He also found that plaintiff agreed to furnish within a reasonable time necessary finances in the form of a building loan of $45,000 to $51,000, and to invest individually or through nominees such additional sums as might be necessary for completion of the project; that plaintiff, between September 28, 1956 and November 21, 1956, and within a reasonable time, performed services in connection with the venture which, exclusive of architectural services, included the conception and preparation of preliminary sketches for a 17-unit apartment house to be erected on defendant's land, contacting financial institutions in an effort to procure a building loan, ascertaining the cost of construction of said proposed apartment house, interviewing subcontractors and materialmen, obtaining bids from subcontractors, having available for investment sufficient moneys to complete said venture; that plaintiff ascertained the estimated cost of construction to be approximately $68,900 and that a building loan could be obtained of approximately $50,000; that plaintiff had available and was ready to invest whatever sums were necessary to complete the project over and above the construction loan; that defendant on or about November 23, 1956, sold the lot upon which the building was to be erected for the sum of $30,000, and refused and failed to invest the said lot in the partnership as agreed; that 60 days was not an unreasonable time within which plaintiff should provide for completion of plans and procuring of necessary financing; that the procuring of a construction loan was frustrated by defendant's acts; that her breach of contract prevented plaintiff from completing performance of the provisions of the agreement on his part to be performed, and as a result thereof he suffered damages; that the value of said services rendered by plaintiff, exclusive of architectural services, was $1,000 and plaintiff was damaged in said sum.

[1] It is settled that an action at law will lie for breach of an agreement to form a partnership when its terms are not void for uncertainty or want of mutuality. 37 Cal.Jur.2d § 18, p. 557; § 81, p. 684; 68

C.J.S. Partnership § 11, pp. 418–419; § 111, p. 555; 40 Am.Jur., § 27, p. 142; § 498, p. 470.

[2, 3] The case was tried and decided long before the decision of Mattei v. Hopper, 51 Cal.2d 119, 330 P.2d 625, but the trial judge seems to have anticipated it and to have held impliedly that there was no want of mutuality or of consideration. The attorneys argue the point, and defendant testified that she relied upon the last paragraph of the contract when she sold her lot and thus prevented further performance on the part of plaintiff. The Mattei reasoning requires a holding that the last paragraph of the instant agreement does not render it unenforceable, but operates to afford a reasonable time (no specific period being mentioned) for the arranging of necessary finances and performance of plaintiff's other obligations. The court ruled that the contract could be supplemented by parol for the purpose of determining where the obligation to raise the finances lay; having done so, it found upon adequate evidence that plaintiff had undertaken that burden; that 60 days would not be more than a reasonable time to perform; that plaintiff in less than 60 days had virtually accomplished that task when defendant notified him of the sale of her lot and thus made the accomplishment of the venture impossible. There appears to be no error in this holding.

[4] The finding of damage is attacked as unsupported by the evidence. Plaintiff valued his services in planning the structure, getting bids from subcontractors, arranging for financing and the like, at $10 an hour; said he spent 240 working hours of which 80 hours were expended after the plans were completed. His overall valuation of the services was $3,000. The judge ruled that preliminary plans are not architect's services (Walter M. Ballard Corp. v. Dougherty, 106 Cal.App.2d 35, 42, 234 P.2d 745) but that final plans fall in that category and as plaintiff was licensed as a contractor, not as an architect, he could not recover for plans other than the preliminary ones. In effect this is a ruling that plaintiff did not come within the exception of Business & Professions Code, § 5537, which relates to plans or drawings for one's own buildings (5 Cal. Jur.2d § 6, p. 128). It is unnecessary for us to determine whether this ruling was correct. Allowing $800 for other services and $200 for preliminary plans would justify the award of $1,000; and that process finds support in the record.

[5] Relying upon Hartley v. Weller, 104 Cal.App.2d 118, 120, 231 P.2d 133 (no application for hearing in Supreme Court), appellant argues that the services of plaintiff were not performed for the benefit of defendant or at her request and, as the partnership had not come into being, there could be no recovery against her for such services. The Hartley case is distinguishable upon the facts. The award at bar was made as an assessment of damages, not by way of an assumpsit, which seems to be the standpoint from which the matter was viewed in Hartley. See, Webster v. Beau, 77 Wash. 444, 137 P. 1013, 1016, 51 L.R.A., N.S., 81, as to the propriety of such an award. Moreover, the Hartley opinion says: "For aught that is disclosed in the complaint appellant incurred this damage voluntarily. The complaint does not charge that respondent had actually or impliedly requested appellant to render any services or incur any indebtedness in his behalf or that of the proposed partnership which would give rise to an obligation therefor in favor of appellant." 104 Cal.App.2d at page 120, 231 P.2d at page 134. In the case before us plaintiff was obligated by contract to render the services for which he was awarded compensation and thus in a sense appellant did "actually or impliedly [request respondent] to render [those] services." We do not consider the Hartley decision to be controlling here.

[6] The original agreement was procured for plaintiff by Mrs. Doris Drake, a real estate broker who was associated with him and acting as his agent in setting up the deal. When defendant telephoned her that she had sold the lot but was not sure the sale would go through, Mrs. Drake

said: "Well, if it shouldn't, then we still have a deal." Counsel for appellant now asserts this to have worked a rescission, although defendant herself testified: "The Court: What did you say; that if the sale didn't go through, you still had the deal? A. No, I don't believe so. I don't believe I gave her any answer at all. I might have said, 'The deal is going through.'" The trial judge correctly ruled that there was no showing that Mrs. Drake was plaintiff's agent for any such purpose as rescission or waiver of breach of contract. He was also warranted in finding that there was no rescission or acquiescence in defendant's breach, which ruling is implicit in the formal findings signed by the court.

Appellant's claim that the findings are uncertain, contradictory and inconsistent, cannot prevail for we find no merit in it.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

166 Cal.App.2d 390

Knute E. GRANBERG, Nan O. Granberg, Plaintiffs and Respondents,

v.

Dorothy TURNHAM, Dave Graham, James Rogers, Jim Milner, Don Engle and San Fernando Valley Real Estate Board, Inc., a Corporation, Defendants,

Dorothy Turnham, Appellant.

Civ. 23228.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1958.

Principals' action to recover for negligence of real estate broker in effecting voidable sale. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Ashburn, J., held that zoning law is directed toward orderly development of properties within city, not protection of brokers, and that principals' violation of zoning ordinance could not constitute such contributory negligence as would preclude recovery from broker.

Affirmed.

1. Estoppel ⇐55

Reliance upon fact which is claimed to work an estoppel is of essence of plea.

2. Estoppel ⇐54
Principal and Agent ⇐178(1)

Where broker's agent, acting in course of his employment, had been told that property was partially in each of two zones, broker could not successfully contend, in action for negligence in effecting voidable sale, that plaintiffs should be estopped, by virtue of appearance of premises, from denying that they had represented property to be entirely within a commercial zone, even if broker's agent had not reported such information to her.

3. Principal and Agent ⇐177(1)

Principal was chargeable with knowledge of information acquired by her agent in transaction of her business. West's Ann. Civ.Code, § 2332; West's Ann.Bus. & Prof. Code, § 10177(h).

4. Principal and Agent ⇐177(3)

An agent's knowledge of content of contract may be imputed to his principal.

5. Trial ⇐251(3)

If there was any contributory negligence shown by evidence, in action to recover for negligence of broker in effecting a voidable sale of real property, court could properly instruct with respect thereto, even though there was no specific plea of contributory negligence.

6. Appeal and Error ⇐959(3)
Pleading ⇐236(4)

The matter of allowing amendments at close of trial rests in sound discretion of trial judge, whose action will not be

disturbed in absence of abuse of that discretion.

7. Brokers ⇐38(1)
Municipal Corporations ⇐601(3)

Zoning law is directed toward orderly development of properties within city, not protection of brokers, and principals' violation of zoning ordinance could not constitute such contributory negligence as would preclude their recovery from broker for negligence in effecting voidable sale of real property.

8. Trial ⇐83(2)

Where only good objection to admission of offered evidence was lack of particularization, objection that such evidence was "irrelevant, incompetent and immaterial" was insufficient.

9. Damages ⇐142

As a general rule, special damages must be alleged with particularity.

10. Appeal and Error ⇐231(2)

Trial of special damages issue without specific objection that it is outside of pleadings precludes parties from raising point for first time on appeal.

11. Evidence ⇐121(2)

Verbal act done in performance of her agent's transaction of principal's business was admissible against her and binding upon her.

12. Evidence ⇐220(2)

Statement, made in defendant's presence, that it was all her fault, called for a response from her, and her silence in face of such statement took on character of an admission, and evidence with regard thereto was thus admissible in action to recover for negligence of real estate broker in effecting voidable sale.

13. Fraud ⇐29

Representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury give person so acting same right to relief as if representations had been made to him directly. West's Ann.Civ.Code, § 1711.

14. Fraud ⇐21

Where broker put commercial zone into information furnished to real estate board which incorporated same into its multiple listing, as broker intended that it should do, and purchaser came into possession of that listing, read it and relied upon it, legal effect was same as if broker had made representation directly to purchaser, and broker could not successfully assert, as defense to action to recover for her negligence in effecting voidable sale, that purchaser had not relied or acted upon anything done or said by her.

15. Principal and Agent ⇐156

Principal was responsible for her agent's representations. West's Ann.Civ. Code, § 2351.

Raymond R. Roberts, Van Nuys, for appellant.

Eugene S. Valian and William Camil, Los Angeles, for respondents.

ASHBURN, Justice.

Defendant Turnham appeals from a judgment rendered against her for $3,092.67, based upon her negligence, as a real estate broker, in effecting a sale of real property from plaintiffs to Vernon L. Beck and wife through misrepresentation as to zoning, resulting in a rescission of the deal by Beck and a repurchase of the property by plaintiffs Granberg. The case was tried before a jury whose verdict for said $3,092.67 represents expenses actually incurred by plaintiffs—such as real estate commission, escrow fees, etc.—in consummating the original sale and the repurchase.

The evidence is conflicting. The proof favorable to plaintiffs' contentions is to the following effect. They owned property known as 6820 Balboa Boulevard, in the city of Van Nuys, upon which they conducted a retail nursery and landscaping business. The frontage is 100 feet and lies in two zones defined by the city zoning ordinance; the south 45 feet in zone C-2 which permits of use for a nursery and

the north 55 feet in R-1 or single family residential zone, which excludes such nursery use. The line between the two zones ran through the residence situated on the property, and the southern portion was used for conduct of the business while the northerly part had storage of nursery stock upon it and display of a fertilizer sign, neither of which was permissible in an R-1 zone.

Mrs. Turnham was a real estate broker under whom David Graham and James Rogers worked as salesmen; they had authority to sign her name to listing agreements. On or about October 9, 1955, Mr. Graham called upon plaintiffs with a view to listing the property. Mr. Granberg told him of the existence of both R-1 and C-2 zoning upon the premises. A listing agreement was made on October 16th, which employed Mrs. Turnham as realtor to sell the property, and same was signed on her behalf by Graham. At that time Mr. Granberg again told him the facts about the zoning and showed him where the line ran through the dining room in which they were sitting. Mrs. Granberg was not present on that occasion, but at some time before the sale was made (escrow was opened November 26, 1954) she talked with Graham about the zoning. She testified: "Q. Now, what did he say to you and what did you say to him about the property? A. Well, I explained the zoning in the property when it wasn't on C2 and he says this was the words Mr. Graham said. 'We won't mention that. The property will sell beter if we don't mention it.' Q. And what did you say then? A. I said, 'Mr. Graham, you cannot do that. You cannot do that.' Q. What did he say to you? A. 'All right'. And then he left. He left. He was laughing at the same time he said it."

The listing agreement had a form on the back designed for entry of details concerning the property, including the zone. When originally executed this back of the paper was not filled in at all. Graham took the listing to the office and testified he did not fill in that portion. Mrs. Turnham says she did it. In the appropriate place the zone was stated as C-2 without any reference to R-1. An original or copy then went from appellant to the San Fernando Valley Real Estate Board which prepared from it a "multiple listing" and distributed same to all members of the board. It stated the zoning to be C–2.

Mr. Vernon Beck and his wife were looking for C-2 property in the San Fernando Valley for use as a baton school. They contacted the office of broker James A. Milner, with whom Donald Engle, another broker, was associated. They had the multiple listing showing this property zoned as C-2. Beck told Engle he was interested in C-2 property in the valley, was shown such properties for a week or ten days, and then was taken to see plaintiffs' place. The Becks saw and had possession of the multiple listing upon it, and Engle impliedly represented to them that it was C-2 property. Mr. Beck testified: "We had looked at nothing but C2 property throughout the Valley and like I say we wanted a home on this C2 property and, of course, it was taken for granted; that's all we looked for and I think that's all we were shown." Neither Beck nor Engle had any conversation with either plaintiff upon the subject. Herman P. Beck, an uncle of the buyer, was with him when he told Engle that he was looking for C-2 property. He said that no one stated in his presence either on that or on later occasions when he accompanied his nephew, that the plaintiffs' property was C-2, and "I think we went by the listing entirely."

Milner and Engle were acting as subagents of Mrs. Turnham in this deal. When the escrow was closed she received a commission of $1,600, which she divided with Milner, Engle, Graham, Rogers and the Real Estate Board. After the purchase the Becks went to the eastern part of the country and plaintiffs remained in possession by agreement. Late in June the Becks learned that the property was not entirely within the C-2 zone, told Mr. Granberg about it and demanded that he repurchase the property. After some consideration he agreed to do this and repaid the Becks their

down payment of $12,000, plus certain interest upon mortgages which they had paid. Then plaintiffs confronted Mrs. Turnham with the situation. Mr. Granberg asked her why the property was not listed right and she replied, "well, I assumed that it was C2." She also said she would not pay back the commission but would sell the property again for plaintiffs without cost. Mr. Graham was present at the time; he kept walking back and forth and said: "It was all Dorothy's fault," referring to Mrs. Turnham. Then followed the lawsuit.

Graham testified that neither of the Granbergs told him about zoning or about the property being in two zones; that he did not fill in the reverse side of the listing agreement and did not tell the plaintiffs that it was all Mrs. Turnham's fault. Appellant testified that she placed the zoning information on the back of the listing agreement; that she did so at plaintiffs' home after asking Mrs. Granberg if "[t]his is a commercial zone" and receiving an affirmative reply. Appellant also denied that she said she had assumed the property was all in a C-2 zone, but admitted that she expressed a willingness to resell for plaintiffs without charge. She also said she did not recall any remark by Graham about its being all her fault.

In this setting the jury found for plaintiffs and the trial judge denied a new trial. Originally, Graham, Rogers, Milner, Engle and San Fernando Valley Real Estate Board were codefendants with Mrs. Turnham. The complaint was in two counts; the first sounded in negligence and the second in fraud. Nonsuit was granted as to the fraud count. Defendants Graham and Rogers were granted nonsuits. The jury found for Milner and Engle. Thus Mrs. Turnham became sole judgment debtor and appellant.

[1–4] Her counsel argues that plaintiffs were using the property illegally and therefore they are precluded from recovering for Mrs. Turnham's negligence. It is said that they are estopped to deny that the entire property was in the C-2 zone; we infer that counsel means that they are estopped to deny that they represented it to be in that zone. The appearance of the premises seems to be the basis of the argument, which overlooks the principle that reliance upon the fact which is claimed to work an estoppel is of the essence of the plea. Gajanich v. Gregory, 116 Cal.App. 622, 634, 3 P.2d 389; American Nat. Bank of San Francisco v. A. G. Sommerville, Inc., 191 Cal. 364, 372, 216 P. 376; Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp., 1 Cal.2d 121, 128, 34 P.2d 139. Here there is no basis for an estoppel in the evidence which the jury credited, for Mrs. Turnham was told through her agent Graham that the property was partially in each of zones C-2 and R-1. The fact that he may or may not have reported this information to his principal is immaterial, for he was acting in the course of his employment and the principal was charged with knowledge of information acquired by him in the transaction of her business. 2 Cal.Jur.2d, § 160, p. 855; Civ.Code, § 2332; Bus. & Prof. Code, § 10177(h). "An agency's knowledge of the content of a contract is imputed to his principal. [Citations.] This rule of law is not a rebuttable presumption. It is not a presumption at all. It is a rule which charges the principal with the knowledge possessed by his agent. [Citations.]" Columbia Pictures Corp. v. DeToth, 87 Cal. App.2d 620, 630, 197 P.2d 580, 586.

[5–7] Appellant claims there was error in the denial of a motion for leave to amend the answer to allege contributory negligence. This motion was made after all parties had rested. It was presented and denied on November 29, 1957; the answer had been filed on May 23, 1956. The contributory negligence claimed by counsel is violation of the zoning ordinance. It is said: "This defense was unknown to the defendant who finally remained in the case until the plaintiff's testimony was finished." But the answer alleges that plaintiffs, "at the time the property was listed and up to the time of sale used all of the property in violation of existing zoning regulations of the City of Los Angeles, that the use plain-

tiffs were at that time making of the property was as C-2 property." So there was nothing new in the defense. All the evidence was in at the time the motion was made and if there was any contributory negligence shown thereby the court properly could have instructed with respect thereto, although there was no specific plea of contributory negligence. 35 Cal.Jur.2d, §§ 239 and 240, p. 776. There are no instructions in either transcript.

This matter of allowing amendments at the close of the trial rests in the sound discretion of the trial judge, whose action will not be disturbed in the absence of an abuse of that discretion. 39 Cal.Jur.2d, § 244, p. 357; Vogel v. Thrifty Drug Co., 43 Cal. 2d 184, 188, 272 P.2d 1; Rogers Bros. Co. v. Beck, 43 Cal.App. 110, 112, 184 P. 515; Palmer v. Wahler, 133 Cal.App.2d 705, 708, 285 P.2d 8.

There could have been no such abuse of discretion here, for the violation of the zoning ordinance could not constitute contributory negligence. That law is directed toward orderly development of properties within the city, not the protection of real estate agents who undertake to sell a given parcel; hence the violation thereof could not spell negligence as to the broker, who was not within the class for whose protection the law was passed. See, Nunneley v. Edgar Hotel, 36 Cal.2d 493, 497, 225 P. 2d 497; Corbett v. Spanos, 37 Cal.App. 200, 204, 173 P. 769; Hagen v. Laursen, 121 Cal.App.2d 379, 386, 263 P.2d 489; Boie-Hansen v. Sisters of Charity, 152 Cal.App. 2d 845, 848, 314 P.2d 189.

[8–10] It is asserted that the court awarded excessive damages in that the items included were special damages which had not been particularly alleged. The award includes plaintiffs' expenses of both escrows. In the first instance they aggregated $2,065.62, consisting of real estate commission of $1,600, interest on existing loan, $139.03, prepayment penalty, $90.77, service charge, $7.50, termite report, $10, title policy, $131.75, etc. The second escrow amount was $1,027.05, which included an allowance to Becks of $729.90 to cover their expenses of the first escrow, certain insurance and recording fees, interest upon a loan procured by them, etc. The complaint specifically alleges the commission item of $1,600; it also says that upon Becks' rescinding plaintiffs were compelled "to repay to the said Becks all monies which plaintiffs had received from the Becks, plus all expenses incurred by the Becks in connection with their purchase of the property. * * * That plaintiffs have been further damaged by the amount of all expenses incurred by them in connection with the sale of the property to the Becks and the reconveyance of the property from the Becks to plaintiffs, plus the loss to the plaintiffs of the profit and interest to be earned by plaintiffs on the sale of such property to the Becks." When evidence was first offered upon this subject and after the question had been answered, counsel for Graham and Rogers said: "Objected to—irrelevant, incompetent and immaterial," and "Object." Such objections were not sufficient, for the matter was clearly admissible. The only good objection would have been that the items were not particularized. As to the inadequacy of such objections, see, In re Estate of Pierce, 32 Cal.2d 265, 273, 196 P.2d 1; Crocker v. Carpenter, 98 Cal. 418, 421, 33 P. 271; 3 Cal.Jur.2d § 157, p. 636. When the escrow officer later testified to the expenses of the two escrows, no objection whatever was made. Thus appellant stands in the position of one who has not objected at all to the evidence in question.

While the general rule is that special damages must be alleged with particularity (14 Cal.Jur.2d, § 22, p. 651), it is also true of that, as of any other issue, that a trial of the issue without specific objection that it is outside the pleadings, precludes the parties from raising the point upon appeal for the first time. 15 Am.Jur., § 306, p. 750; 3 Cal.Jur.2d, § 140, p. 604; § 142, p. 607; 3 Witkin on California Procedure, § 97, p. 2265; Cockerell v. Title Ins. & Trust Co., 42 Cal.2d 284, 288, 267 P.2d 16; Miller v. Peters, 37 Cal.2d 89, 93, 230 P.2d 803; Buckley v. Chadwick, 45 Cal.2d 183, 188, 288 P.2d 12, 289 P.2d 242; Viglione

v. City and County of San Francisco, 109 Cal.App.2d 158, 159–160, 240 P.2d 68; Standley v. Feather River Pine Mills, 112 Cal.App.2d 101, 104, 245 P.2d 657.

[11, 12] Immediately following the granting of the Graham motion for nonsuit appellant's attorney moved "to have all of the testimony of Graham and Rogers stricken from the record on the grounds that it is hearsay and have the jury admonished to disregard all such testimony." This was denied and the ruling as to Graham's testimony is now challenged as error. Counsel's argument goes not to the testimony of Graham but to the statements made by him at the time Mrs. Granberg told him about the zoning, his remarks when he said in appellant's presence that it was all her fault, and his repetition of this last remark to the Granbergs as they were leaving appellant's office and on their way to the automobile. The argument is wholly without merit. The first item was a verbal act done in the performance of the agent's transaction of appellant's business, and of course admissible against her and binding upon her. The statement that "it was all Dorothy's fault," being made in appellant's presence, called for a response from her and her silence took on the character of an admission. The third item probably would have been excluded had objection been made at the time, but that was not done. The presence or absence of Graham as a defendant has no legitimate bearing upon the motion to strike.

[13–15] Finally, appellant argues that Vernon Beck did not rely or act upon anything done or said by her. The point cannot be sustained. Appellant put the C-2 zone into the information furnished the Real Estate Board, which incorporated the same into its multiple listing, as appellant intended it should do. "The law is well settled that 'representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury gives the person so acting the same right to relief as if the representations had been made to him directly.'" Simone v. McKee, 142 Cal.App. 2d 307, 313, 298 P.2d 667, 671. See, also, Civ.Code, § 1711; Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 188, 25 P.2d 839, 91 A.L.R. 1357; 23 Cal.Jur.2d, § 32, p. 78; § 33, p. 79. Beck came into possession of that listing, read it and relied upon it. The legal effect of this was the same as if appellant had made the representation directly to him. Moreover, Engle was appellant's sub-agent and he impliedly represented to the buyer that the property was all within the C-2 zone. Appellant, the principal, is of course responsible for that representation. Civ.Code, § 2351; 2 Cal.Jur.2d, § 69, p. 722.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

166 Cal.App.2d 602

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Bills LEWIS, Defendant and Appellant.

Cr. 6112.

District Court of Appeal, Second District, Division 1, California.

Dec. 30, 1958.

Proceeding on an application for a writ of error coram nobis. The Superior Court, Los Angeles County, Lewis Drucker, J., denied motion, and defendant appealed. The District Court of Appeal, Lillie, J., held that bare accusation that district attorney and deputy public defender willfully suppressed evidence was insufficient to justify writ of error coram nobis.

Affirmed.

1. Criminal Law ⇐997(1), 1147

Granting of relief on application for writ of error coram nobis rests largely within lower court's discretion, and its ruling thereon will not be upset on appeal except for an abuse thereof.

2. Criminal Law ⇐997(6)

Writ of error coram nobis is limited writ available only where no other remedy exists, is intended to reach errors of fact extrinsic to record and its function is to bring to attention of court facts which existed at time of trial that would have constituted a valid defense, but which, without negligence on part of defendant, were not presented, either through duress, fraud or excusable mistake and which, not appearing on face of record, would have effected an acquittal of petitioner or, at least, have caused a more favorable judgment to be entered against him.

3. Criminal Law ⇐997(15)

In coram nobis proceedings there is a strong presumption that judgment of conviction is correct.

4. Criminal Law ⇐997(15)

In coram nobis proceeding defendant has burden of overcoming presumption in favor of validity of judgment by establishing through a preponderance of strong and convincing evidence that he was deprived of substantial legal rights by extrinsic causes and lower court is not required to accept at face value the allegations of motion or petition even though it be verified and uncontradicted.

5. Criminal Law ⇐997(4)

Bare accusation that district attorney and deputy public defender willfully suppressed evidence in favor of defendant would not justify granting of writ of error coram nobis.

6. Criminal Law ⇐997(15)

Where defendant alleged that his witness was prevented from testifying, but did not reveal identity of witness, or in what manner or by whom he was prevented from testifying, or to what matters he would have testified had he been given the opportunity, defendant was not entitled to writ of error coram nobis on ground that witness had been prevented from testifying.

7. Criminal Law ⇐997(15)

If defendant, in connection with his allegation, in motion for writ of error coram nobis, that his witness had been prevented from testifying, referred to certain witness who had testified but whom deputy public defender did not see fit to question concerning gun allegedly used in assault with deadly weapon, defendant was not entitled to writ of error coram nobis in absence of showing that such witness would have answered such questions favorably to defendant, or that if he were to be asked such questions in the future, he would so testify, or that if deputy public defender were called he would testify that he had suppressed evidence.

8. Criminal Law ⇐997(11)

Where defendant in his motion for writ of error coram nobis charged that verdict was decided by "lot of means, other than that of a fair expression of opinion" on part of the judge but failed to provide any reasonable explanation therefor, or offer any proof thereon, such general accusations were insufficient to constitute the strong and convincing proof required of defendant to overcome presumption in favor of validity of judgment and denial of writ of error coram nobis was not an abuse of discretion.

9. Criminal Law ⇐997(4)

Defendant's alleged ignorance of law in failing to appeal from judgment was insufficient to justify issuance of writ of error coram nobis.

10. Criminal Law ⇐997(5)

Lack of effective aid of counsel is not properly raised in a proceeding for writ of error coram nobis.

11. Criminal Law ⇐997(4)

Fact that district attorney and deputy public defender were both state officials was insufficient to constitute any evidence of collusion between them or influence or coercion and was insufficient basis for issuance of writ of error coram nobis.

12. Criminal Law ⇐641

Public defender is free from any restraint or domination by district attorney or of prosecuting authorities and is as free to act in behalf of his client as if he had been regularly employed and retained by defendant whom he represents.

Ray M. Davidow, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

LILLIE, Justice.

On May 7, 1957, defendant was convicted by the trial court of first degree burglary and assault with a deadly weapon. It also found four prior felony convictions alleged in the information to be true and sentenced defendant to the state prison. At the trial he was represented by a deputy public defender. No motion for a new trial was made nor was an appeal taken from the judgment. Four months later, defendant in propria persona filed in the lower court a document denominated "Motion to Annul, Vacate and Set Aside Judgment," later held by this court to constitute an application for a writ of error coram nobis. People v. Lewis, 157 Cal.App.2d 722, 321 P.2d 859.

Defendant in his motion asked the lower court to set aside the judgment of conviction or, in the alternative, accord him a full hearing on his allegations. He alleged therein that the district attorney and the deputy public defender wilfully and knowingly suppressed evidence favorable to him; a defense witness was prevented from taking the stand; the "verdict" was decided by "lot of means, other than that of a fair expression of opinion, on the part of the judge"; he was not given sufficient aid by counsel to protect his rights and he failed to appeal because he was ignorant of the law.

Although defendant admitted that at the trial the prosecution had proved the commission of the burglary and assault charges and connected defendant therewith through positive identification by the victim and evidence that the revolver taken from the burglary was subsequently pawned by defendant, he asserted in his motion that he had been home all night on the night of the burglary and that Andrew Swift saw defendant purchase the revolver from one Scott subsequent thereto. Defendant claimed that he advised the deputy public defender that Swift saw him buy the gun from Scott; that Swift told defendant's lawyer he witnessed the purchase but the public defender refused to ask Swift about it on the stand because "I was afraid to ask the witness, Andrew Swift, the 64 Dollar question; you cannot never tell what a witness answer will be under oath," thereby suppressing "evidence knowingly by him favorable to defendant; and the fact is manifest and undutiable (sic) that he should have ask the witness the said 64 Dollar question," and had he done so "the endition (sic) of judgment would have been prevented."

The verified motion and attached points and authorities were the only documents filed by defendant. No affidavits or proof of any kind in support thereof were proffered by him. It is from the order denying the motion, defendant appeals.

Appellant contends that the lower court abused its discretion in denying the motion and/or in refusing to grant a hearing to which Swift and the deputy public defender should have been subpoenaed, on the ground that the conduct of the deputy public defender in failing to ask Swift about the gun constituted "extrinsic fraud as to the defendant."

[1] The granting of relief in proceedings of this kind rests largely within the lower court's discretion, and its ruling thereon will not be upset on appeal except for an abuse thereof. People v. Bible, 135 Cal.App.2d 65, 286 P.2d 524; People v. Devora, 105 Cal.App.2d 457, 233 P.2d 653; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13.

[2] The writ of error coram nobis is a limited writ available only where no other remedy exists, aimed at reaching errors of fact extrinsic to the record (People v. Bible, 135 Cal.App.2d 65, 286

P.2d 524); and its function, as pointed out in People v. Flores, 147 Cal.App.2d 243, at page 246, 305 P.2d 90, at page 92: "* * * is to bring the attention of the court to such facts as existed at the time of the trial that would have constituted a valid defense, but which, without negligence on the part of the defendant, were not presented, either though duress, fraud or excusable mistake and which, not appearing on the face of the record, would have effected an acquittal of the petitioner or, at least, have caused a more favorable judgment to be entered against him (citations)."

[3, 4] At the outset it should be borne in mind that in coram nobis proceedings there is a strong presumption that the judgment of conviction is correct (People v. Flores, 147 Cal.App.2d 243, 305 P.2d 90; People v. Bobeda, 143 Cal.App.2d 496, 300 P.2d 97; People v. Shorts, 32 Cal.2d 502, 197 P.2d 330) and, as stated in People v. Bible, 135 Cal.App.2d 65, at page 68, 286 P.2d 524, at page 525: "(T)he petitioner is deemed to be prima facie guilty." Defendant, therefore, has the burden of overcoming the presumption in favor of the validity of the judgment by establishing through a preponderance of strong and convincing evidence (People v. Fritz, 140 Cal.App.2d 618, 295 P.2d 449; People v. Shorts, 32 Cal.2d 502, 197 P.2d 330). that he was deprived of substantial legal rights by extrinsic causes (People v. Flores, 147 Cal.App.2d 243, 305 P.2d 90; People v. Devora, 105 Cal.App.2d 457, 233 P.2d 653; People v. Bible, 135 Cal.App.2d 65, 286 P.2d 524). In this connection, the lower court is not required to accept at face value the allegations of the motion or petition even though it be verified and uncontradicted (People v. Martinelli, 118 Cal.App.2d 94, 257 P.2d 37; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; People v. Fritz, 140 Cal.App.2d 618, 295 P.2d 449).

It is clear from the record before us that defendant failed to meet his burden of producing the necessary "strong and convincing" evidence in support of the charges contained in his motion, and in fact failed to offer or produce any competent proof thereon by way of affidavit or otherwise.

[5] The motion itself contained only the most general charges. Beyond the bare accusation that the district attorney and deputy public defender wilfully suppressed evidence in his favor, defendant did not disclose therein when, how, or in what manner they accomplished this or the nature of the evidence suppressed.

[6, 7] Defendant further alleged in his motion that his witness was prevented from testifying, yet he did not reveal his identity, or by whom, or in what manner he was prevented from testifying, or to what matters he would have testified had he been given the opportunity. If, in this connection, he refers to Andrew Swift, it is obvious from defendant's own statements that Swift was not "prevented from testifying," that he was a witness for defendant at the trial and did testify, even though the deputy public defender in his experience and judgment and under the circumstances, did not see fit to question him concerning the gun. Defendant made no showing, by way of affidavit or direct testimony of Swift, or by any offer of proof, that at the trial Swift would have answered such a question favorably to defendant, or that, if he were to be asked such a question in the future, he would so testify. Nor has defendant made any offer of competent proof by way of affidavit or otherwise, that if the deputy public defender were called, he would testify to the conclusions outlined by defendant in his motion. The lower court had before it only the barest of charges contained in the motion and defendant's hearsay statements. Nor does the record disclose whether defendant himself testified he purchased the gun from Scott, or, if so, whether it was in the presence of Swift. However, it is clear that no one by the name of "Scott" testified at the trial.

As to the third charge that the "verdict" was decided by "lot of means, other than that of a fair expression of opinion, on the

part of the judge" defendant has not seen fit to provide any reasonable explanation therefor, much less offer any proof thereon.

[8] We are here confronted with only general accusations, bare of evidentiary support of any kind; and mere legal and factual conclusions based entirely upon hearsay statements of defendant. As such, we deem them to be insufficient to constitute any of the "strong and convincing" proof required of defendant to overcome the strong presumption in favor of the validity of the judgment, in order to establish his right to the writ. The lower court was wholly justified in denying the motion and we find no abuse of its discretion in the record before us.

As to defendant's remaining charges that he was not given sufficient aid of counsel to protect his rights and he failed to appeal his case through ignorance of the law, we deem them likewise to be without merit.

[9] Defendant's alleged ignorance of the law in failing to appeal from the judgment is no more excusable than would be his or his attorney's failure to file notice of appeal because of illness or incapacitation (People v. Dawson, 98 Cal. App.2d 517, 220 P.2d 587). Relief therefrom cannot be found by way of writ of error coram nobis.

[10–12] It is also well settled that lack of effective aid of counsel is not properly raised in a proceeding of this kind. People v. Parseghian, 152 Cal.App.2d 1, 312 P.2d 81; People v. Keller, 151 Cal.App.2d 201, 311 P.2d 14; People v. James, 99 Cal.App.2d 476, 222 P.2d 117; People v. Krout, 90 Cal.App.2d 205, 202 P.2d 635. The suggestion that the deputy public defender and district attorney joined in any way to "wilfully and knowingly" suppress evidence on his behalf, although vague, general and wholly unsupported, in the absence of any ground for such alleged action, can only be the result of an intimation arising out of the fact they are both "state officials." This fact alone is insufficient to constitute any evidence of collusion between them, influence or coercion. In this connection, the court stated in the case of In re Hough, 24 Cal.2d 522, at page 529, 150 P.2d 448, at page 452: "The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents." People v. Cole, 152 Cal.App.2d 71, 312 P.2d 701.

For the foregoing reasons the order is affirmed.

WHITE, P. J., and FOURT, J., concur.

166 Cal.App.2d 476

Helen REID and B. Louise Merry, Plaintiffs and Appellants,

v.

Winifred Alicia LANDON, Defendant and Respondent.

Civ. 23072.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1958.

Action for specific performance of an option agreement and in the alternative for damages for breach. From a judgment of the Superior Court of Santa Barbara County, Ernest D. Wagner, J., in favor of the defendant, the plaintiffs appealed. The District Court of Appeal, Lillie, J., held that the defendant was entitled to rescission of an "option letter agreement" on ground of mistake of fact and that partial rescission of the transaction could be permitted where the agreement was separable from an exchange of deeds.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

On plaintiffs' appeal from a judgment in favor of the defendant, evidence must be viewed in the light most favorable to the defendant, indulging all intendments and reasonable inferences in favor of sustaining the findings.

2. Contracts ⇐93(1)

Under statutes permitting trial court to adjudicate rescission of a written contract not any and every mistake is remediable and the "mistake of fact" must not have been caused by the neglect of a legal duty by the claimant, and in determining what conduct amounts to a neglect of duty, there must be an element of carelessness in nearly every case of mistake, and that which does not amount to neglect of a legal duty will not of itself bar rescission, where the mistake does not stem from an original error in judgment. West's Ann.Civ.Code, §§ 1577, 1689, 3406.

See publication Words and Phrases, for other judicial constructions and definitions of "Mistake of Fact".

3. Contracts ⇐99(1)

Although generally one is presumed to know the meaning of unambiguous language and will be bound by execution of a written instrument including it, rule applies only in the absence of fraud, confidential relationship or circumstances indicating excusable mistake.

4. Contracts ⇐93(1)

In order to authorize rescission of a contract for mistake of fact, mistake must be one material to contract and be such that it animated and controlled conduct of party, go to essence of object in view and not merely be incidental, and court must be satisfied, that but for mistake, complainant would not have assumed obligation from which he seeks to be relieved. West's Ann.Civ.Code, §§ 1577, 1689, 3406.

5. Contracts ⇐93(1)

Generally, a mistake of fact authorizing rescission of a contract occurs when a person understands the facts to be other than they are. West's Ann.Civ.Code, §§ 1577, 1689, 3406.

6. Appeal and Error ⇐1011(1)

To determine whether a mistake of fact existed, warranting rescission of a contract, the appellate court must accept as conclusive any decision of the trial court in a factual conflict if there is sufficient evidence in the record to support it, and a mere conflict in the testimony as to the mistake does not necessitate a denial of relief. West's Ann.Civ.Code, §§ 1577, 1689, 3406.

7. Vendor and Purchaser ⇐18(1)

Where plaintiffs, unknown to defendant, had greater knowledge concerning terms of agreement, giving plaintiff an option to purchase an acre of land, than the defendant and intimate friendship existed between parties and defendant relied on representations of plaintiffs that agreement merely gave the plaintiffs first option to purchase if defendant decided to sell, and had defendant known agreement was not the same she had instructed her counsel to prepare, she would not have signed it and consideration was wholly inadequate, defendant's mistake was due to conduct which constituted neither neglect of duty nor an error in judgment, and defendant was entitled to a rescission of agreement on ground of mistake. West's Ann.Civ. Code, §§ 1577, 1689, 3406.

8. Contracts ⇐171(1)

Whether a contract is susceptible of division depends on its terms, language employed, subject matter covered, nature and purpose of the agreement, its relation to other documents in the transaction and intention of parties as reflected by its terms.

9. Contracts ⇐171(1)

Where the things to be done under a contract are to be done at different times, and the consideration is apportioned to each of the items to be performed, the contract may be severable.

10. Contracts ⇐171(1)

Where defendant never intended to sell the acre sought by plaintiff, an option letter agreement to purchase such acre, which defendant was entitled to rescind

because of mistake, was separable from rest of transaction involving an exchange of deeds between parties, where such agreement was not a part of, or connected with, other agreements, and where it could not be said, that deeds' exchange depended upon getting "option" or that exchange of deeds would not have been agreed to unless option had been given.

11. Appeal and Error ⇐1008(3)

The trial court's interpretation of the meaning of an instrument cannot be disturbed on appeal when it appears to be reasonable and consistent with the intention of the parties.

Carleton B. Wood and Paul D. Kolyn, Santa Barbara, for appellants.

Cornwall & Westwick, Santa Barbara, for respondent.

LILLIE, Justice.

Plaintiffs filed an action for specific performance of an option agreement and, in the alternative, for damages for its breach. Defendant's answer set up a general denial and inadequacy of the consideration specified in the agreement and, in addition, alleged that the agreement had been rescinded for fraud and mistake. Plaintiffs appeal from the court's judgment in favor of defendant.

[1] Viewing the evidence in the light most favorable to respondent, and indulging all intendments and reasonable inferences in favor of sustaining the findings (Clark v. Redlich, 147 Cal.App.2d 500, 305 P.2d 239), the following is a brief summary of the pertinent facts surrounding the execution of the agreement.

Defendant owned a fifteen-acre ranch in Santa Ynez Valley, upon which she and one Miss Burt resided. As a gift, and for no consideration, defendant deeded one acre thereof to plaintiffs, close friends of hers, who lived and worked in the city. At defendant's invitation, plaintiffs decided to retire to defendant's ranch and open a tearoom. They moved into her home in 1946. Because of the intimate friendship existing among the four women, and defendant wanting them all to share equally with her in the ranch, in May, 1947, without receiving any monetary consideration therefor, she deeded the entire ranch to the four in joint tenancy. At this time plaintiffs relinquished their one acre. Shortly thereafter, plaintiffs constructed a tearoom, hereinafter called Orchard House, on a portion of the premises and opened it for business in the fall of 1947. Miss Burt died shortly thereafter and she is not involved in this litigation. Defendant had no interest in the tearoom and has never claimed any, but in order to help her friends finance it she contributed some of her own money, all of which has been repaid; and with her permission a mortgage was placed on the ranch. Although the ranch was held in joint tenancy, the tearoom was not a joint venture, but was constructed and operated entirely by the two plaintiffs.

In July, 1951, desiring to have in their names alone the land upon which Orchard House was located, plaintiffs proposed to defendant that she deed it to them in return for their deed to the remainder of the ranch. Since defendant at no time had or wanted any interest in Orchard House, she orally agreed with them to exchange deeds. Defendant told them she would have her attorney attend to it. An informal accounting then resulted in the settlement of all accounts, including proration of taxes, insurance, and reimbursement of any money due her; and plaintiffs agreed to pay her $1,000. Thereafter, but during the same conversation, plaintiffs discussed with defendant the one acre lying between Orchard House and the highway.

A factual conflict arises here, but the trial court found, and there is ample evidence thereof in the record, that there was no mention between plaintiffs and defendant of either any option to buy the acre in question or any sale price therefor; and that defendant at no time ever wanted, or intended, to sell the same. The evidence further discloses that after the re-

ciprocal deeds and informal accounting were each discussed and agreed upon plaintiffs then asked defendant if she would sell them the acre between Orchard House and the road. She said she would not and furthermore, it had been leased for five years. Plaintiffs then asked her if they could have the right of first refusal thereon, stating that in return therefor they would give her the right of first refusal on Orchard House. Defendant told them she was not interested in a first refusal right on Orchard House for had she any interest in it she would not have agreed to deed it to them in the first place. She further advised them that she did not want or intend to sell the acre in question. Finally, to keep harmony she agreed to give them a right of first refusal in the event she ever decided to sell. Defendant testified that she at no time agreed to give plaintiffs an option to buy and that the word "option" was never mentioned, nor was the subject of an "option" ever discussed.

Several days thereafter, defendant went alone to her attorney and discussed the various informal agreements, including the proposed reciprocal rights of first refusal, and accordingly asked him to draw the papers. After she left his office, he prepared certain deeds and documents, including a letter agreement which gave plaintiffs a right of first refusal on the acre and defendant a right of first refusal on Orchard House. None of these instruments made any mention of an option to buy.

Thereafter, and without the knowledge of defendant, plaintiffs went to see defendant's attorney who read to them the letter agreement which he had prepared at the request of defendant; and gave them the ranch quitclaim deed to sign. Plaintiffs thereupon told him the letter agreement was in error, that defendant had agreed that they were to have an option to buy the acre instead of only the right of first refusal. Relying on plaintiffs' word, defendant's counsel, without further advising her or consulting with defendant, and without her knowledge, drew a new letter agreement, giving plaintiffs an option to purchase the acre for $200, and defendant a right of first refusal on Orchard House. He mailed the executed quitclaim deed, the grant deed to Orchard House to be signed by defendant, the new option letter agreement and a letter of instruction, not to defendant his client, but to plaintiffs, who first took the documents to their own lawyer for advice and then presented them to defendant for her signature. Defendant had not seen or heard from her counsel since she asked him to prepare the documents and she did not know of the change in the letter agreement; nor did plaintiffs advise her they had been to see her counsel, that they had requested him to change the terms of the letter agreement as opposed to those she asked her lawyer to prepare, that he had done so, or that the document was any different than the one she had originally authorized him to draw. In presenting the letter agreement and other documents to her for her signature, plaintiffs told defendant they were the papers drawn by her lawyer to put their agreement in formal form, and that they all should sign them. Defendant read the documents, including the letter agreement. She saw the word "option" but believed the term to mean the same as a "right of first refusal" upon which they had originally agreed, which she discussed with her counsel and concerning which she asked him to prepare the letter agreement. Since she had not previously discussed any option with plaintiffs, she did not understand the word "option" to mean an option to buy, as explained to her later, or that there was any distinction between that term and the refusal right. She thought she was signing an agreement giving plaintiffs only a right of first refusal.

Relying upon plaintiffs' representations and believing it to be the same document she had instructed her attorney to prepare, she executed the letter agreement, having "utter faith" in her friends and her lawyer. She also signed the grant deed and letter of instruction to her counsel, which incidentally referred to the letter agreement as

containing "certain first refusal rights" without any mention of an option. Thereafter, the parties continued to live together for five years during which time no mention was made of any option. However, on August 7, 1956, plaintiffs wrote to defendant advising her they were taking up the option to buy under the letter agreement. This was defendant's first knowledge that the letter agreement actually contained an option to buy, as such. A controversy arose and plaintiffs moved out of defendant's home. Defendant refused to convey the acre and on September 27, 1956, served a notice of rescission of the agreement on plaintiffs.

The trial court found against the material allegations of plaintiffs' complaint and specifically found that the price of $200 for the acre in question was neither reasonable nor adequate consideration therefor, and that the alleged option agreement was neither just nor fair to defendant. Plaintiffs offered no evidence on the issue of damages and the court found they had sustained none. Appellants attack none of these findings. As to the affirmative defenses set up in the answer, the trial court found that plaintiffs' statements to defendant's lawyer that they were to have an option to purchase the acre for $200 were false, although not knowingly and deliberately so; that defendant relied upon the statements in signing the letter agreement and would not otherwise have signed it; and that at all times defendant mistakenly believed she was executing only a right of first refusal. The trial court concluded that the agreement was not fair or equitable to defendant and the consideration for the property was inadequate; that defendant signed the agreement while laboring under a mistake of law and fact; that plaintiffs were not entitled to specific performance thereof or damages; that plaintiff had no right, title or interest in the one acre and defendant had rescinded the agreement on September 27, 1956, on the ground of mistake.

Although plaintiffs have appealed from the entire judgment, they seek to reverse only that portion of the judgment resulting from the trial court's findings and conclusions arising out of the affirmative defenses set up in defendant's answer. They attack only that portion of the judgment declaring the rescission of the option letter agreement and that plaintiffs have no interest, right or title in and to the acre in question. They do not question any other findings or conclusions of the trial court.

Appellants contend the trial court erred in adjudicating the rescission of the option letter agreement because it was not rescindible, and in permitting partial rescission since the agreement was indivisible.

[2] Section 3406, Civil Code, permits the trial court to adjudicate the rescission of a written contract in certain cases mentioned in section 1689, Civil Code, which entitles a party to rescind if his consent was given by "mistake." Appellants' first contention is predicated on the argument that the evidence discloses no "mistake of fact" which would relieve defendant from the terms of the agreement.

It is true that under section 1577, Civil Code, defining "mistake of fact", not any and every mistake is remediable. Of whatever it might consist, the mistake of fact claimed under this section must not have been caused by the neglect of a legal duty on the part of the claimant. In determining what conduct will amount to a neglect of duty the courts recognize there is an element of carelessness in nearly every case of mistake (Van Meter v. Bent Construction Co., 46 Cal.2d 588, 297 P.2d 644) and that which does not amount to the neglect of a legal duty will not of itself bar rescission where the mistake does not stem from an original error in judgment. Brunzell Const. Co. v. G. J. Weisbrod, Inc., 134 Cal.App. 2d 278, 285 P.2d 989; M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 235 P.2d 7; Klose v. Sequoia Union High School Dist., 118 Cal.App.2d 636, 258 P.2d 515. This rule is particularly applicable in a situation in which false representations were made to induce the execution of the instrument, even though the person making them believed them to be true. The Su-

preme Court so held in Van Meter v. Bent Construction Co., 46 Cal.2d 588, at page 595, 297 P.2d 644, at page 648, stating: "There is even more reason for not barring a plaintiff from equitable relief where his negligence is due in part to his reliance in good faith upon the false representations of a defendant, although the statements were not made with intent to deceive. * * * A defendant who misrepresents the facts and induces the plaintiff to rely on his statements should not be heard in an equitable action to assert that the reliance was negligent unless plaintiff's conduct, in the light of his intelligence and information, is preposterous or irrational."

[3] In support of their argument that no mistake of fact existed, appellants place great reliance on defendant's testimony that before signing it she read the letter agreement and observed the word "option." They urge that since the term is unambiguous, defendant is presumed to have known its meaning. However, included in her testimony is her statement that although she now knows the meaning of the word "option," she did not then understand it and thought it had the same meaning as a right of first refusal. Although generally one is presumed to know the meaning of unambiguous language and will be bound by the execution of a written instrument including it, the rule applies only in the absence of fraud, confidential relationship or circumstances indicating excusable mistake. Fraters Glass & Paint Co. v. Southwestern Const. Co., 107 Cal.App. 1, 290 P. 45; Wetzstein v. Thomasson, 34 Cal.App.2d 554, 93 P.2d 1028.

[4] Whether the mistake of fact here is one consisting of "an unconscious ignorance or forgetfulness of a fact present" or a "belief in the present existence of a thing * * * which does not exist" (section 1577, Civil Code), it must be one material to the contract. The mistake must be such that it animated and controlled the conduct of the party; go to the essence of the object in view and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved (Roller v. California Pacific Title Ins. Co., 92 Cal.App.2d 149, 206 P.2d 694). In Foster v. De Venney, 107 Cal.App. 500, 290 P. 462, the vendor, in a contract of sale, as vendee well knew, was an elderly woman with defective eyesight who relied upon the advice of a third party in business affairs and signed the contract in the mistaken belief it had her advisor's approval. The court found the mistake to be material to the contract and said, at page 504 of 107 Cal. App., at page 463 of 290 P.: "* * * when she signed she believed that the person upon whom she was relying knew the terms of the contract and approved them. Her mistake, therefore, was one material to the contract."

[5] Generally, a mistake of fact occurs when a person understands the facts to be other than they are (People v. Kelly, 35 Cal.App.2d 571, 96 P.2d 372, citing O'Brien v. Det Forende Damphibs Selskab, 94 N. J.L. 244, 246, 109 A. 517; 40 Cor.Jur. 1227). An example is found in Nelson v. Meadville, 19 Cal.App.2d 68, at page 70, 64 P.2d 1116, at page 1117: "If the court was satisfied from all the evidence at the trial that notwithstanding such examination and reading, the plaintiff did not then understand the terms of the instruments and was not aware that they provided for the 25 years' instead of 6 months' option, it was authorized to find that the agreements were accepted by plaintiff under a mistake in this particular. Sullivan v. Moorhead, 99 Cal. 157, 160, 33 P. 796."

[6, 7] To determine whether a mistake of fact existed, we must accept as conclusive any decision of the trial court in a factual conflict if there is sufficient evidence in the record to support it. A mere conflict in the testimony as to the mistake does not necessitate a denial of relief. Nelson v. Meadville, 19 Cal.App.2d 68, 64 P. 2d 1116; Hutchinson v. Ainsworth, 73 Cal. 452, 15 P. 82; Sullivan v. Moorhead, 99 Cal. 157, 33 P. 796. The record before us fully justified the finding of the trial court on the issue of mistake of fact. The tes-

timony of the defendant contained evidence of sufficient substantiality to warrant an adjudication of rescission. We have before us a situation in which plaintiffs, unknown to defendant, had greater knowledge concerning the preparation and the terms of the agreement than she; a circumstance of intimate friendship bordering on a confidential relationship existing between defendant and plaintiffs, trust in plaintiffs, and defendant's reliance upon their false representations. Although the trial court found no fraud to exist, there was clearly an imposition by plaintiffs upon their friend. Had defendant known the agreement was not the same she had instructed her counsel to prepare and its terms were not in accord with her original agreement, she would not have signed it. The $200 consideration was wholly unreasonable and inadequate, the reasonable market value of the acre in July, 1951, being $550 to $800, the enforcement of which would have been unconscionable. It is clear that defendant's mistake was due to conduct that constituted neither a neglect of duty nor an error in judgment and was not "preposterous or irrational," but a natural and reasonable mistake due largely to defendant's reliance on the plaintiffs' representations that the document reflected the terms of her original agreement. Having been told by plaintiffs the letter agreement had been prepared by her counsel, he never having advised her of the change; believing plaintiffs' representations that the document embodied the terms originally agreed upon and not understanding the difference between an "option" and a "first right of refusal," defendant signed the option letter agreement in the mistaken belief that as a matter of fact she was signing quite another document. We conclude that the evidence justified relief from the terms of the agreement (1577 and 1689, Civil Code), and the court's adjudication of defendant's rescission thereof.

[8] A determination of appellants' second contention that the transaction of the parties was single, entire and indivisible and that the option letter agreement, as a part thereof alone, could not be rescinded depends mainly upon the interpretation of the contract and the intention of the parties. Appellants concede that if the option letter agreement is separable from the rest of the transaction, it could be rescinded without disturbing the reciprocal exchange of deeds and the accounting resulting in the payment to defendant of $1,000. Whether a contract is susceptible of division depends on its terms, the language employed, the subject matter covered, the nature and purpose of the agreement, its relation to other documents in the transaction and the intention of the parties as reflected in its terms (Simmons v. California Institute of Technology, 34 Cal.2d 264, 209 P.2d 581; Herzog v. Purdy, 119 Cal. 99, 51 P. 27; Sterling v. Gregory, 149 Cal. 117, 85 P. 305; Conrad v. Thompson, 137 Cal.App.2d 73, 290 P.2d 36).

Substantial evidence in the record discloses that in July, 1951, plaintiffs were originally and primarily interested in obtaining in their names alone the land on which Orchard House was located, that they approached defendant for that purpose and artfully initiated the discussion that resulted in the agreement to execute reciprocal deeds. They proposed to defendant that if she would give them a deed to Orchard House they, in exchange, would deed to her the remainder of the ranch in which they wanted no interest. Although defendant had no particular desire to regain sole title to the ranch, or to retain an interest in Orchard House and was not interested in a right of first refusal on it, otherwise "she wouldn't have deeded it to appellants" in the first place, she was willing to exchange deeds. Thereafter, they discussed the proration of taxes and insurance and repayment of an amount due defendant on her loan, and after an informal accounting, plaintiffs agreed to a payment of $1,000 to make defendant whole. It was after these discussions and agreements the conversation concerning the acre in question took place. Defendant, having no interest in Orchard House, likewise had no interest in selling the acre between it and the highway, did not want or intend to sell

it, so told plaintiffs, and had no concern about the subject. Finally, however, "(I)f it pleased them," she told plaintiffs she would agree to reciprocal rights of first refusal although she had no interest in Orchard House and "(I)t was because of them that this was written. They were insistent on it." It is obvious from her testimony that since she never intended to sell the acre she could see no harm in giving them a right of first refusal, and since plaintiffs were insistent, it would keep the friends who lived with her happy. It is also clear that neither the "first right of refusal" on Orchard House nor the same on the acre in question was of any business concern to her and she agreed to them only to preserve harmony and that the reciprocal rights of first refusal at no time entered into their discussion concerning the exchange of deeds or other matters agreed upon, or had any connection with them. It was wholly incidental. That this agreement concerning the right of first refusal was not a part of, or connected with the other agreements, is clearly reflected in the conduct of defendant's counsel. He did not intend the exchange of deeds to be dependent on the letter agreement. Although the deeds themselves contained various agreements relating to water rights, easement for access, etc., and another agreement prorated taxes, removed the encumbrance on the ranch and provided for the $1,000 payment, defendant's counsel prepared the letter agreement on a paper apart from all the others and as the subject of a wholly separate document.

As to its context, the consideration for her "option" is expressly stated in the letter agreement to be defendant's first right of refusal on Orchard House. The document contains its own consideration and has no connection with the exchange of deeds which was reciprocal. It makes no mention of its dependency on or reference to any other document or transaction, and none of the others mention their dependence on the letter agreement. The letter agreement itself embodies the entire agreement between the parties concerning the "option" and first right of refusal, without reference to any accounting between the parties, proration of taxes and insurance, the payment of the $1,000, the release of the encumbrance or any other factor, by expressly providing therein that upon signature, it "shall constitute this letter a contract between us."

[9, 10] Although the deeds were recorded, the letter agreement was neither recorded nor acknowledged. On the record before us it can hardly be said that the deed exchange depended upon getting the "option" or that the exchange of deeds would not have been agreed to unless the option had been given. Plaintiffs were anxious to receive in their names alone a deed to Orchard House. This was their primary object. A later conversation concerning the acre between the house and the road could no more make the exchange of deeds dependent on the "option" agreement than the fact that all the documents were signed at the same time. Furthermore, the deeds were exchanged forthwith, but the "option" could not be exercised until five years later. In addition, where the things to be done under a contract are to be done at different times, and the consideration is apportioned to each of the items to be performed, the contract may be severable. Blonder v. Gentile, 149 Cal.App.2d 869, 309 P.2d 147; Sterling v. Gregory, 149 Cal. 117, 85 P. 305. In the case before us, the consideration is apportioned and none of the documents expressly or even by inference show any interdependence. That such a contract is severable is borne out by the rules set forth in numerous authorities. Pacific Wharf & Storage Co. v. Standard American Dredging Co., 184 Cal. 21, 192 P. 847; In re Marshall's Garage, 2 Cir., 63 F.2d 759.

[11] Implicit in the court's finding that defendant rescinded the option letter agreement and adjudication of the rescission, is the finding that the letter agreement was separate from the other transactions. The trial court's interpretation of the meaning of an instrument cannot be disturbed on appeal when it appears to be reasonable

and consistent with the intention of the parties (Hayward Lumber & Investment Co. v. American Nat. Bank, 50 Cal.App.2d 247, 123 P.2d 56).

The record fully justifies the finding that what defendant rescinded was an agreement separate and apart from the other transactions, which could be and was rescinded. The parties were equitably returned to status quo. The rights of both parties in the agreement were cancelled—the option to buy on the one hand and the first right of refusal on the other, and they were left where they would have been had the agreement never been executed.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

166 Cal.App.2d 616

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roscoe SMITH, Defendant and Appellant.

Cr. 6256.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1958.

Rehearing Denied Jan. 13, 1959.

Hearing Denied Feb. 25, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Mark Brandler, J., for unlawfully possessing heroin, and he appealed. The District Court of Appeal, Parker Wood, J., held that evidence regarding defendant's offer of a bribe to police officer could be considered as evidence of an admission tending to show consciousness of guilt.

Affirmed.

1. Criminal Law ⇐408

In prosecution for unlawfully possessing heroin, evidence regarding defendant's offer of a bribe to police officer could be considered as evidence of an admission tending to show consciousness of guilt.

2. Poisons ⇐9

In prosecution for unlawfully possessing heroin, whether defendant knew that narcotic was in his automobile was a question of fact for determination by trial judge, and evidence was sufficient to support conviction.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Morris Schachter, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with unlawfully possessing heroin. In a nonjury trial, he was convicted. He appeals from the judgment and the order denying his motion for a new trial.

Appellant asserts that the evidence was insufficient to support the judgment.

Officer Beeson testified that on November 28, 1957, he received information from a confidential informant that appellant was dealing in narcotics in the area of Jefferson and San Pedro Streets, that appellant met his contacts at a pool hall, and that he gave the stuff to them in front of the pool hall; the informant gave the name of appellant, and described his appearance, and said that he drove a 1947 Cadillac sedan car and that the left rear windwing of the car was missing. He testified further that on November 29, 1957, he received information from another informant that on said day about 6 p. m. appellant had sold twenty "balloons" to five persons at 35th and San Pedro Streets, that appellant always went around the corner for another sale just before the pool hall closed, that appellant had a "stash" at 35th and Trinity Streets, and a "stash" near 29th and Paloma Streets. He testified further that about 12:30 a. m. on November 30 he saw appellant driving a black 1947

Cadillac sedan car and that the left rear windwing of the car was missing; at that time one Williams and one Brown were with appellant, who was driving the car; he (witness) and Officer Appleton followed appellant's car until it stopped near 35th and Trinity Streets; after waiting about a minute, the officers approached the car, and then appellant was in the street walking toward his car; appellant entered the car on the driver's side of the car and shut the door; the appellant and the two other persons (Williams and Brown) were arrested and searched by Officer Appleton; Officer Beeson (witness) was of the opinion that Brown was under the influence of heroin at that time; Officer Appleton removed a paper bag from the lining of the front seat on the driver's side of the car; the bag contained ten "balloons"; when the officer opened the bag, the appellant said: "What is that stuff? I don't know where it came from. I never used dope. I don't have anything to do with it."

Officer Appleton testified that on December 13, 1957 (about two weeks after the arrest), when he was with Officer Brady, he stopped the appellant and "shook him down" to see if he had any narcotics in his possession. Then appellant asked if he might speak to Officer Appleton alone. After Officer Brady had gone to the police car which was about 20 feet away, appellant said to Officer Appleton: "You know, it is getting close to Christmas time. I would like to take care of you and the fellow that was with you the other night." After Officer Appleton asked what he meant, he said, "Well, I would like to give you and your partner some money." When Officer Appleton asked him how much it was worth to him, appellant said, "Well, I would see that each one of you got five bills." Officer Appleton said: "Well when can my partner and I get together with you and talk about it?" Appellant said, "No, I am not going to talk to both of you at the same time because you would have grounds for a bribery case then."

The ten "balloons" were received in evidence. Officer King, a chemist, testified that three of the "balloons" contained heroin.

Appellant testified that prior to his arrest on November 30, he had been to a drive-in cafe and had parked his car there without locking the doors or windows; he was away from the car about half an hour, and there were many persons at the cafe; when he left the cafe, Bloom and Brown were in the front seat of the car with him; after he had stopped near 35th and San Pedro Streets to urinate and had returned to the car, the officers stopped him; that night he was driving a 1947 Cadillac; a window of the car had been broken out, and the lining of the front seat of the car had been torn and was hanging open about six inches; he did not have any narcotics in his possession when he was arrested on November 30, and he did not know anything about narcotics being in his car; on December 13 he did not have a conversation with Officer Appleton such as that related by Officer Appleton concerning the giving of money to the officers.

[1, 2] Appellant argues that there was no proof of knowledge on his part that any narcotic was in the car; and that other persons who were in or near the car could have placed the narcotic there. It was established that heroin was found in the torn lining of the front seat on the driver's side of the car, and the appellant was the owner and driver of the car. The evidence regarding the offer of a bribe by appellant might be considered by the trial judge as an admission tending to show consciousness of guilt. In People v. Velarde, 45 Cal.App. 520, 188 P. 59, it was claimed that the court erred in permitting an arresting officer to testify that soon after the arrest the defendant offered money to the witness (officer) if he would release the defendant. In that case the court said at page 529: "Such evidence, like evidence of flight, is admissible as an admission tending to show consciousness of guilt. It is not to be supposed that one who is innocent, and conscious of the fact, will resort to bribery." In the present case, whether the appellant knew that the narcotic was in his car was a question of fact for the

determination of the trial judge. The evidence was sufficient to support the judgment.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 758

CITY OF HAWTHORNE, a municipal corporation, Plaintiff and Respondent,

v.

Clarence R. PEEBLES, Grace E. Peebles, Southland Escrow Corporation, Joseph F. Palazzo, Muriel Palazzo, Thomas B. Densford, Eugenia Densford, Personal Escrow Company, Irene A. Newland, Robert P. Luke, George J. Luke, Jr., Joseph Peter Sachs, Carrie A. Luke, Clifford I. Hoffman, Hazel Gladys Hoffman, Title Insurance and Trust Company, Pacific State Bank, George G. Mullin, Bernice Mullin, Liberty Escrow Company, Great Western Savings and Loan Association, Bertrand L. Metcalf, Lillie M. Metcalf, Ellsworth F. Braner, Dorothy B. Braner, Luis A. Cedillos, Consuelo Cedillos, Owen Scranton, County of Los Angeles, the Heirs of Frank R. Bruner, Doe One to Doe Twenty, Inclusive, and All Persons Unknown Claiming any Title or Interest in or to the Property Sought to be Condemned Herein, Defendants.

Robert P. Luke, George J. Luke, Jr., Joseph Peter Sachs, Carrie A. Luke, Bertrand L. Metcalf, Lillie M. Metcalf, Thomas B. Densford, and Eugenia Densford, Appellants.

Civ. 23235.

District Court of Appeal, Second District, Division 2, California.

Jan. 5, 1959.

Action by city to condemn certain land for use as a part of its public park system. Owners of land lying outside the city limits, but bounded on one side by city boundary line appealed from judgment of condemnation entered by the Superior Court, Los Angeles County, Eugene P. Fay, J. The District Court of Appeal, Herndon, J., held that city had constitutional authority to condemn property outside city limits for park purposes.

Judgment affirmed.

1. Municipal Corporations ⇐223

A city had constitutional authority to acquire land for park purposes even though such land was outside its corporate limits. West's Ann.Public Resources Code, §§ 5301–5303.

2. Eminent Domain ⇐196

In eminent domain proceeding by city, evidence sustained finding that public interest and necessity required acquisition by city of certain realty for public park purposes, even though such property was outside corporate limits of the city.

3. Eminent Domain ⇐56

Generally, statutory requirements of necessity as a condition of the exercise of the power of eminent domain are liberally construed by the courts so as not to limit unnecessarily the power of the condemning agency.

4. Eminent Domain ⇐198(2)

Question of whether a taking of property is necessary is for the trier of fact.

5. Eminent Domain ⇐56

In considering question of necessity for a taking under the power of eminent domain, a court may consider immediate future needs of the condemnor, other available facilities, or public economic considerations.

6. Eminent Domain ⇐196

In action by city to condemn land for use as a part of its public park system, evidence sustained finding as to necessity.

7. Eminent Domain ⇐196

In an eminent domain proceeding, condemnor is not required to prove that the acquisition is indispensably necessary, but

is required to show merely that the land is reasonably suitable and useful for the improvement.

Arthur J. Manley, Los Angeles, for appellants.

David Rice, City Atty., City of Hawthorne, David R. Denny, Hawthorne, for respondent.

HERNDON, Justice.

The judgment here presented for review condemns certain parcels of land sought by respondent city for use as a part of its public park system. By its ordinance, the City Council declared its determination that the public interest and necessity required the acquisition of certain described parcels of real property aggregating 8.2 acres in area for a public park. Part of this proposed park lies within the corporate limits of the city and part of it lies outside. All the parcels involved in this appeal lie outside the city limits, but each is bounded on one side by the city boundary line.

The adequacy of the compensatory award is not questioned. The questions involved as stated by appellants are as follows: "(1) Can a city be authorized to condemn property outside its limits for park purposes? (2) Did the City of Hawthorne abuse its discretion in seeking to condemn property outside its borders for park purposes? (3) Was there a public necessity for taking the land?"

We have concluded that each of the foregoing questions posed by appellants must be answered adversely to their contentions, and that the judgment at bar is well supported both legally and factually.

[1] First, the power of a city to acquire land for park purposes either by purchase or by condemnation is expressly conferred by section 5301 of the Public Resources Code. Section 5302 of the same code provides that "The land may be within the corporate limits of the city * * * or conveniently adjacent * * *" Section 5303 provides that "The legislative body of any city or city and county may, by ordinance, * * * determine what lands are necessary and proper to be acquired for public parks or boulevards." Appellants do not argue that any of the foregoing statutory provisions is unconstitutional. "There is no constitutional objection to condemnation by a municipal corporation of property wholly outside its corporate limits, if the condemnation has the purpose of serving its inhabitants." 17 Cal.Jur.2d 768, § 231; Sacramento Municipal Utility Dist. v. Pacific G. & E. Co., 72 Cal.App.2d 638, 652, 165 P.2d 741.

[2] Second, the contention that respondent "abused its discretion in seeking to condemn property outside its borders for park purposes" is negated by the well supported finding of the trial court that the public interest and necessity required the acquisition by respondent of the subject real property for public park purposes.

Recognizing that its ordinance would not constitute conclusive evidence of the necessity and propriety of the proposed acquisition of property located outside its territorial limits (Code Civ.Proc. § 1241, subd. 2), respondent assumed the burden of proof in the trial court. Respondent called as an expert witness its Director of Parks and Recreations. His qualifications are not challenged. The testimony of this witness was more than sufficient to sustain the essential findings. He testified to the following effect: that respondent city with a population of some 30,000 had only one public park containing an area of 12.94 acres; that an adequate system of parks would require 1 acre of park for each 100 of population; that the existing park was of such shape and so located that it was neither adequate nor suitable; that the tract, of which the subject parcels are a part, is well suited, properly located and desirable to serve the needs of the community for recreational facilities. The testimony of this witness was neither impeached nor contradicted.

Third, appellants are in error when they argue in effect that the required measure of public necessity is a mechanically absolute

necessity, or, to use the language of their brief, that the acquisition must be "indispensably necessary."

[3] Generally, statutory requirements of *necessity* as a condition of the exercise of the power of eminent domain are liberally construed by the courts so as not to limit unnecessarily the power of the condemning agency. This liberal construction has been applied in several recent cases from other jurisdictions. In Latchis v. State Highway Board, 1957, 120 Vt. 120, 134 A.2d 191, 194, where the statute required "necessity" for condemnation, the court said: "The necessity specified by the statute * * * does not mean an imperative or indispensable or absolute necessity but only that the taking provided for be reasonably necessary for the accomplishment of the end in view under the particular circumstances." In Klump v. Cybulski, 1957, 274 Wis. 604, 81 N.W.2d 42, 47, the court said of the statutory requirement: "The 'necessity' required to support condemnation is only a reasonable, and not an absolute or imperative, necessity." And finally in State ex rel. Department of Highways v. Pinson, 1949, 66 Nev. 227, 207 P.2d 1105, 1107, the court said: "* * * the word 'necessity' as used in the statute does not mean an absolute and unconditional necessity as determined by physical causes * * * the word 'necessity' must be deemed to mean a reasonable necessity under all of the circumstances of the particular case."

The cases above reflect the general rule as stated in 29 C.J.S. Eminent Domain § 90, p. 886: "'*Necessity,*' within the rule that the particular property to be appropriated must be necessary, does not mean an absolute but only a reasonable or practical necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner consistent with such benefit, although it does not include the taking of land which may merely render the employment of the improvement more convenient or less expensive, or for a necessity which is merely colorable."

In California, as early as 1861, in the leading case of Gilmer v. Lime Point, 18 Cal. 229, 251, the Supreme Court had occasion to remark: "To each and every sovereignty belong certain rights which are deemed essential to its existence. * * * When applied to property alone, it is called the *dominium eminens,* or the right of eminent domain; that is, the right of the sovereignty to use the property of its members for the public good or public necessity. The word *necessity,* in this connection, is not to be used in too limited a sense; it means a want, an exigency, an expediency, for the interest or safety of the State."

[4] It is, of course, a question for the trier of fact whether a taking is necessary. Spring Valley Water-Works Co. v. Drinkhouse, 92 Cal. 528, 532, 28 P. 681; see 17 Cal.Jur.2d 748–749, § 200.

[5] And, in considering the question of necessity, the court may consider immediate future needs (Kern County High School Dist. v. McDonald, 180 Cal. 7, 14, 179 P. 180), other available facilities (cf. Rialto Irrigating Dist. v. Brandon, 103 Cal. 384, 387, 37 P. 484; Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123, 28 P. 447), or public economic considerations. Sacramento Municipal Utility Dist. v. Pacific G. & E. Co., supra, 72 Cal.App.2d 638, 654, 165 P.2d 741; see 17 Cal.Jur.2d 748–750, §§ 200–201.

In Montebello Unified School Dist. of Los Angeles v. Keay, 55 Cal.App.2d 839, 842–844, 131 P.2d 384, 386, 387, following an adverse judgment in the trial court, the defendant landowners in a condemnation proceeding appealed, contending that the "* * * parcel of land being condemned was not located in the manner most compatible with the greatest public good and least private injury" as required by statute. Code Civ.Proc. § 1242. Rejecting appellant's contentions, which by implication, attacked the finding that "* * * the public interest and necessity require the acquisition of said property * * *" the court said: "'In all cases where land is required for public use, the state, or its

agents in charge of such use' (quoting again from section 1242, Code of Civil Procedure) 'may survey and locate the same,' and in doing so 'the condemning party is vested with wide discretion.' * * * '* * * "we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing, for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so *ad infinitum*. The improvement could never be secured, because, whatever location was proposed, it could be defeated by showing another just as good."'

"In this case it is the school district, acting through its governing board that is the agent of the state in charge of the use for which the land was sought. Civ.Code, § 1001; School Code, §§ 6.102 and 6.103. Its act, in selecting the particular site herein sought, 'should, in the absence of evidence to the contrary, be presumed correct and lawful.'"

[6, 7] In reviewing the evidence, which amply supported the disputed finding as to necessity, the court observed that the statute required "* * * a balancing of the greatest public good and the least private injury. A parcel of land with objectionable features is not to be chosen just because poorer land is available." As stated in 1 Nichols, Eminent Domain, 391–392, § 4.11 [4], "* * * it is generally held, necessity does not signify impossibility of constructing the improvement for which the power has been granted without taking the land in question, but merely requires that the land be reasonably suitable and useful for the improvement." See Spring Valley Water Works v. San Mateo Water Works, supra, 64 Cal. 123, 28 P. 447; Rialto Irrigation District v. Brandon, supra, 103 Cal. 384, 387, 37 P. 484; City of Pasadena v. Stimson, 91 Cal. 238, 253, 27 P. 604.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

166 Cal.App.2d 671

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles WOODS, Defendant and Appellant.

Crim. 2852.

District Court of Appeal, Third District, California.

Dec. 31, 1958.

Defendant was convicted of first degree murder. The Superior Court, Solano County, Joseph M. Raines, J., entered judgment, and the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that direct evidence of a deliberate and premeditated purpose to kill is not required to sustain first degree murder conviction, and that deliberation and premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference, and that evidence sustained first degree murder conviction.

Judgment affirmed.

1. Homicide ⇐253(3)

Direct evidence of a deliberate and premeditated purpose to kill is not required to sustain first degree murder conviction, and deliberation and premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference.

2. Criminal Law ⇐554

In prosecution for first degree murder, trial court was not bound to accept testimony of defendant that reason he had a gun at time of homicide was because he often carried a gun.

3. Homicide ⇐253(1)

Evidence sustained first degree murder conviction.

Eileen M. Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

By indictment, defendant-appellant Charles Woods was accused by the grand jury of Solano County of the crime of murder in that on September 18, 1955, in Vallejo, California, he murdered Nellie Driskell. On November 28th, appellant was arraigned and entered a plea of not guilty. On December 5th, the court granted his motion to enter an additional plea of not guilty by reason of insanity. On January 16, 1956, the court granted his motion to withdraw his pleas and to enter a new and different plea. Thereupon, he personally and through counsel entered a plea of guilty. The court received evidence to determine the degree of the crime, thereafter pronounced a judgment of conviction of murder in the first degree, and sentenced appellant to the state prison for life. Throughout the proceedings appellant was represented by counsel.

The sole contention raised by appellant is that as a matter of law the evidence is insufficient to justify the court's finding him to be guilty of murder in the first degree. He asks this court to reduce the degree of the offense to murder of the second degree. A thorough examination of the entire record, however, convinces us that the trial court's finding of murder in the first degree is supported and that the judgment herein appealed from must be affirmed.

On this appeal this court, at appellant's request, appointed Eileen M. Sullivan, to represent appellant. Counsel has filed on his behalf herein a persuasive brief in support of the contention that the evidence is insufficient to support a finding of first degree murder. The attention of the court has been directed to the discussion of first degree murder appearing in People v. Bender, 27 Cal.2d 164, 183, 163 P.2d 8, 19, wherein the Supreme Court said:

> "The adjective 'deliberate' means 'formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; * * * Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; * * * unhurried; * * * Characterized by reflection; dispassionate; not rash.' (Webster's New Int. Dist., (2d ed.).) The word is an antonym of 'Hasty, impetuous, rash, impulsive.' (Id.) * * * The verb 'premeditate' means 'To think on, and revolve in the mind, beforehand; to contrive and design previously.' (Webster's New Int. Dict., (2d ed.).)"

Our attention is also directed to the approval in People v. Bender of a statement in People v. Howard, 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385, reading:

> "* * * 'When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree.'"

Counsel cites a number of other decisions discussing the degree of proof required to establish murder of the first degree where the degree of the crime depends upon the presence or absence of premeditation, as is the case here. We feel compelled, however, to say that the record here does not present a case of murder of the second degree as a matter of law; that the proof does no more than to require the trial court in the exercise of its discretion to determine the degree of the crime to have been either first or second degree without power in an appellate court to reverse the conclusion of the trial court that appellant was guilty of murder in the first degree.

Because of the seriousness of the issue presented we think we are justified in relating the evidence in considerable detail. Defendant and appellant Charles Woods shot Nellie Driskell with an automatic pistol shortly before 10:15 a. m. on Sunday, September 18th at the Johnson home in

Vallejo, where she lived with her mother and stepfather and other relatives. Woods and Nellie Driskell had been keeping company about two years. Nellie was divorced.

Woods had given two extrajudicial statements, one to deputy Richey of the sheriff's office at 1:05 p. m. on the day of the shooting and the other to the district attorney at 12:30 p. m. on September 19th. The two statements were read into evidence.

On Sunday morning Nellie's stepfather, John Johnson, and his young son Rickey met Woods and accompanied him in his car to the Johnson home. When Johnson entered the living room, Grace Byas, Nellie's cousin, was sitting in a chair, Nellie was sitting on a daybed, and Leonard Walker, an airman from Travis Air Force base, was asleep on a chesterfield.

Johnson testified: He (Johnson) went directly into the bathroom and about ten minutes later heard three shots, "bing, bing, bing." He ran immediately into the living room. With a pistol in his hand pointed at Johnson, Woods walked backwards out the front door. Nellie was lying on the floor against the kitchen door.

Grace Byas testified: Woods came into the living room through the front entrance as Johnson handed her some fly spray he had bought. Woods sat down beside Nellie. Grace sprayed some of the spray on Nellie who got up and opened a window and then closed it at Grace's insistence. Grace continued spraying and talking about the spray. Woods, pointing his gun at Nellie, got up, said "Grace, call the cops." Nellie said, "Charles, don't point that gun toward me." Thereupon, Grace ran toward the back door. Grace heard three shots, the first when she was in the kitchen, the second from the back yard and the third from beside the house next door. Grace estimated that appellant Woods entered the living room three to five minutes after Johnson and was there twenty or twenty-five minutes before the shooting commenced.

Walker testified: He was awakened by a scream and the sound of running footsteps, heard a shot and saw Nellie fall against the wall. Appellant pointed his gun toward Nellie and shot. That was the third shot. Immediately thereafter Johnson stuck his head around the bedroom door, and Woods raised the automatic pistol and said, "Come out, Bubby, I want you, too." Johnson stepped back and Woods turned around and walked out.

Grace Byas testified further: The preceding Monday when Grace was on lower Georgia Street she saw Nellie get up off the street. Nellie said that Woods had pushed her and she fell, that he had humiliated and embarrassed her and would not have an opportunity to do that again. Regarding this occurrence Woods testified that he and Nellie had been drinking and had quarreled over the fact that Nellie ran out of gas when she drove appellant's car to work and had no money to buy gas; that Nellie started to walk away; that he pulled her and she slipped and fell on the sidewalk.

Woods testified further: He saw Nellie on Thursday night and she told him she was sleepy and tired and had to work the next morning. On Friday night he went to the 126 Club where Nellie was working in the kitchen alone. She saw the gun in his belt and asked, "What are you doing with that?" He adjusted the gun in his belt and she said, "Leave it there." Then he told her he would see her later and left.

Friday night Woods went to Nellie's home. A deputy had been called and was there when Woods arrived. The officer told him that Nellie was afraid and asked him if he had "pulled" a gun on her at the restaurant. Woods replied that he had not "drawn" a gun on Nellie. The officer told appellant to stay away from Nellie's house unless he had an invitation to go there.

On cross-examination Woods was asked what his purpose was in going to see Nellie Friday night after the incident in the restaurant. He answered, "Well, I didn't

know what she wanted." He was asked further if he had given any consideration on Sunday morning to the warning given by the deputy sheriff. He said he had and concluded, "Well, there was nobody angry. She had time to cool off."

Johnson and Grace Byas each testified that neither detected the odor of alcohol an appellant's breath that morning. Grace said there was no drinking during the period of time appellant was in the living room and that he appeared disturbed. Walker testified that on that morning Woods appeared to have been drinking and looked somewhat haggard and sleepy. Another witness said that Woods appeared sober. The court asked Woods, "Would you say you were drunk or sober, I will put it that way, at the moment of the shooting?" Woods answered, "I was feeling pretty good."

In his statement to the district attorney Woods said that he usually had a gun when he went down town.

Woods testified further as follows: He had been separated from his wife about three years and he and Nellie planned to marry after he obtained a divorce. They had lived together about four months as man and wife in Berkeley. In answer to his inquiries the first time he telephoned on Sunday morning, Nellie said she was not "mad at" him. He told her he wanted to talk with her and would go to see her. She said, "I am still in bed," and hung up. Then he went to Cora's, a club on Georgia Street, where he and three others drank a pint and a half of whiskey. From Cora's he telephoned Nellie again. He told her, "I will see you later," and she said, "I will see you sometime." His purpose in going to see Nellie that morning was to reconcile their differences. He did not feel that their relationship was ended. He did not intend to hurt her in any way. If Nellie refused, then he would go back and try again. He was in love with Nellie. What took place in the Johnson living room that morning was rather hazy in his memory. When he arrived he sat down beside Nellie. In answer to his question she said she was not angry with him. Grace was talking about fly spray. As well as he could remember, Nellie pushed him and he lost control of himself. He has a hot temper. Grace ran into the kitchen. He did not know why he started shooting. When he left his residence that morning he took the gun from under the front seat of his car and put it in his belt. It always had a shell in the chamber. He had no particular reason for carrying the automatic pistol with him on that particular day.

Woods said in his statement to the district attorney that he pulled the gun out, fired it at Nellie and that he was under the impression he was trying to hit her. "I just lost my head. I couldn't think there for a minute. In fact, I loved her. I felt that I couldn't give her up. I couldn't afford to lose her." In his statement to deputy Richey, Woods said that after Nellie fell on the floor he thought she was dead and drove off in his car. His car stopped running and he abandoned it. He then walked to a fountain or club where he unsuccessfully tried to telephone the police.

[1] We think the proper rule to apply to the foregoing evidence is that stated in People v. Byrd, 42 Cal.2d 200, at page 213, 266 P.2d 505, 512, reading as follows:

> "* * * Direct evidence of a deliberate and premeditated purpose to kill is not required to sustain a conviction of first degree murder. Deliberation and premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference."

[2, 3] From the evidence the court could conclude this was a case, not uncommon, of a jealous and rejected lover who had determined he would kill his inamorata rather than let her go. Woods had "drawn a gun" on Nellie and for that had been warned by an officer to leave her alone, not to go to the house where she lived until invited. Notwithstanding this admonition he went, and being with Johnson who lived there he managed to get into the house. He was armed. His only attempt at justifi-

cation of this is his statement he often carried a gun. This the trial court was not bound to accept. He was there for some time under pretense of peace. When rebuffed he killed. The court could well conclude this was premeditated murder.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

166 Cal.App.2d 424

Nina AMAR, Isaac Amar, Sophie Hassid, and Frank McClane, a minor, by Lillian McClane, his guardian ad litem, Plaintiffs and Respondents,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and Ray Walter Wadlow, Defendants and Appellants.

Civ. 23269.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1958.

Action arising out of truck-automobile collision which occurred when driver of westbound truck allegedly lost control of vehicle and it crossed over a divider into eastbound lane and was struck by eastbound automobile. From an order of the Superior Court, Los Angeles County, Joseph L. Call, J., granting plaintiff's motion for a new trial, the defendants appealed. The District Court of Appeal, Fox, P. J., held that doctrine of res ipsa loquitur was applicable and it was error to instruct that no inference of negligence arises because an accident has happened and to instruct on unavoidable accident, and giving of plaintiff's instruction that instruction on res ipsa loquitur might appear to constitute exception to general rule that happening of accident does not support an inference of negligence but that instruction on res ipsa loquitur was based upon a special doctrine of law which might be applied under special circumstances and that when all of such conditions were found to exist they begot inference of negligence and proximate cause, did not preclude plaintiff from raising such objection.

Order affirmed.

1. Appeal and Error ⇐977(3, 5)
New Trial ⇐6

Granting or denying of a motion for a new trial rests, to a great extent, within sound discretion of trial court and will be disturbed on appeal only where it is clearly shown that there has been an abuse of that discretion.

2. Appeal and Error ⇐978(1)

Granting of a new trial on ground that error was committed in giving an instruction can be reversed only if questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury.

3. Appeal and Error ⇐978(1)

On appeal from an order granting a new trial on ground that error was committed in giving an instruction, sole issue before reviewing court is whether trial court has abused its discretion and whether giving of erroneous instruction was prejudicial need not be determined by reviewing court.

4. Negligence ⇐138(2)

Where uncontradicted evidence warrants application of the res ipsa loquitur doctrine, it is error to give a "mere fact of an accident" instruction.

5. Appeal and Error ⇐882(12)
Automobiles ⇐242(2), 246(22, 60)

In action arising out of truck-automobile collision which occurred when driver of westbound truck allegedly lost control of vehicle and it crossed over a divider into eastbound lane and was struck by eastbound automobile, doctrine of res ipsa loquitur was applicable and it was error

to instruct that no inference of negligence arises because an accident has happened and to instruct on unavoidable accident, and giving of plaintiff's instruction that instruction on res ipsa loquitur might appear to constitute exception to general rule that happening of accident does not support an inference of negligence but that instruction on res ipsa loquitur was based upon a special doctrine of law which might be applied under special circumstances and that when all of such conditions were found to exist they begot inference of negligence and proximate cause, did not preclude plaintiff from raising such objection.

6. Negligence ⇐140

It is error to give unavoidable accident instruction in negligence case where plaintiff has burden of proving that complained-of injury was proximately caused by defendant's negligence where ordinary instructions on negligence and proximate cause adequately so informed the jury.

Veatch, Thomas & Carlson and Henry F. Walker, Los Angeles, for appellants.

William B. Murrish, Hollywood, Robert A. Cushman, Los Angeles, for respondents.

FOX, Presiding Justice.

Judgment was entered in favor of defendants at the conclusion of a jury trial in which plaintiffs sought to recover damages for personal injuries. Plaintiffs' motion for a new trial based on the ground that error was committed in giving certain instructions was granted and defendants appeal from the order granting the new trial.

Defendant Wadlow was employed by the defendant company as a gasoline truck driver. While driving a fully loaded company truck westbound on the Hollywood Freeway, Wadlow lost control of the vehicle, which subsequently crossed over a divider into the eastbound traffic. The automobile in which the plaintiffs were riding, which was eastbound, crashed into the rear of defendants' truck as it passed across the eastbound lanes. Wadlow, following the accident, was operated on for acute thrombosis of the right common carotid artery. In was defendants' position that Wadlow suffered a sudden paralyzing stroke without previous warning and that this was the cause of the accident. Plaintiffs, on the other hand, offered evidence that the stroke was not the cause of the accident but rather a result thereof. The evidence was also in conflict on other points. For example, there was conflicting testimony as to when the truck went out of control with respect to where it crossed the divider; whether Wadlow was slumped over the steering wheel and unable to use both his hands; and as to the cause and the time of the tire blowout on the defendants' truck.

The jury was instructed in part as follows: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence." BAJI 134. "The mere fact that an accident happened, considered alone, does not support an inference that some party or any party to this action, was negligent." BAJI 131. "The mere fact that an accident happened, considered alone, does not give rise to a legal inference that it was caused by negligence or that any party to this action was negligent." BAJI 131.1. "From the happening of the accident involved in this case as established by the evidence, an inference arises that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference itself is a form of evidence, * * *" BAJI 206–B. The first three of these instructions were given at the defendants' request and the last upon plaintiffs' request.

[1, 2] The granting or denying of a motion for a new trial rests, to a great extent, with the sound discretion of the trial court and will be disturbed on appeal only where it is clearly shown that there

has been an abuse of that discretion. Shaw v. Pacific Greyhound Lines, 50 Cal. 2d 153, 323 P.2d 391; Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 733, 306 P.2d 432; Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338. As stated in the Shaw case, supra, at page 159 of 50 Cal.2d, at page 394 of 323 P.2d, "[t]he determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance. Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 733–734, 306 P.2d 432. In the Brandelius case it was stated that the granting of a new trial could be reversed 'only if * * * the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury.' [Citation.]"

[3] Therefore, if the complained of instructions were in any sense misleading or confusing, the trial court's granting of a new trial must be affirmed. As to the question of the prejudicial effect of the instructions, assuming there was error, the following quotation from the Brandelius case, supra, 47 Cal.2d at page 744, 306 P.2d at page 441, is controlling: "Whether the giving of this erroneous instruction was prejudicial need not be determined by this court on this appeal from the order granting a new trial. It is true that section 4½ of article VI of our Constitution should control the action of the trial court in considering a motion for a new trial, but when the trial court has determined that the error in the instructions was prejudicial and has therefore granted the motion, the sole issue before the appellate court is whether the trial court has abused its discretion. (Citations.)"

Plaintiffs contend that (1) error was committed in giving BAJI 131 and 131.1, supra, in conjunction with and instruction on res ipsa loquitur in a case where res ipsa loquitur was applicable under the undisputed facts, and (2) it was error to instruct on unavoidable accident.

[4, 5] Our Supreme Court has held where uncontradicted evidence warrants the application of the res ipsa loquitur doctrine, it is error to give the "mere fact of an accident" instruction (BAJI 131, 131.1). Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897; Jensen v. Minard, 44 Cal. 2d 325, 329, 282 P.2d 7. In the case at bar, although the evidence is in conflict as to certain aspects of the case, the factual situation necessary to bring the doctrine of res ipsa loquitur into operation exists without contradiction. See Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 441, 247 P.2d 344; Michener v. Hutton, 203 Cal. 604, 607, 265 P. 238, 59 A.L.R. 480. In Shaw v. Pacific Greyhound Lines, 50 Cal. 2d 156, 323 P.2d 391, 393, the court stated that "[i]n the absence of a proper explanation of the relationship between the two instructions, the words 'mere' and 'considered alone' might not prevent laymen from erroneously concluding that under no view of the evidence could an inference of negligence be drawn from the happening of the accident. And it has been held that where both instructions were given without explanation, an order granting a new trial should be affirmed. Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 261–262, 143 P.2d 929; England v. Hospital of Good Samaritan, 22 Cal. App.2d 226, 230, 70 P.2d 692; Ellis v. Jewett, 18 Cal.App.2d 629, 634, 64 P.2d 432."

Defendants maintain that there was sufficient explanation within the rule of the Shaw case in that, at plaintiffs' request, the court instructed as follows: "Now the instruction just given [on res ipsa loquitur] may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based upon a special doctrine of the law which may be applied only under special circumstances." Then,

after setting forth these circumstances, the instruction concludes: "When all these conditions are found to have existed, they beget the inference of negligence and proximate cause concerning which I have instructed you * * *." BAJI 206–C.

In a case where the undisputed evidence does not establish the applicability of res ipsa loquitur doctrine as in the Shaw case, supra, both parties are entitled to instructions consistent with their respective contentions, and it is not error to give BAJI 131 in conjunction with a res ipsa instruction so long as the jury are clearly informed that if they find res ipsa applicable, the mere happening of an accident rule is not to govern. In such a situation, misconception and confusion are avoided. Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 240 P.2d 672; Seedborg v. Lakewood Gardens, etc., Ass'n, 105 Cal.App.2d 449, 233 P.2d 943. However, in a case, as the one at bar, where the evidence discloses without conflict that res ipsa loquitur is applicable, the jury is likely to be confused by the giving of the contradictory instruction and the saving grace of the explanatory instruction in those cases in which there is a conflict as to whether the doctrine is applicable has no such effect where the inference of negligence indisputably arises. The jury in the case at bar were first told that no inference of negligence arises because an accident happened; then they were told, due to the evidence in this case, such an inference does arise; finally, the jury was given the explanatory instruction above quoted. This latter instruction could not expunge the confusion which would naturally result in the minds of the jurors from the giving of the first two instructions for they were not told to choose between the two rules, but could have reasonably believed, as both were instructed upon, that somehow both rules were to apply or that they were in fact to make a choice even though not so directed. Consequently, as a result of this confusion, it is possible the jury did not give any weight to the res ipsa inference.

Plaintiffs were in no way precluded from raising the above objection by reason of the fact they requested the giving of BAJI 206–C which, incidentally, referred to the general rule that the mere happening of an accident does not support an inference of negligence. BAJI 206–C did not result in instructing the jury to the same effect as did BAJI 131 and 131.1.

Plaintiffs also questioned the giving of the unavoidable accident instruction (BAJI 134), such being the first instruction quoted in the statement of facts, supra. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 657–660, 320 P.2d 500, expressly held the giving of the unavoidable accident instruction was error in that such instruction served no useful purpose and was confusing. See also Grant v. Mueller, 160 Cal. App.2d 804, 325 P.2d 680; Britton v. Gunderson, 160 Cal.App.2d 66, 324 P.2d 938. Defendants, however, attempt to take the instant case out of the operation of the Butigan decision. First, it is argued, as Butigan was decided after the judgment was rendered in the instant case, it should not be here applied but the prior rule which approved such instruction should instead govern this decision. The obvious answer is that the Butigan decision itself was given retroactive effect, as is common with judicial changes in the law.

Next, defendants suggest that the error sought to be avoided in the Butigan case was caused by the inclusion of additional language in the unavoidable accident instruction there given which was omitted in the present case.[1] That this position is

1. Only the italicized portion of this instruction was given in the instant case.

"*In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence.* Even if such an accident could have been avoided by the exercise of exceptional foresight, skill, or caution, still, no one may be held liable for the injuries resulting from it. Bear

without foundation is evidenced by the following quotations from Butigan where language common to the instruction given in the instant case is criticized: "The statement in the quoted instruction on 'unavoidable or inevitable accident' that these terms 'simply denote an accident that occurred without having been proximately caused by negligence' informs the jury that the question of unavoidability or inevitability of an accident arises only where the plaintiff fails to sustain his burden of proving that the defendant's negligence caused the accident. Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose." 49 Cal.2d at page 659, 320 P.2d at page 504. "The instruction is not only unnecessary, but it is also confusing. When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation." 49 Cal.2d at page 660, 320 P.2d at page 505.

Finally, defendants assert that the Supreme Court in the Butigan case expressly stated that in special situations it would be proper to give an unavoidable accident instruction, and that the instant case represents such a special situation. It is true that the Supreme Court excepted certain situations from the ruling of that case, for at page 660 of 49 Cal.2d, at page 505 of 320 P.2d the court stated: "There are situations where it may be necessary to explain the meaning of the words 'unavoidable accident,' for example, where a defendant is charged with a violation of section 602 of the Vehicle Code. That statute makes it a misdemeanor for a person to drive certain vehicles for more than a limited number of hours but provides that the 'section does not apply in any case of casualty or unavoidable accident or an act of God.' It * * * would be proper to explain to the jury the meaning of the terms contained in the exception. *The definition of the words 'unavoidable accident' as used in section 602 would not involve any of the problems which arise in connection with the challenged instruction.*" (Emphasis added.)

[6] While we do not find it necessary to decide whether a special situation within the contemplation of the above quotation is limited to a case where a statute makes reference to an unavoidable accident (see Rayner v. Ramirez, 159 Cal.App. 2d 372, 324 P.2d 83), it is clear that it is error to give the unavoidable accident instruction in a negligence case where plaintiff has the burden of proving that the complained of injury was proximately caused by the defendant's negligence where the ordinary instructions on negligence and proximate cause adequately so inform the jury, for this is the precise holding of our Supreme Court. See Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897.

Therefore, as there was error in instructing the jury, it cannot be said that the trial court abused its discretion in granting a new trial and the order appealed from is affirmed.

ASHBURN and HERNDON, JJ., concur.

in mind, however, that if any defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained by that defendant." 49 Cal. 2d at page 657, 320 P.2d at page 503.

166 Cal.App.2d Supp. 833

Martin HILLHOUSE, Plaintiff and Respondent,

v.

Vernon WOLF, Defendant and Appellant.

Appeal No. 61.

Appellate Department, Superior Court, Fresno County, California.

Dec. 26, 1958.

Action for conversion of a sulphuring machine. The Municipal Court, Fresno Judicial District, Fresno County, George W. Huffman, J., entered judgment in favor of plaintiff and defendant appealed. The Superior Court, Appellate Department, DeWolf, J., held that where defendant in 1953, commenced using a sulphuring machine which had been accidentally left in his possession by plaintiff-owner at time defendant acquired possession of a ranch from owner, statute of limitations commenced to run from date of such unauthorized use, and therefore, action commenced by owner in 1957 was time barred, even though owner did not demand return of the machine until 1957.

Judgment reversed and entered in favor of defendant.

1. Bailment ⇐11

Where a sulphuring machine was accidentally left in a party's possession by the owner, the party was bound to take charge of the machine, but had no right to use the machine without the consent of the owner. West's Ann.Civ.Code, §§ 1815, 1816, 1835.

2. Trover and Conversion ⇐10

Where a sulphuring machine was accidentally left in a party's possession by the owner, act of the party in using the machine without the consent of the owner constituted an act of conversion. West's Ann.Civ.Code, § 1835.

3. Limitation of Actions ⇐95(1), 104(1)

The statute of limitations commences to run at the time of the conversion, and not when the owner of the property acquires knowledge of the acts constituting the conversion, although an exception to the rule exists when it is shown that an offending party voluntarily conceals a cause of action, in which case the statute is deemed not to become operative until the aggrieved party discovers the existence of the cause of action.

4. Limitation of Actions ⇐55(5), 66(14)

Where defendant in 1953, commenced using a sulphuring machine which had been accidentally left in his possession by plaintiff-owner at time defendant acquired possession of a ranch from owner, statute of limitations commenced to run at time of such unauthorized use, and therefore, conversion action commenced by owner in 1957 was time-barred, even though owner did not demand return of the machine until 1957. West's Ann.Civ.Code, §§ 1815, 1816, 1835.

Wilbur K. Kessler, Kerman, for appellant.

Maurice E. Smith, of the firm of Lerrigo, Thuesen, Thompson & Thompson, Fresno, for respondent.

DE WOLF, Judge.

This is an action in conversion. The trial court gave judgment in favor of the plaintiff from which the defendant has taken this appeal.

The facts in this case are not in dispute. In February, 1951, plaintiff sold a ranch to the defendant who then went into possession of it. The sale of the ranch did not include the selling or purchasing of any of the personal property on the premises. At the time plaintiff turned over possession of the ranch there was left behind a sulphuring machine which is the subject matter of this lawsuit.

The defendant first discovered this sulphuring machine several months after taking possession of the ranch. He found it in an old barn surrounded by sweat boxes. The barn in which he found the machine was in a dilapidated condition, so in the

fall of 1951 he moved it to a more sheltered place.

In 1952, the defendant repaired the machine and made an addition to it at a cost of about $75. In 1953, the defendant used the sulphuring machine for his own purposes in his farm work. His next and last use of the sulphuring machine was in 1956.

From the time defendant purchased the ranch in February, 1951, the defendant did not see the plaintiff until about May of 1957, at which time the plaintiff appeared and demanded possession of his sulphuring machine. This demand the defendant refused.

On October 10, 1957, the plaintiff filed an action in the Municipal Court, alleging that the defendant had converted his sulphuring machine. The defendant defended the action on the ground that plaintiff's action was barred by the Statute of Limitations. The trial court granted a judgment in favor of the plaintiff, and it is from that judgment that the defendant prosecutes this appeal.

[1] The facts of this case clearly show the defendant to have been an involuntary bailee of the sulphuring machine, the machine having been accidently left in his possession by the plaintiff. Civil Code, § 1815, subd. 1. As such the defendant was bound to take charge of the machine. C.C. § 1816. But the defendant had no right to use the machine without the consent of the owner. C.C. § 1835. That the defendant did use the machine without the consent of the plaintiff (owner) is conceded.

[2] The act of the defendant in using the machine in 1953 was an act of conversion because a bailee such as the defendant was had no right to use the machine at all. C.C. § 1835; 7 Cal.Jur.2d 630.

It is plaintiff's position that the Statute of Limitations did not commence to run until the defendant refused his demand to return the machine, the demand having been made in May, 1957. On the other hand, defendant contends that the statute began to run, at the very latest, in 1953 when he used the machine.

[3] We are compelled to agree with the defendant. The law of this state provides that the Statute of Limitations commences to run at the time of the conversion and not when the owner of the property acquires knowledge of the acts constituting the conversion. Rose v. Dunk-Harbison Co., 7 Cal.App.2d 502, 46 P.2d 242; First National Bank v. Thompson, 60 Cal.App. 2d 79, 140 P.2d 75; 1 Witkin's Cal.Proc. 646. An exception to this rule exists when it is shown that an offending party voluntarily conceals a cause of action, in which case the statute is deemed not to become operative until the aggrieved party discovers the existence of the cause of action. Pashley v. Pacific Electric Railway Co., 25 Cal.2d 226, 153 P.2d 325. However, the exception is not applicable as the facts in this case in no way show that the defendant voluntarily attempted to conceal from the plaintiff the fact that the plaintiff had a cause of action.

At the trial of the action in the trial court, it was stipulated that the present value of the sulphur machine was $150.

[4] It is our conclusion that the trial judge was in error when he did not rule that the action of the plaintiff was barred by the Statute of Limitations. At the very latest it would appear that the defendant committed an action of conversion in 1953, and it is from that time that the Statute of Limitations started running; consequently, at the time plaintiff filed his action in October, 1957, the action was barred.

For the foregoing reasons the judgment of the lower court is reversed, and

It is ordered that judgment be entered in favor of the defendant.

CONLEY, P. J., and POPOVICH, J., concur.

51 Cal.2d 423

CITY OF LOS ANGELES et al., Petitioners,

v.

SUPERIOR COURT of THE COUNTY OF LOS ANGELES et al., Respondents,

Los Angeles Dodgers, Inc. (a Corporation), et al., Real Parties in Interest.

L. A. 25113.

Supreme Court of California, In Bank.

Jan. 13, 1959.

Rehearing Denied Feb. 11, 1959.

Proceeding in prohibition by a city to restrain the superior court from enforcing a preliminary injunction or taking further action in a taxpayers suit to enjoin the certification of the result of a referendum election. The Supreme Court, Gibson, C. J., held that writ of prohibition was an appropriate remedy; and that a contract by which the city agreed to convey to a ball club land for the erection of a stadium and to use its best efforts to acquire additional land and to employ its best efforts to have eliminated a deed provision restricting the use of certain property acquired from the Housing Authority and to vacate existing public streets was not invalid.

Writ issued.

1. Prohibition ⇐10(1)

The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy and adequate remedy in the ordinary course of law and when the proceedings of the court are without or in excess of its jurisdiction. West's Ann.Code Civ.Proc. §§ 1102, 1103.

2. Prohibition ⇐23

The absence of another adequate remedy was determined by the Supreme Court when it granted an alternative writ of prohibition. West's Ann.Code Civ.Proc. §§ 1102, 1103.

3. Prohibition ⇐10(1)

To permit the issuance of prohibition, there need not be a lack of jurisdiction over the subject matter or parties in a fundamental sense but only that there be a want or excess of power of the court as defined by the statute or by the rules developed under the doctrine of stare decisis. West's Ann.Code Civ.Proc. §§ 1102, 1103.

4. Injunction ⇐85(1)

A court acts in excess of its jurisdiction if it attempts to enjoin the enactment or enforcement of a valid public statute or ordinance.

5. Prohibition ⇐5(3)

A proceeding in prohibition seeking to restrain the Superior Court from enforcing a preliminary injunction in a taxpayer's suit to enjoin certification of a result of a referendum election would lie to test the validity of the ordinance where there was no evidence presenting a substantial question of fact upon the material issues. West's Ann.Code Civ.Proc. §§ 526, subd. 7, 1102, 1103; West's Ann.Civ.Code, § 3423, subd. 7.

6. Municipal Corporations ⇐225(4)

Adequacy of a consideration for a contract entered into by a municipality with respect to conveyance to a ball club of land for erection of a stadium and which involved the comparative values of the promises of the parties is a matter which in the absence of abuse of discretion rests in the judgment and discretion of the city council.

7. Contracts ⇐10(5)
Municipal Corporations ⇐225(5)

A contract by a city to convey land to a ball club for the purpose of erection of a stadium thereon was not invalid as lacking mutuality in that there was no absolute obligation requiring the club to purchase additional land to be used for recreational purposes or buying it or to pay any amount therefor, nor was the contract defective because it provided that a violation of the agreement by the club regarding its obligations concerning recreation facilities would not affect any transfers of land theretofore made.

8. Contracts ⇐25

Generally, if an essential element of a promise is reserved for the future agree-

ment of both parties the promise gives rise to no legal obligation until such a future agreement is made.

3. Contracts ⇐25

Enforceability of a contract containing a promise to agree depends upon relative importance and the severability of the matter left to the future, and is a question of degree, and may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair, the enforcement of the remainder of the agreement.

10. Contracts ⇐25

Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced.

11. Municipal Corporations ⇐225(5)

A contract by city to convey land to a ball club for the erection of a baseball stadium was not invalid because it left to the future agreement of the parties the location and size of site to be used for oil drilling, nature of recreation facilities to be constructed and maintained for twenty years and the rental to be paid to the city in the event the club exercised its right to use a former ball field prior to the completion of the stadium.

12. Municipal Corporations ⇐225(1)

In considering whether a contract by city to convey land to a ball club for erection of a stadium has a proper public purpose the court must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial provided the city receives benefits which serve legitimate public purposes.

13. Municipal Corporations ⇐225(5)

A contract by city to convey land to a ball club for erection of a stadium was not invalid on the ground that it was not for a proper "public purpose" in view of the transfer of a former ball field from the club to the city and the construction by the club on a parcel of recreation facilities to be used by the city for twenty years together with maintenance thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Purpose".

14. Municipal Corporations ⇐225(5)

A contract by city to convey land to a ball club for erection of a stadium thereon when viewed as a whole was not inconsistent because the contract declared that property was no longer required for the use of the city and the recital that 40 acres of the total of the 300 to be conveyed to the club were to be used by the city for needed recreational facilities.

15. Municipal Corporations ⇐225(5)

In determining the validity of contract by city to convey land to a ball club for erection of a stadium, testimony of a council member that no steps were taken by the council acting as a party to determine whether the land was no longer required for the use of the city was properly rejected where the testimony would be insufficient to overcome the ordinance declaration that the land was no longer required by the city.

16. Municipal Corporations ⇐225(3)

In determining the validity of a contract by city to convey land to a ball club for erection of a stadium, testimony of the general manager of the city department of parks that the department was actively seeking and acquiring land to be used for playground and recreational purposes and that the property conveyed was suitable for such purposes was properly rejected.

17. Municipal Corporations ⇐225(5), 870, 871

A city conveying land to a ball club for erection of a stadium could properly agree in return for legitimate benefits it would receive under the contract, that it would use its best efforts to acquire additional land to convey as part of the consideration to be furnished by it, even though the city was in effect agreeing to purchase land and to sell it immediately thereafter to a private corporation, on the

ground that the additional land was to be acquired for a proper "public purpose", nor was the contract invalid on the ground that the city was seeking to purchase property for the purpose of making a gift of it to a private enterprise or otherwise improperly using city funds to aid private persons.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Purpose".

18. Municipal Corporations ⇐225(3)

Where land acquired from housing authority by deed contained a restriction that it was to be used for public purposes only or residential development or residential subdivision, agreement was not construable as prohibiting the city from selling the property, and under the city charter, when city no longer needed the property, it could sell the property to a ball club for use as a stadium under such terms as the council prescribed by the ordinance.

19. Municipal Corporations ⇐225(2)

An agreement by city to convey property to a ball club for erection of a stadium was not invalid as attempting to make an illegal delegation to a private corporation of the duties of the city council, by agreeing that prior to passage of title the city would spend $2,000,000 to place the property in a proper condition to convey to the club in a manner designated by the club, where the city could not be required to make any expenditures not in accord with the general purposes of the contract.

20. Contracts ⇐153

Contracts must be construed whenever possible so as to make them valid rather than invalid.

21. Municipal Corporations ⇐225(5)

Contract by city to convey land to a ball club for erection of a stadium was not invalid on the ground that the city illegally agreed to vacate streets in the property which would no longer be needed for street purposes, where the agreement was to apply only to such streets as the city might subsequently determine to be no longer needed for street purposes, and the agreement was not invalid as purporting to govern the exercise of the power of the city to determine what streets might no longer be necessary, since the city was merely agreeing to do an act which it should do regardless of the contract.

22. Municipal Corporations ⇐225(2)

The contract of a city to convey land to a ball club for the erection of a stadium thereon was not invalid because of provision requiring the city to spend up to $2,000,000 to place the property in a proper condition to convey to the club on the ground that the provision had the effect of delegating to the club, the power to designate which streets were to be eliminated.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Weldon L. Weber, Deputy City Atty., Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Joe Crider, Jr., O'Melveny & Myers and Pierce Works, Los Angeles, for Real Party in Interest Los Angeles Dodgers, Inc.

Julius Ruben, in pro. per., and Phill Silver, Hollywood, for Real Parties in Interest Ruben and Kirshbaum.

GIBSON, Chief Justice.

By this proceeding in prohibition the city of Los Angeles seeks to restrain the superior court from enforcing a preliminary injunction or taking further action in a taxpayer's suit to enjoin certification of the result of a referendum election.

The city council adopted an ordinance authorizing execution of a contract between the city and the Brooklyn National League Baseball Club, Inc., which provided, among other things, for the exchange of certain properties and for the ball club to erect a stadium and procure the transfer from Brooklyn to Los Angeles of the franchise of the major league baseball club known as the "Dodgers." Following the filing of a referendary petition, the city council vot-

ed to place the ordinance on the ballot for approval or disapproval by the voters, and at the ensuing election a majority of the voters favored adoption of the ordinance. Thereafter respondent superior court granted a temporary restraining order and a preliminary injunction restraining the city council from declaring the result of the election.

Two prior actions were filed by some of the real parties in interest. One was brought to secure a declaration that the ordinance and contract were invalid and to enjoin any proceedings thereunder (Ruben v. City of Los Angeles, L.A. Superior Court No. 687210); in the other similar relief was sought together with mandamus and prohibition (Kirshbaum v. Housing Authority, L.A. Superior Court No. 699077). Judgments were rendered enjoining the execution of the contract, and appeals therefrom are now pending in this court. In a third action filed by Kirshbaum against the city, a preliminary injunction was issued enjoining certification of the result of the referendum election. (Kirshbaum v. City of Los Angeles, L.A. Superior Court No. 703023.) This proceeding was then brought by the city to prohibit the superior court from enforcing the preliminary injunction or from taking further steps in the third action.

[1–3] The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy, and adequate remedy in the ordinary course of the law and when the proceedings of the court are without or in excess of its jurisdiction. Code Civ.Proc. §§ 1102, 1103. The absence of another adequate remedy was determined by this court when we granted an alternative writ. Cf. Atkinson v. Superior Court, 49 Cal.2d 338, 342, 316 P.2d 960; Bowles v. Superior Court, 44 Cal.2d 574, 582, 283 P.2d 704. To permit the issuance of prohibition it is not necessary that there be a lack of jurisdiction over the subject matter or parties in the fundamental sense but only that there be a want or excess of the power of the court as defined by statute or by rules developed and followed under the doctrine of stare decisis. Tide Water Associated Oil Co. v. Superior Court, 43 Cal.2d 815, 821, 279 P.2d 35; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287 et seq., 109 P.2d 942, 132 A.L.R. 715.

Subdivision 7 of section 3423 of the Civil Code and the second subdivision 7 of section 526 of the Code of Civil Procedure provide that an injunction cannot be granted to "prevent a legislative act by a municipal corporation."

Subdivision 4 of section 3423 of the Civil Code and the second subdivision 4 of section 526 of the Code of Civil Procedure similarly provide that an injunction cannot be granted to "prevent the execution of a public statute by officers of the law for the public benefit." The basis for these statutory provisions is to be found in the doctrine of separation of powers of government into three independent departments. See Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 682, 154 P. 845; Glide v. Superior Court, 147 Cal. 21, 24 et seq., 81 P. 225.

[4, 5] A court acts in excess of its jurisdiction if it attempts to enjoin the enactment or enforcement of a valid public statute or ordinance. Financial Indemnity Co. v. Superior Court, 45 Cal.2d 395, 402, 289 P.2d 233; Santa Clara County v. Superior Court, 33 Cal.2d 552, 557–559, 203 P.2d 1; Reclamation Dist. No. 1500 v. Superior Court, supra, 171 Cal. 672, 676, 681–682, 154 P. 845; Wheeler v. Herbert, 152 Cal. 224, 241, 92 P. 353; Glide v. Superior Court, 147 Cal. 21, 23 et seq., 81 P. 225; Loftis v. Superior Court, 25 Cal.App.2d 346, 352 et seq., 77 P.2d 491; State Board of Equalization v. Superior Court, 5 Cal. App.2d 374, 378, 42 P.2d 1076; cf. Moore v. Superior Court, 6 Cal.2d 421, 424, 57 P. 2d 1314. Although prohibition should not issue where the propriety of the trial court's action depends upon questions of fact (Brock v. Superior Court, 11 Cal.2d 682, 687 et seq., 81 P.2d 931; Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 586–587, 55 P.2d 495), none of the persons attacking the contract has pointed

to any evidence which would present a substantial question of fact upon a material issue. It follows that prohibition will lie to test the validity of the ordinance.

The contract, as set forth in Ordinance No. 110,204, provides that the city will convey to the ball club 185 acres, more or less, of land presently owned by it in Chavez Ravine and will use its best efforts to acquire at a reasonable cost and convey additional land to make a total of about 300 acres, reserving, among other things, an oil drilling site not to exceed five acres, the location of the site to be mutually agreed upon by the parties. Title to 40 acres of the 300, to be designated by the ball club, is to be retained by the city for 20 years to assure performance by the ball club of its obligations to provide and maintain certain recreational facilities during that period, after which title is to be conveyed to the club.

The city is to employ its best efforts to have eliminated or modified a deed provision restricting the use of certain property acquired by the city from the Los Angeles Housing Authority, provided that if the city is unable to have the restriction altered to permit the use contemplated by the ball club, the contract shall be of no further effect. Upon conveyance of the property to the club, existing public streets therein no longer needed for street purposes will be vacated, and the city, upon demand of the ball club, is to commence proceedings to vacate such streets and deliver title to the club. Prior to passage of title to any of the 300 acres, the city is to spend up to but not to exceed $2,000,000, in the manner to be designated by the ball club, to place such property in a proper condition to convey to the ball club. The city also is to perform certain acts with respect to construction of additional streets, rezoning the property, and obtaining funds from the county for access roads.

The ball club agrees to construct on the Chavez Ravine property, at its expense, a modern baseball stadium seating at least 50,000 people. It will move to Los Angeles "the present Brooklyn National League franchise and ball team known as the 'Dodgers.'" Further, the club will convey to the city the land and improvements known as Wrigley Field, reserving the right to use of the field until the stadium is completed, conditioned upon payment of a rental to be mutually agreed upon.

Recreational facilities costing not over $500,000 are to be constructed by the ball club on the 40-acre portion of the Chavez Ravine property referred to above, such facilities to be mutually agreed upon prior to conveyance of the property. The club is to maintain the recreational facilities on the 40-acre parcel at an annual cost of $60,000, and in the event the maintenance does not amount to that much in any year, the club is to pay the city the difference between $60,000 and the actual cost. The ball club is under no obligation to furnish personnel for the operation of the recreational facilities, and, with certain exceptions, the city is to have control of them.

In addition, the agreement contains a number of recitals of fact and declarations of policy to the general effect that the contract will be beneficial to the city and that the property which the city now owns and is to convey to the ball club is no longer required for the use of the city.

The city reserves all mineral rights in the Chavez Ravine property, and it is to acquire all mineral rights in Wrigley Field. The agreement directs that one-half of the receipts from the mineral rights is to be placed by the city in a special trust fund and expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the ball club, the location and type of facilities to be mutually agreed upon by the parties. The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no

longer any reason to treat them as parts of the contract.

[6] The benefits to be received by the city are apparent, and the adequacy of the consideration, which involves the comparative values of the promises of the parties, is a matter which, in the absence of abuse of discretion, rests in the judgment and discretion of the city council. Cf. Wehrle v. Board of W. & P. Com'rs, 211 Cal. 70, 72–73, 293 P. 67; Nickerson v. County of San Bernardino, 179 Cal. 518, 521 et seq., 177 P. 465; Burns v. American Casualty Co., 127 Cal.App.2d 198, 206, 273 P.2d 605.

[7] There is no merit to the argument that the contract lacks mutuality in that there is no absolute obligation requiring the ball club to purchase the 40 acres to be used for recreational purposes or binding it to pay any amount therefor. The contract expressly declares that at the end of the 20-year period during which the ball club is to operate the recreational facilities, title to the 40 acres shall be conveyed to the club "without further consideration" if all the terms of the agreement pertaining to the facilities have been fully performed. The consideration for this conveyance obviously is to be found in the various obligations which must be performed by the ball club whether or not it accepts the 40 acres. The contract likewise is not defective because it provides that a violation of the agreement by the ball club regarding its obligations concerning the recreational facilities will not affect any transfers of land theretofore made. The city is amply protected, in the event of such a default, by the fact that it may continue to retain title to the 40 acres and, in addition, may maintain an action for damages for breach of contract.

[8–10] The contract is claimed to be void because it contains promises to agree in the future. The general rule is that if an "essential element" of a promise is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made. Ablett v. Clauson, 43 Cal.2d 280, 284–285, 272 P.2d 753. The enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future; it is a question of degree and may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair the enforcement of the remainder of the agreement. See 1 Williston on Contracts (3rd ed. 1957) §§ 45, 48, pp. 152, 156–158. See also Belcher v. Williams, 151 Cal.App.2d 615, 620, 311 P.2d 861. Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced. Wilson v. Wilson, 96 Cal.App.2d 589, 593–595, 216 P.2d 104; see 1 Williston on Contracts (3rd ed. 1957) § 48, pp. 156–158.

[11] The contract leaves to the future agreement of the parties the location and size, within five acres, of the site to be used for oil drilling, the nature of the recreational facilities to be constructed and maintained for 20 years on the 40-acre parcel, and the rental to be paid to the city in the event the ball club exercises its right to use Wrigley Field prior to completion of the stadium. The reservation of an oil drilling site and the establishment and maintenance of the recreational facilities on the 40-acre parcel are, of course, important features of the contract, but, in our opinion, the uncertainty with respect to the exact location and size of the drilling site and the details with respect to the recreational facilities are matters which should not be treated as rendering the contract void. There is no indication that the city and the ball club are unable to come to an agreement as to them, and, if the parties cannot do so, the court may determine the matters within the test of reasonableness referred to above, in ac-

cordance with the general purposes of the contract. Similarly, the court could fix a reasonable rental for Wrigley Field, if this should ever become necessary.

[12, 13] In considering whether the contract made by the city has a proper public purpose, we must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes. Cf. City of Oakland v. Williams, 206 Cal. 315, 319 et seq., 274 P. 328; County of Los Angeles v. La Fuente, 20 Cal.2d 870, 876–877, 129 P.2d 378. The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. In view of these direct benefits, it is unnecessary for us to consider whether the city could properly expend public funds for the various indirect benefits which the public will receive under the contract, such as the bringing to the city of a major league baseball club, the construction by the club of its new stadium, and the return of the Chavez Ravine property to the tax rolls.

[14] When the contract is viewed as a whole, there is no actual inconsistency, as argued, between the declaration, on the one hand, that the 185 acres of Chavez Ravine property now owned by the city are no longer required for the use of the city and the recital, on the other hand, that 40 acres of the total of 300 to be conveyed to the club are to be used by the city for needed recreational facilities. The provisions, when read together, may properly be interpreted as meaning that the city has no need for the Chavez Ravine property with the exception of the use of the 40-acre parcel over a 20-year period for the recreational facilities referred to in the contract. As we have seen, the city retains control of and title to that 40-acre parcel for the purpose of obtaining the needed facilities. It is difficult to see anything improper in an agreement by which a city, owning more land than it needs, conveys some of that land in exchange for the construction and maintenance of needed facilities for use by the city over a 20-year period. It is immaterial that the facilities are to be located on the land which the city thus sells; in fact, under the circumstances involved here, it is of advantage to the city that the facilities are to be so located because this enables the city to retain title for the 20-year period as a means of securing the performance of the promises of the ball club regarding the construction and maintenance of the facilities.

[15, 16] Kirshbaum, in action No. 699077, offered to prove by the testimony of a council member that no steps were taken by the council acting as a body to determine whether the land was no longer required for the use of the city. The offer was rejected by the trial court upon the ground that the minutes of the council are the best evidence until there is a dispute as to their correctness, and our attention has not been called to any portion of the minutes which would support Kirshbaum's assertion or to any evidence that the minutes are incorrect. Moreover, the offered evidence, if admitted, would be insufficient to overcome the declaration in the ordinance that the land to be conveyed by the city was no longer required by the city, since the offer does not show any fraud or abuse of discretion by the council. Likewise insufficient to overcome the declaration are Kirshbaum's offers to prove by the testimony of the general manager of the city's department of recreation and parks that this department was actively seeking and acquiring land to be used for playground and recreational purposes and that the Chavez Ravine property is suitable for such purposes.

[17] In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire additional land to convey as part of the consideration to be furnished by it,

even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. If the city had so desired, it clearly could have added to the contract price, in cash, the reasonable value of the additional land which it agreed to use its best efforts to acquire, and there is no essential difference if the city, instead of paying the amount in cash, uses the money to acquire property and then conveys the property as part of the contract consideration. Section 2(11) (1) of the city charter authorizes the city to buy "anything useful or convenient" in connection with the exercise of the city's powers. While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. The contract does not require the city to use eminent domain to acquire the additional land, and we need not determine whether that method could be employed for such a purpose. This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose.

[18] It is contended that the city does not have power to sell to a private corporation land held by the city subject to a public purpose restriction imposed by the grantor's deed to the city and that the city has no power to enter into an agreement with a private corporation obligating the city to extinguish such a restriction. This contention relates to land acquired from the Housing Authority of the City of Los Angeles by a deed containing a restriction reading, in part, "to be used for public purpose only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision." The city, as we have seen, agrees to use its best efforts to have the restriction eliminated or modified to permit the use contemplated by the club, and it is provided that if the city is unable to have the restriction changed, the contract shall be of no further effect.

The grantor did not intend by this provision to prohibit the city from selling the property; the provision contains no such limitation and plainly contemplates the possibility of a sale in that the restriction is made applicable to use of the property by the "grantees" and "assigns" of the city. Under section 393 of the charter, when the city no longer requires the use of property, it may, with certain exceptions not pertinent here, sell the property upon such terms and conditions as the council prescribes by ordinance. In view of the declaration by the council that the city no longer requires the use of the property, the city's promise to use its best efforts to have the deed restriction removed cannot be said to constitute an illegal agreement binding the city council to exercise its judgment in the future. Any possibility that the Housing Authority may have a right to complain of a termination of the public use upon a sale by the city will disappear if the city is able to obtain the Housing Authority's consent to eliminate the restriction. Similarly, such a consent will obviate any difficulty with respect to the restriction against residential use of the property. Whether or not the Housing Authority has power to execute, and is willing to execute, a release of its rights under the deed restriction is a question which relates to the performance rather than to the validity of the contract and is not before us in this proceeding.

[19] We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property "in a proper condition to convey to" the ball club, the manner in which the money will be spent for such purpose to be designated by the club. It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract. The city could have paid the money to the club outright, as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which the city will keep possession of the money until it is spent and, in addition, retain some control of how it is spent, is an advantage to the city which does not militate against the validity of the contract.

[20, 21] It is contended that the city is illegally agreeing to vacate streets under the provision that the existing public streets in the Chavez Ravine property which will no longer be needed for present or future street purposes will be vacated and the city will, upon demand of the ball club, commence proceedings to vacate the streets. It is an elementary rule that contracts must be construed, whenever possible, so as to make them valid rather than invalid, and the provision, when read as a whole, may be construed as not imposing on the city any improper obligation. The clear implication is that the agreement will apply only to such streets as the city may subsequently determine to be no longer needed for street purposes. The agreement does not purport to control or govern the exercise of the power to determine what streets may no longer be necessary but to provide that, when the determination is made, the city will commence the required statutory procedure.

It is to the advantage of a city and the public to vacate a street which is no longer needed and thereby relieve the city of the expense and responsibility of maintaining it in proper and safe condition. By this part of the contract the city is merely agreeing to do an act which it should do regardless of contract once it determines that there is no longer a need for a particular street. Cases which declare that agreements to vacate or sell a street are invalid as being attempts to evade the statutory modes of procedure and safeguards or to bind local officials in advance as to the exercise of their judgment in the future, are clearly distinguishable. See County of San Diego v. California Water etc. Co., 30 Cal.2d 817, 824, 186 P.2d 124, 175 A.L.R. 747; People v. City of Los Angeles, 62 Cal.App. 781, 218 P. 63.

[22] Ruben asserts, in opposition to the conclusion we have reached with respect to vacation of streets, that we must also consider the paragraph which provides that the city shall spend up to $2,000,000 to place the property in a proper condition to convey to the ball club and that the manner in which the money is to be spent is to be designated by the club. He urges that this paragraph, when read together with the provision relating to the vacation of streets, has the effect of delegating to the club the power to designate which streets are to be eliminated. The contract, however, does not purport to authorize either the city or the ball club to use any of the $2,000,000 to remove a street where such removal has not been duly authorized in appropriate vacation proceedings. If it should be determined in such a proceeding that a particular street remained necessary for public use as a street, the stadium obviously could not be built at that location, but this possibility does not go to the validity of the contract. At most it might render performance impossible, a matter which is not now before us.

Let the writ issue as prayed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

51 Cal.2d 418

Alfred W. GOMES, Appellant,
v.
Selma F. E. BYRNE, Respondent.

Sac. 6919.

Supreme Court of California,
In Bank.
Jan. 9, 1959.

Salesman's action against dog owner for injuries inflicted by dog. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment for dog owner and salesman appealed. The Supreme Court, Spence J., held that where door to door salesman approached owner's home which was enclosed by fence and had been followed along fence by dog which had barked at salesman prior to salesman's opening gate and entering yard in which dog was confined, salesman voluntarily exposed himself to an obvious hazard and assumed risk of being bitten by dog.

Affirmed.

Opinion 321 P.2d 495 vacated.

Carter, Schauer and McComb, JJ., dissented.

1. Animals ⇐71

In adopting so-called "dog bite" statute legislature did not tend to render inapplicable such defenses as assumption of risk or wilfully invited injury, and those defenses are available in all proper cases. West's Ann.Civ.Code, § 3342; West's Ann.Code Civ.Proc. § 963.

2. Negligence ⇐105

Elements of defense of assumption of risk are, a person's knowledge and appreciation of danger involved and his voluntary acceptance of risk.

3. Animals ⇐71

If plaintiff, bitten by dog after having opened gate into enclosed yard in which dog was kept, had recognized danger that dog would bite him, plaintiff's knowledge was sufficient to constitute assumption of risk although plaintiff did not know whether or not dog had a history of viciousness. West's Ann.Civ.Code, § 3342; West's Ann. Code Civ.Proc. § 963.

4. Animals ⇐71

Where salesman, approaching yard which was enclosed by fence, was followed along fence by dog which had barked at him for some 50 feet and salesman then opened gate and entered yard, he voluntarily exposed himself to the obvious hazard and assumed risk of being bitten. West's Ann.Civ.Code, § 3342.

P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, San Francisco, James William Morgan and Jordan M. Peckham, Chico, for appellant.

Albert M. King, Harry Deirup, Orville, and Dorothy D. McKalson, Chico, for respondent.

SPENCE, Justice.

Plaintiff sought damages under the so-called Dog Bite Statute (Civ.Code, § 3342) for injuries inflicted by defendant's dog. Following a trial without a jury, judgment was entered for defendant. Plaintiff appeals from said judgment and from the order denying his motion for a new trial. The latter order is not appealable and therefore the purported appeal therefrom must be dismissed. Code Civ.Proc. § 963.

Defendant is a practical nurse and uses her premises as a private nursing home. At the time of the occurrence, the house and yard were surrounded by a wire fence with a closed gate. A path led from the gate to the front door. No signs were posted on the premises indicating that peddlers or solicitors were unwelcome, nor was there any sign warning of a vicious dog.

Plaintiff, a salesman for the Fuller Brush Company, was canvassing in the neighborhood of defendant's home. As he walked along the sidewalk approaching the gate leading to defendant's door, the dog in the enclosed yard followed him along the inside of the fence for about fifty feet,

barking continuously all the way. Plaintiff nevertheless opened the gate and walked into the yard, whereupon the dog bit him on the right lower leg, causing a puncture wound and superficial abrasions. Defendant, having heard the dog barking, went to the door and met plaintiff as he came up the steps. Plaintiff said that the dog had bitten him; defendant expressed her sorrow at the mishap; and plaintiff responded with the statement that it was one of "the hazards of the game." Plaintiff gave defendant a catalogue and left. The next day plaintiff again called at defendant's home and at that time defendant bought some merchandise from him.

Section 3342 of the Civil Code provides: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property * * * upon the invitation, express or implied, of the owner."

The trial court's denial of recovery was based upon findings that (1) plaintiff was not a business visitor or invitee on the premises; (2) that plaintiff was negligent in entering defendant's premises; and (3) that plaintiff assumed the risk. Since we have concluded that the record sustains the finding that plaintiff assumed the risk, it is unnecessary to consider his contention that he was lawfully on the premises or his further contention that contributory negligence is not a bar to recovery under the Dog Bite Statute.

[1] In adopting section 3342 of the Civil Code, the Legislature did not intend to render inapplicable such defenses as assumption of risk or wilfully invited injury. Therefore those defenses are available in all proper cases. See Smythe v. Schacht, 93 Cal.App.2d 315, 321, 209 P.2d 114; see also 2 Harper and James, The Law of Torts, (1956) § 14.12, pp. 843–845.

Plaintiff contends that the defense of assumption of risk is not available here because there was no showing that the dog had a history of viciousness or that plaintiff knew of that history. He argues that the knowledge required of a plaintiff before he can be held to have assumed the risk is identical to that which had been required to impose liability on the owner of the dog prior to the enactment of section 3342 of the Civil Code. We have concluded that plaintiff's position cannot be sustained.

[2, 3] The "elements of the defense of assumption of risk are a person's knowledge and appreciation of the *danger* involved and his voluntary acceptance of the risk." Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 162, 265 P.2d 904, 906; emphasis added. Thus if plaintiff recognized the *danger* that the dog would bite him, his knowledge was sufficient although he did not know whether the dog had a history of viciousness.

Plaintiff claims, however, that there was no showing that he had actual knowledge of that danger. It may be assumed for the purpose of this discussion that the defense of assumption of risk is not available unless the plaintiff had actual knowledge, as distinguished from constructive notice, of the risk. See Prescott v. Ralph's Grocery Co., supra, 42 Cal.2d 158, 162, 265 P.2d 904; Sloboden v. Time Oil Co., 131 Cal.App.2d 557, 562, 281 P.2d 85; 35 Cal. Jur.2d, Negligence, § 277, p. 823; Comment, 10 So.Cal.L.Rev. 67, 74. But actual knowledge of the risk may be inferred from the circumstances. Ching Yee v. Dy Foon, 143 Cal.App.2d 129, 138–139, 299 P.2d 668.

[4] Here the dog had followed plaintiff along the fence for fifty feet, barking all the way. Under these circumstances, the risk was obvious. Notwithstanding the dog's display of hostility, plaintiff elected to leave his place of safety upon the public sidewalk and to enter upon defendant's enclosed private property. In so doing, he voluntarily exposed himself to the obvious

hazard. It was a calculated risk on plaintiff's part, or, as he expressed it, one of the "hazards of the game." We therefore conclude that the trial court's finding that plaintiff assumed that risk is amply supported by the evidence.

The purported appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

GIBSON, C. J., and SHENK, and TRAYNOR, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I find nothing in the record to support the trial court's finding that the plaintiff assumed the risk. As the majority correctly points out, one of the elements of the defense of assumption of risk is knowledge of the danger involved. This element is clearly absent in this case.

The majority has held that "the risk was obvious." The sole predicate for its position is that "the dog had followed plaintiff along the fence for fifty feet, barking all the way." To hold that this single piece of evidence is sufficient to show that the plaintiff had knowledge of the danger is unrealistic and erroneous.

One does not have to be an expert on dogs to know that a dog that barks is not necessarily vicious or dangerous. When a dog barks and runs alongside of a passer-by, more often than not it is only being playful and seeking attention. Action of this sort by a dog, barring other circumstances, is not a sufficient basis from which to draw an inference that the passer-by has actual knowledge that the dog might bite. It is so common and harmless as to not alarm him at all.

There are additional facts which vitiate such an inference. The dog was a small dog about a foot high and was not one of the breeds known to be either vicious by nature or normally thought to be vicious or dangerous. Throughout the trial, in fact, defendant's counsel, apparently attempting to underplay the fact that the dog bit the plaintiff, referred to it as "the little dog." Also, no signs had been posted warning of the dog. As has been pointed out above, the only evidence upon which the finding of actual knowledge is based is that the dog barked at the plaintiff. Under all the circumstances, this is not sufficient.

The finding of the trial court that the plaintiff was negligent in entering defendant's premises is similarly erroneous. The record is devoid of evidence indicating that the plaintiff was negligent in any way. However, even if there was such evidence, it appears that ordinary contributory negligence is not a defense to liability under Civil Code section 3342. See, Smythe v. Schacht, 93 Cal.App.2d 315, 322, 209 P.2d 114.

The third finding that the trial court made a basis for denial of recovery was that the plaintiff was not a business visitor or invitee on the premises. This also appears to be incorrect.

Salesmen are considered invitees when they come to a place which they have good reason to believe is open for possible dealings with them. (Prosser, Law of Torts, p. 457.) In this case the plaintiff was selling products which he could reasonably believe would be useful to the defendant, and in which she would be interested. Moreover, defendant had not posted signs indicating that peddlers and salesmen were unwelcome. In light of these facts, the plaintiff was justified in believing that defendant's premises were open to him. "Every man, by implication invites others to come to his house as they may have proper occasion either of business or courtesy or information, etc." Duval v. Rowell, 124 Cal.App.2d Supp. 897, 901, 269 P.2d 249, 251; DeLay v. Braun, 63 Cal.App.2d 8, 10, 146 P.2d 32; Cambou v. Marty, 98 Cal.App. 598, 601, 277 P. 365. It seems clear that the plaintiff was lawfully on the defendant's premises.

I would reverse the judgment.

SCHAUER and McCOMB, JJ., concur.

51 Cal.2d 409

William A. DRENNAN, Respondent,

v.

STAR PAVING COMPANY (a Corporation), Appellant.

L. A. 25024.

Supreme Court of California,

In Bank.

Dec. 31, 1958.

General contractor brought action against paving subcontractor to recover damages because of refusal of subcontractor to perform paving according to bid which subcontractor submitted to general contractor. The Superior Court, Kern County, William L. Bradshaw, J., entered judgment adverse to the subcontractor, and the subcontractor appealed. The Supreme Court, Traynor, J., held that where paving subcontractor submitted bid for paving work to general contractor, and bid was silent with respect to right of paving subcontractor to revoke the bid, and general contractor used the bid in making its own successful bid on the main contract, general contractor's reliance on paving subcontractor's bid made the bid irrevocable, and that fact that subcontractor's bid was result of mistake was no defense.

Affirmed.

Opinion, 323 P.2d 477 vacated.

1. Contracts ⇦1

Where there was no evidence that subcontractor offered to make its paving bid, which it submitted to general contractor, irrevocable in exchange for use of its figures by general contractor in computing his bid, and there was no evidence that would warrant interpreting general contractor's use of subcontractor's bid as the acceptance thereof, binding general contractor, on condition that general contractor receive the main contract, to award paving subcontract to paving contractor, there was neither an option supported by consideration nor a bilateral contract binding on both parties.

2. Estoppel ⇦85

Promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise.

3. Contracts ⇦218

Submission of paving bid to general contractor by subcontractor constituted a promise to perform on such conditions as were stated expressly or by implication in the bid or were annexed thereto by operation of law.

4. Contracts ⇦218

If offer for unilateral contract is made, and part of consideration requested in the offer is given or tendered by offeree in response thereto, offeror is bound by a contract, the duty of immediate performance of which is conditional on full consideration being given or tendered within time stated in offer, or, if no time is stated therein, within a reasonable time.

5. Contracts ⇦19

Reasonable reliance resulting in foreseeable prejudicial change in position affords a compelling basis for implying a subsidiary promise not to revoke an offer for a bilateral contract.

6. Contracts ⇦85

Absence of consideration is not fatal to enforcement of implied subsidiary promise not to revoke an offer for a bilateral contract.

7. Contracts ⇦19

Where paving subcontractor submitted bid for paving work to general contractor, and bid was silent with respect to right of paving subcontractor to revoke the bid, and general contractor used the bid in making its own successful bid on the main contract, general contractor's reliance on paving subcontractor's bid made the bid irrevocable.

8. Contracts ⇦21

General contractor cannot reopen bargaining with subcontractor and at same time claim a continuing right to accept the original offer of subcontractor.

9. Contracts ⇐93(1)

If general contractor had reason to believe that paving contractor's bid was in error, general contractor could not justifiably rely on the bid in making the general contractor's main bid.

10. Contracts ⇐93(1)

Where paving subcontractor submitted bid for paving work to general contractor, and bid was silent with respect to right of paving subcontractor to revoke the bid, and general contractor used the bid in making its own successful bid on the main contract, fact that bid of paving subcontractor was result of mistake would not relieve paving subcontractor from its obligation.

11. Damages ⇐155

In action by general contractor against paving subcontractor to recover damages caused by subcontractor's refusal to perform paving work according to bid of $7,131.60 submitted by subcontractor to general contractor, allegation of complaint that after subcontractor's default, general contractor was forced to procure services of third party to perform paving for $10,948.60 sufficiently alleged attempt by general contractor to mitigate damages.

12. Pleading ⇐406(7)

Where question of alleged uncertainty in allegation in complaint as to damages was not raised by special demurrer, question was waived by defendant. West's Ann.Code Civ.Proc. §§ 430, subd. 9, 434.

Atus P. Reuther, Norman Soibelman, Los Angeles, Obegi & High and Earl J. McDowell, Van Nuys, for appellant.

S. B. Gill, Bakersfield, for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment for plaintiff in an action to recover damages caused by defendant's refusal to perform certain paving work according to a bid it submitted to plaintiff.

On July 28, 1955, plaintiff, a licensed general contractor, was preparing a bid on the "Monte Vista School Job" in the Lancaster school district. Bids had to be submitted before 8:00 p. m. Plaintiff testified that it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids. Thus on that day plaintiff's secretary, Mrs. Johnson, received by telephone between fifty and seventy-five subcontractors' bids for various parts of the school job. As each bid came in, she wrote it on a special form, which she brought into plaintiff's office. He then posted it on a master cost sheet setting forth the names and bids of all subcontractors. His own bid had to include the names of subcontractors who were to perform one-half of one per cent or more of the construction work, and he had also to provide a bidder's bond of ten per cent of his total bid of $317,385 as a guarantee that he would enter the contract if awarded the work.

Late in the afternoon, Mrs. Johnson had a telephone conversation with Kenneth R. Hoon, an estimator for defendant. He gave his name and telephone number and stated that he was bidding for defendant for the paving work at the Monte Vista School according to plans and specifications and that his bid was $7,131.60. At Mrs. Johnson's request he repeated his bid. Plaintiff listened to the bid over an extension telephone in his office and posted it on the master sheet after receiving the bid form from Mrs. Johnson. Defendant's was the lowest bid for the paving. Plaintiff computed his own bid accordingly and submitted it with the name of defendant as the subcontractor for the paving. When the bids were opened on July 28th, plaintiff's proved to be the lowest, and he was awarded the contract.

On his way to Los Angeles the next morning plaintiff stopped at defendant's office. The first person he met was defendant's construction engineer, Mr. Oppenheimer. Plaintiff testified: "I introduced myself and he immediately told me that they had made a mistake in their bid to me the night before, they couldn't do it for

the price they had bid, and I told him I would expect him to carry through with their original bid because I had used it in compiling my bid and the job was being awarded them. And I would have to go and do the job according to my bid and I would expect them to do the same."

Defendant refused to do the paving work for less than $15,000. Plaintiff testified that he "got figures from other people" and after trying for several months to get as low a bid as possible engaged L & H Paving Company, a firm in Lancaster, to do the work for $10,948.60.

The trial court found on substantial evidence that defendant made a definite offer to do the paving on the Monte Vista job according to the plans and specifications for $7,131.60, and that plaintiff relied on defendant's bid in computing his own bid for the school job and naming defendant therein as the subcontractor for the paving work. Accordingly, it entered judgment for plaintiff in the amount of $3,817.00 (the difference between defendant's bid and the cost of the paving to plaintiff) plus costs.

Defendant contends that there was no enforceable contract between the parties on the ground that it made a revocable offer and revoked it before plaintiff communicated his acceptance to defendant.

[1] There is no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff's use of its figures in computing his bid. Nor is there evidence that would warrant interpreting plaintiff's use of defendant's bid as the acceptance thereof, binding plaintiff, on condition he received the main contract, to award the subcontract to defendant. In sum, there was neither an option supported by consideration nor a bilateral contract binding on both parties.

Plaintiff contends, however, that he relied to his detriment on defendant's offer and that defendant must therefore answer in damages for its refusal to perform. Thus the question is squarely presented: Did plaintiff's reliance make defendant's offer irrevocable?

[2] Section 90 of the Restatement of Contracts states: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." This rule applies in this state. Edmonds v. County of Los Angeles, 40 Cal.2d 642, 255 P.2d 772; Frebank Co. v. White, 152 Cal.App.2d 522, 313 P.2d 633; Wade v. Markwell & Co., 118 Cal.App.2d 410, 258 P.2d 497, 37 A.L.R.2d 1363; West v. Hunt Foods Co., 101 Cal.App.2d 597, 225 P.2d 978; Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807; see 18 Cal.Jur.2d 407–408; 5 Stan.L.Rev. 783.

[3] Defendant's offer constituted a promise to perform on such conditions as were stated expressly or by implication therein or annexed thereto by operation of law. (See 1 Williston, Contracts [3rd. ed.], § 24A, p. 56, § 61, p. 196.) Defendant had reason to expect that if its bid proved the lowest it would be used by plaintiff. It induced "action * * * of a definite and substantial character on the part of the promisee."

[4] Had defendant's bid expressly stated or clearly implied that it was revocable at any time before acceptance we would treat it accordingly. It was silent on revocation, however, and we must therefore determine whether there are conditions to the right of revocation imposed by law or reasonably inferable in fact. In the analogous problem of an offer for a unilateral contract, the theory is now obsolete that the offer is revocable at any time before complete performance. Thus section 45 of the Restatement of Contracts provides: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein,

within a reasonable time." In explanation, comment *b* states that the "main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see § 90)."

[5] Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

[6] The absence of consideration is not fatal to the enforcement of such a promise. It is true that in the case of unilateral contracts the Restatement finds consideration for the implied subsidiary promise in the part performance of the bargained-for exchange, but its reference to section 90 makes clear that consideration for such a promise is not always necessary. The very purpose of section 90 is to make a promise binding even though there was no consideration "in the sense of something that is bargained for and given in exchange." (See 1 Corbin, Contracts 634 et seq.) Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding. In a case involving similar facts the Supreme Court of South Dakota stated that "we believe that reason and justice demand that the doctrine [of section 90] be applied to the present facts. We cannot believe that by accepting this doctrine as controlling in the state of facts before us we will abolish the requirement of a consideration in contract cases, in any different sense than an ordinary estoppel abolishes some legal requirement in its application. We are of the opinion, therefore, that the defendants in executing the agreement [which was not supported by consideration] made a promise which they should have reasonably expected would induce the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise." Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 408, 10 N.W.2d 879, 884; see also, Robert Gordon, Inc., v. Ingersoll-Rand Co., 7 Cir., 117 F.2d 654, 661; cf. James Baird Co. v. Gimbel Bros., 2 Cir., 64 F.2d 344.

[7] When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

[8] It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer. See, R. J. Daum Const. Co. v. Child, Utah, 247 P.2d 817, 823. In the present case plaintiff promptly informed defendant that plaintiff was being awarded the job and that the subcontract was being awarded to defendant.

[9, 10] Defendant contends, however, that its bid was the result of mistake and that it was therefore entitled to revoke it. It relies on the rescission cases of M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 235 P.2d 7, and Brunzell Const. Co. v. G. J. Weisbrod, Inc., 134 Cal. App.2d 278, 285 P.2d 989. See also, Lemoge Electric v. San Mateo County, 46 Cal.2d 659, 662, 297 P.2d 638. In those cases, however, the bidder's mistake was known or should have been known to the offeree, and the offeree could be placed in status quo. Of course, if plaintiff had reason to believe that defendant's bid was in error, he could not justifiably rely on it, and section 90 would afford no basis for enforcing it. Robert Gordon, Inc., v. Ingersoll-Rand, Inc., 7 Cir., 117 F.2d 654, 660. Plaintiff, however, had no reason to know that defendant had made a mistake in submitting its bid, since there was usually a variance of 160 per cent between the highest and lowest bids for paving in the desert around Lancaster. He committed himself to performing the main contract in reliance on defendant's figures. Under these circumstances defendant's mistake, far from relieving it of its obligation, constitutes an additional reason for enforcing it, for it misled plaintiff as to the cost of doing the paving. Even had it been clearly understood that defendant's offer was revocable until accepted, it would not necessarily follow that defendant had no duty to exercise reasonable care in preparing its bid. It presented its bid with knowledge of the substantial possibility that it would be used by plaintiff; it could foresee the harm that would ensue from an erroneous underestimate of the cost. Moreover, it was motivated by its own business interest. Whether or not these considerations alone would justify recovery for negligence had the case been tried on that theory (see Biakanja v. Irving, 49 Cal.2d 647, 650, 320 P.2d 16), they are persuasive that defendant's mistake should not defeat recovery under the rule of section 90 of the Restatement of Contracts. As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it.

Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal.App.2d 226, 296 P.2d 368, 371, and Bard v. Kent, 19 Cal.2d 449, 122 P. 2d 8, 139 A.L.R. 1032, are not to the contrary. In the Piazza case the court sustained a finding that defendants intended, not to make a firm bid, but only to give the plaintiff "some kind of an idea to use" in making its bid; there was evidence that the defendants had told plaintiff they were unsure of the significance of the specifications. There was thus no offer, promise, or representation on which the defendants should reasonably have expected the plaintiff to rely. The Bard case held that an option not supported by consideration was revoked by the death of the optionor. The issue of recovery under the rule of section 90 was not pleaded at the trial, and it does not appear that the offeree's reliance was "of a definite and substantial character" so that injustice could be avoided "only by the enforcement of the promise."

[11, 12] There is no merit in defendant's contention that plaintiff failed to state a cause of action, on the ground that the complaint failed to allege that plaintiff attempted to mitigate the damages or that they could not have been mitigated. Plaintiff alleged that after defendant's default, "plaintiff had to procur the services of the L & H Co. to perform said asphaltic paving for the sum of $10,948.60." Plaintiff's uncontradicted evidence showed that he spent several months trying to get bids from other subcontractors and that he took the lowest bid. Clearly he acted reasonably to mitigate damages. In any event any uncertainty in plaintiff's allegation as to damages could have been raised by special demurrer. Code Civ.Proc. § 430, subd. 9. It was not so raised and was therefore waived. Code Civ.Proc. § 434.

The judgment is affirmed.

GIBSON C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

166 Cal.App.2d 693

Marian PANDELL, Plaintiff and Appellant,

v.

Robert HISCHIER, Defendant and Respondent.

Civ. 17750.

District Court of Appeal, First District, Division 1, California.

Jan. 5, 1959.

Action arising out of collision occurring when plaintiff made left turn onto highway from exit road of drive-in theater and was struck by defendant's automobile, which was traveling on highway in direction which plaintiff turned. The Superior Court, Santa Clara County, Thomas O'Donnell, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that trial court had adequately and properly instructed on proper interpretation of Vehicle Code section requiring prospective entrant from private road to yield right of way, and that its instructions were sufficiently specific.

Affirmed.

1. Automobiles ⇐167(1)

Prospective entrant from private road may lawfully enter highway so long as there is no vehicle so near as to constitute an immediate hazard. West's Ann.Vehicle Code, § 553.

2. Trial ⇐267(1)

A party is not entitled to have jury instructed in particular phraseology selected by such party, even if language selected states correctly an applicable rule of law, if court does, properly, instruct on issue involved.

3. Automobiles ⇐246(23)

In action arising out of collision occurring when plaintiff made left turn onto highway from exit road of drive-in theater and was struck by defendant's automobile, which was traveling on highway in direction which plaintiff turned, trial court adequately and properly instructed on proper interpretation of Vehicle Code section requiring prospective entrant from private road to yield right of way, and its instructions were sufficiently specific. West's Ann.Vehicle Code, § 553.

4. Trial ⇐260(1)

Giving of the general instruction covering field in an abstract way does not justify refusal of a requested specific instruction.

Boccardo, Blum, Lull, Niland & Teerlink, San Jose, Wavel McLennan, San Francisco, of counsel, for appellant.

Campbell, Custer, Warburton & Britton, San Jose, W. R. Dunn, Burlingame, of counsel, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action against defendant for damages incurred in an automobile accident. The defendant cross-complained against the plaintiff. The jury found in favor of defendant on plaintiff's complaint and in favor of the cross-defendant on defendant's cross-complaint. From the judgment entered on such verdicts the plaintiff appeals. The sole point urged is that an instruction offered by her and refused by the trial court should have been given.

The accident occurred shortly after 1 a. m. on September 11, 1955. Plaintiff was on an exit road of a drive-in theater, which road enters into Almaden Road in San Jose. Plaintiff intended to make a left turn and proceed in a northerly direction on that road. She testified that she waited at the intersection for three or four minutes, waiting for a break in the traffic on Almaden Road. Finally it appeared to her that the nearest automobile approaching the exit road where she was stopped, which was presumably the car of defendant, was some 200 to 400 feet from where she was stopped. It, too, was proceeding northerly on Almaden Road. Plaintiff entered Almaden Road and made a left turn. She had proceeded about three or four car lengths, or from 50 to 75 feet, when she was hit from the rear by the car of defendant.

The testimony produced by defendant was that as defendant approached the drive-in exit going northerly, he was going about 30 or 35 miles per hour; that he first noticed plaintiff's automobile when he was about 100 feet from the exit road; that plaintiff's car was then stopped at the entrance to Almaden Road; that when defendant was but 50 feet from the exit road plaintiff's car started forward and turned in front of defendant; that defendant was unable to stop, and his car struck plaintiff's car in the rear; that the accident occurred 31 feet north of the exit road; that defendant was going but 15 to 20 miles per hour at the time of impact.

[1] Plaintiff urges that the decisive question at the trial was, which of the two vehicles had the right of way at the time of the accident under section 553 of the Vehicle Code. It is then contended that it was prejudicial error for the trial court to refuse to give the following instruction offered by plaintiff: "If you find from the evidence that the automobile operated by the defendant Hischier did not constitute an immediate hazard at the time the plaintiff entered the highway from the theatre driveway, then the defendant was required to yield the right of way to the plaintiff."

The proffered instruction undoubtedly states a correct principle of law.

Section 553 of the Vehicle Code provides that: "The driver of a vehicle about to enter or cross a highway from any private road or driveway or from an alley * * * shall yield the right of way to all vehicles approaching on said highway." Literally, this section would require the prospective entrant from a private road to yield the right of way to all vehicles on the highway regardless of where they were. This would be an unreasonable interpretation. For that reason, the courts have interpreted the section to mean that a prospective entrant from a private road may lawfully enter a highway so long as there is no vehicle so near as to constitute an immediate hazard. Wakefield v. Horn, 109 Cal.App. 325, 293 P. 97; Jansen v. Sugiyama, 29 Cal.App.2d 717, 85 P.2d 476; McDougall v. Morrison, 55 Cal.App.2d 92, 130 P.2d 149; Malinson v. Black, 83 Cal.App.2d 375, 188 P.2d 788; see cases collected 7 Cal.Jur.2d p. 54, § 243. In Todd v. Stanfield, 111 Cal.App.2d 615, 245 P.2d 331, the court affirmed a trial court that gave an instruction that, under this section, the driver on the highway, if his car did not present an immediate hazard to the car entering from a private road, should have yielded the right of way. Thus, the instruction proffered by plaintiff stated a proper rule of law applicable to the facts. But this, alone, does not necessarily require a reversal.

[2] A party is not entitled to have the jury instructed in the particular phraseology selected by such party, even if the language selected states correctly an applicable rule of law, if the court does, properly, instruct on the issue involved. This elementary principle, supported by numerous cases, is stated as follows in 24 Cal.Jur. p. 806, § 79: "Numerous cases establish the rule that it is not error for a court to refuse to give a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are refused if the court, of its own motion or otherwise, correctly announces the substance of the law applicable to the case; this is true even though the requested charges state the principles involved more clearly and definitely than those given." See also Jaeger v. Chapman, 95 Cal.App.2d 520, 213 P.2d 404; Ideal Heating Corp. v. Royal Indem. Co., 107 Cal.App.2d 662, 237 P.2d 521.

[3, 4] It is our opinion that, in the instant case, the trial court adequately and properly instructed on the proper interpretation of section 553 of the Vehicle Code. The court properly instructed as to the general duty of the defendant as follows: "It is the duty of the driver of any vehicle using a public street or highway to exercise ordinary care to avoid placing himself or another person in danger; to use like care

to avoid an accident from which injury might result; to be vigilant at all times, keeping a lookout for traffic and other conditions to be reasonably anticipated; and to keep the vehicle under such control that, to avoid a collision with any person or with any other object, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position."

After reading section 553 of the Vehicle Code to the jury, the court then instructed:

"Section 553 of the Vehicle Code, being the last section just read to you, which provides that the driver about to enter a highway from a private road or driveway shall yield the right of way to all approaching vehicles, does not literally mean that such driver must yield to all vehicles on such highway regardless of how far away they are. That section means that a driver about to enter a highway from a private road or driveway must yield the right of way to any vehicle approaching on said highway which constitutes an immediate hazard.

"You may ask yourselves the question: When has a vehicle approached so close to an intersection between a private driveway and a highway as to constitute an immediate hazard? The answer is that the approaching vehicle is that close whenever, if a reasonably prudent person were in the position of the driver who has stopped his automobile at the entrance to the highway, he would apprehend the probability of colliding with the approaching vehicle were he then to enter the highway.

"When the law says that one person has the right of way over another, its purpose simply is to establish a practical basis for necessary courtesy on the highway, and its meaning is that when at any given moment of the time two persons, neither of whom then occupies the space in question, desire to proceed into the same place on the highway, one of them shall yield. The other has the privilege of the immediate use of the space in question. That privilege is his right of way.

"No question of right of way arises until an actual conflict exists in the desires of two persons to enter into immediate use of a place on the highway not then occupied by either, and which only one can use at the time. In other words, the law gives no one a right to eject another from a place on the highway, nor to collide with him nor to injure him simply because the latter occupies the space which the former wants to use."

In our opinion these instructions adequately covered the field. Although the trial court did not expressly state that it is the duty of the driver on the highway to yield the right of way when his car does not constitute an immediate hazard to the driver entering from the private road, such a rule is necessarily and clearly implied from the instructions quoted above. The instructions quoted can be given no other reasonable interpretation.

The plaintiff contends that the instructions given were general in nature, and that she was entitled to a specific instruction on this pivotal issue. It is undoubtedly the law that the giving of a general instruction covering the field in an abstract way does not justify the refusal of a requested specific instruction. Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 282 P.2d 148; Fletcher v. Pierceall, 146 Cal.App.2d 859, 304 P.2d 770. But, it is our opinion that, properly construed, the given instructions were not mere general, abstract statements of the law, but were sufficiently specific. "It is also well established that a reviewing court should adopt the construction and effect of an instruction which will support rather than defeat the judgment if it is reasonably susceptible of such interpretation." Mullanix v. Basich, 67 Cal.App.2d 675, 681, 155 P.2d 130, 132; see also Reuter v. Hill, 136 Cal.App. 67, 28 P.2d 390.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

166 Cal.App.2d 815

Robert A. TANKERSLEY, Plaintiff and Respondent,

v.

LOW & WATSON CONSTRUCTION CO., Doe One, Doe Two and Doe Three, Defendants,

Kenneth A. Low and R. R. Watson, Individually, and Kenneth A. Low and R. R. Watson, Copartners d.b.a. Low & Watson Construction Co., a copartnership, Appellants.

Civ. 23130.

District Court of Appeal, Second District, Division 3, California.

Jan. 7, 1959.

Hearing Denied March 4, 1959.

Action for injuries sustained by motorcycle officer who struck cable placed across highway under construction by contractor. Judgment for the plaintiff in the Superior Court of Los Angeles County, A. E. Paonessa, J., and the defendants appealed. The District Court of Appeal, Nourse, J., pro tempore, held that an instruction on the statute respecting warning signs in performance of work on the highways was properly given; that the question of proximate cause was for the jury; that the evidence established the contractor's noncompliance with the statute and that while refusal of an instruction as to speed was error it was not prejudicial.

Judgment affirmed.

1. Statutes ⇐223.2(14)

The provisions of the Vehicle Code with respect to types of warning signs, lights and devices to be placed upon a highway by contractor engaged in construction work and the provisions of the Streets and Highways Code respecting the closing of any highway and notice of such closing are not in conflict but are complementary of each other. West's Ann. Vehicle Code, § 465.7; West's Ann.Streets & High.Code, §§ 124, 125.

2. Automobiles ⇐279

The purpose of the provisions of the Vehicle Code and the Streets and Highways Code is to give warnings to traffic moving upon a portion of the highway that is open but which is approaching construction work, whether that work has partially or totally closed the highway under construction, and under the former, if the contractor complies therewith, he has fulfilled the duty that he owes to the public but he is precluded from placing any signs or devices other than those specified by the department's manual and if he does so and his departure is the proximate cause of injury to another, he cannot escape responsibility. West's Ann.Vehicle Code, § 465.7; West's Ann.Streets & High.Code, §§ 124, 125.

3. Automobiles ⇐309(2)
Trial ⇐241

In action for injuries against construction company when motorcycle officer ran into a cable placed across a highway by the contractor to warn of road under construction, instruction in the language of the Vehicle Code with respect to warning signs, lights and devices for use in performance of works upon the highway and that one who violated the statute was negligent as a matter of law was proper. West's Ann.Vehicle Code, § 465.7; West's Ann.Streets & High.Code, §§ 124, 125.

4. Automobiles ⇐278, 279

In action for injuries sustained by motorcycle officer who ran into a cable that was stretched across the highway under construction by construction contractor, fact that plaintiff was not approaching but was starting from within that portion of the highway upon which signs and barricades had been erected by the contractor did not preclude the application of the Vehicle Code on the ground that the plaintiff was not a person whom the statute was designed to protect and that a failure by the contractor to comply with the statute did not constitute an actionable wrong against the plaintiff. West's Ann.Vehicle Code, § 465.7.

5. Negligence ⇐56(3)

The violation of a statute is of no consequence unless it operates as a proximate cause of the accident.

6. Automobiles ⇐285, 306(7), 308(10)

In action for injuries sustained by motorcycle officer who struck a cable placed across highway by construction contractor, that plaintiff knew the road was closed and negligently failed to observe sign stating that which the plaintiff already knew did not preclude a recovery but whether the failure of the contractor to comply with the statute in erection of the barrier was the proximate cause of the accident was a question of fact for the jury and evidence supported a finding adverse to the contractor. West's Ann.Vehicle Code, § 465.7.

7. Automobiles ⇐306(2)

In action for injuries sustained by motorcycle officer who struck a cable placed across highway under construction by contractor where cable was a barrier or barricade which blocked the entire highway and did not conform with the statutory specifications for such a barrier, evidence justified recovery against the contractor on the ground that he did not comply with the statute. West's Ann.Vehicle Code, § 465.7.

8. Trial ⇐252(8)

In action for injuries sustained by motorcycle officer who struck cable placed across highway under construction by contractor, refusal to give instructions based upon relationship of licensee and licensor was not error in view of the absence of evidence thereof.

9. Licenses ⇐43

A "license" in respect to real property is an authority to do an act which without it would be unlawful.

See publication Words and Phrases, for other judicial constructions and definitions of "License".

10. Appeal and Error ⇐204(1), 237(2)

Where evidence was received without objection and no motion to strike it was made, defendant could not complain on appeal of its admission as error.

11. Trial ⇐240

Instruction respecting the inference that one who looks in the direction of an object clearly visible sees it was properly refused where it was but a statement of a commonplace and was argumentative in form.

12. Automobiles ⇐309(4)
Trial ⇐260(8)

In action for injuries sustained by motorcycle officer who struck cable placed across highway under construction by contractor, refusing to instruct on the basic speed law was error under the evidence but was not prejudicial in view of other instructions. West's Ann.Vehicle Code, § 510.

Spray, Gould & Bowers, Los Angeles, for appellants.

Obegi & High, Van Nuys, for respondent.

NOURSE, Justice pro tem.

This is an appeal by the defendant from a judgment in favor of plaintiff in the sum of $50,000 entered upon the verdict of the jury in an action brought to recover damages for personal injuries sustained by plaintiff through the alleged negligence of defendant.

The relevant facts as established by substantial evidence are: The defendant under contract with the Division of Highways, Department of Public Works of the State of California, engaged in certain road construction work involving the straightening and at one place lowering Topanga Canyon Road in the County of Los Angeles. The portion of the highway under construction was six-tenths of a mile in length and was approximately midway between the northern end of Topanga Canyon Road at Ventura Boulevard and its southern end at the Pacific Coast Highway. By the terms of its contract with the State, the defendant was permitted, on working days, to close the portion of the road under construction to all traffic between the hours of 9 a. m. and 4 p. m. On May 18, 1956, the work had been substantially completed and the work was to be accepted and the highway opened on the afternoon of that day. The plaintiff

was at that time employed as a highway patrolman for the Highway Patrol of the Motor Vehicle Department of the State. On the morning of May 18th, he had been ordered by his superiors to patrol Topanga Canyon Road and particularly that portion which had been straightened through the work done by the defendant. This patrol work was done upon a motorcycle. Shortly before 9 a. m. on the day in question, plaintiff stopped his motorcycle beside a small building that was situated on the west side of the highway immediately north of the project and which was used by the defendant's superintendent in connection with the work. On an occasion prior to the day in question he had noticed that the portion of the highway under construction was closed to traffic by a cable stretched across the highway. While plaintiff was engaged in conversation, employees of the defendant placed signs and barricades upon the highway both north and south of the point at which plaintiff was seated on his motorcycle. Plaintiff saw the work being done. The barricades were in the nature of cross-arms and wooden horses with flashing lights and some bore the word "caution" on them and others "Road Closed." These were staggered across the highway so as not to leave room for an automobile to pass between them. South of these barricades they stretched across the highway between two 8 x 8 wooden posts set in concrete, a steel cable about one-half or five-eighths inches in diameter. There were no signs, flags or other objects attached to and pendent from the cable. This was the last barrier erected. There was conflict in the evidence as to whether the center of this cable was supported by a wooden post painted white. Just north of the cable were three diamond-shaped signs which were supported by posts five feet in height. The cable was between 31 and 36 inches in height where it was attached to the posts. There was conflict in the evidence as to how close these signs were to the cable, the witnesses varying in their estimates from over 30 feet to two feet.

The method of barricading the highway used and the barricades erected, including the cable, were designated for use by defendant by the resident engineer of the Board of Public Works after his plan therefor had been approved by that body.

Plaintiff testified that during the conversation above referred to, he asked one Cowan, the job superintendent, if it was alright for him to go through to the Coast Highway and if any cables were up, and that Cowan replied that there were no cables in place and that plaintiff might proceed. No other witness supported his testimony in this regard. At the close of this conversation plaintiff started his motorcycle and drove onto the highway, turned south, passed between certain of the barriers and signs and struck the cable. The force of the collision was such that it sheared off, above the ground level, one of the 8 x 8 posts to which the cable was attached and plaintiff and his motorcycle came to rest on the highway approximately 40 feet south of the point of collision.

There was a conflict in the evidence as to whether the cable was visible from the point at which plaintiff was seated on his motorcycle beside the construction shack. Plaintiff testified that he did not see it at any time and did not know that it was in place.

At the request of plaintiff the court instructed [1] the jury in the words of section

1. "Section 465.7 of the California Vehicle Code provides as follows: 'The State Department of Public Works shall determine and publicize the specifications for uniform types of warning signs, lights and devices to be placed upon a highway by any person, firm or corporation engaged in performing work which interferes or endangers the safe movement of traffic upon such highway. On and after July 1, 1942, only those signs, lights and devices as are provided for in this section shall be placed upon a highway to warn traffic of work which is being performed on such highway.' "

[X]

"The Department of Public Works of the State of California, pursuant to the provisions of Section 465.7 of the Cali-

465.7 of the Vehicle Code and a portion of the "Manual Of Warning Signs, Lights, And Devices For Use In Performance Of Work Upon Highways" issued by the Department of Public Works in 1955. The court further instructed the jury that one who violated section 465.7 of the Vehicle Code was negligent as a matter of law.

[1–3] Defendant does not claim error in the form of these instructions but asserts that section 465.7 of the Vehicle Code did not prescribe the duties owed by the defendant in closing the highway and was therefore not applicable. It bases its contention that the giving of these instructions was error upon the fact that section 465.7 is contained in the Vehicle Code and that the subject matter of that code has nothing to do with the construction or repairs of highways but only with moving traffic upon highways. It asserts that the only duties owed by it to the general motoring public in closing a highway, were those imposed by sections 124–125 of the Streets & Highways Code which in substance provide that the Department of Public Works may restrict the use of or close any highway for the protection of the public and may give notice of such restriction or closing by erecting "suitable barriers or obstructions" upon the highway. It therefore contends that as the barriers and signs erected were those designated by the Board of Public Works to be used on the project and were deemed by it to be suitable, the defendant did not breach any duty it owed to the plaintiff. Defendant cites no authority to support its contention and we do not find it tenable. The provisions of 465.7 of the Vehicle Code and the provisions of 124–125 of the Streets & Highways Code are not in conflict but the Vehicle Code section is complementary of the provisions of the Streets & Highways Code as set forth in the section cited. The purpose of both statutes is to require that warnings be given to traffic moving upon a portion of the highway that is open but which is approaching construction work, whether that work has partially or totally closed the highway under construction. Section 465.7 of the Vehicle Code establishes an uniform method and system to be followed by a contractor in giving that warning and limits the signs and barriers that may be used to those meeting the specifications therefor made by the State Department of Public Works and published by it. Under the provisions of 465.7 if the contractor complies with section 465.7 he has fulfilled the duty that he owes to the public but he is precluded from placing any signs, lights or devices other than those specified by the department's Manual, and if he does so and his departure is the proximate cause of injury to another he cannot escape responsibility. Section 465.7 of the Vehicle Code was clearly applicable under the facts established by the evidence.

[4] Defendant further contends that assuming the applicability of section 465.7 of the Vehicle Code, it was designed to protect the motoring public approaching the closed area and that as plaintiff was not approaching but started from within that portion of the highway upon which signs and barricades had been erected, he was not a person whom the statute was designed to protect and therefore a failure to comply with the statute did not constitute an ac-

fornia Vehicle Code, has declared the following to be those signs, lights and devices which are authorized to be placed upon a highway by person, firm or corporation engaged in performing work which interferes with or endangers the safe and orderly movement of traffic upon such highway: Barriers or Barricades shall present a vertical face of not less than five and one-half inches facing traffic. If the barrier or barricades is composed of more than one cross or face member, such members shall present a total vertical face of not less than nine inches, no face member considered being less than four inches. Barriers or barricades shall be painted: a. All yellow, or b. With yellow and black alternate stripes on cross or face members. Stripes shall be at an angle of between forty-five and sixty degrees from the horizontal and not less than three inches in width. The yellow stripes may be of greater width than the black stripes."

tionable wrong against the plaintiff. This contention cannot be sustained. The Manual promulgated by the Department of Public Works provides that all "barriers or barricades shall present a vertical face of not less than five and one-half inches facing traffic" and should be painted all yellow or with yellow and black alternate stripes on face members. Undoubtedly the purpose of specifying the width of the vertical face of a barrier and its color was to make sure that it would be visible to persons approaching it and thus to prevent persons traveling on the highway, even though they may have passed other barriers and warning signs, from colliding with it. The provisions of the Manual as to the construction of a barrier apply not only to the first barrier that may be erected but to all barriers or barricades and are for the protection of those who might enter the highway between signs as well as those who might approach from beyond the signs but fail to observe their warnings. In our opinion the plaintiff was a person whom the statute and regulation were designed to protect.

[5, 6] Defendant asserts that assuming that the cable was a barrier, the fact that it did not comply with the statute was not a proximate cause of the accident. No citation of authority is needed for the proposition defendant advances that the violation of a statute is of no consequence unless it operates as a proximate cause of an accident. That proposition has no application here. Defendant's argument that because the plaintiff knew the road was closed and because he either did not see or ignored the signs stating that the road was closed demonstrates that if the barrier had been constructed in accordance with the statute the plaintiff would not have seen it is wholly untenable. Certainly it could not be said as a matter of law that because he proceeded, knowing the road was closed and negligently failed to observe signs stating that which he already knew, that he would not have observed the last barrier had it been constructed in accordance with specifications set forth in the Manual. Whether the failure to comply with the statute in the erection of the barrier in question was a proximate cause of the accident, was a question of fact for the jury. That question has been determined by the jury adversely to the defendant and the evidence supports its finding.

[7] It is beyond dispute that the cable was a barrier or barricade which blocked the entire highway and that it did not conform to the statutory specifications for such a barrier. These facts themselves effectively dispose of the contention made by appellant that the evidence failed to show that defendant did not comply with the statute. If it be assumed, as defendant contends, that the evidence failed to show that other signs and barriers erected by it did not conform to the statutory specifications, that fact would in no wise excuse it from failure to comply with the statute as to the barrier in question.

[8] Defendant requested, and the court refused to give instructions based upon the relationship of licensor and licensee. This refusal is assigned as error. We find nothing in the evidence which would have justified the trial court in giving the requested instructions.

[9] A license in respect to real property "is an authority to do" an "act which without it would be unlawful." Fisher v. General Petroleum Corp., 123 Cal.App.2d 770 at page 776, 267 P.2d 841, at page 844; 31 Cal.Jur.2d 210. The lawfulness of plaintiff's intended use of the closed portion of the highway was not dependent upon any authority to use it from the defendant. His use of it would have been as an officer of a department of the State acting in the performance of his duty and as such lawful. Further, the accident did not occur within that portion of the highway over which defendant had a limited power of control nor was the accident the result of any defect in the premises over which the defendant had such a right of control but on the contrary was caused by a barrier which defendant had erected to prevent

entry into that portion of the highway. No question of a license was involved.[2]

[10] The plaintiff testified without objection as to statements made to him by defendant's construction superintendent relative to his proceeding from the construction shack to the Coast Highway. Defendant now asserts that it was error to receive this testimony as there was no evidence that Cowan had authority to grant permission to anyone to pass over the closed road. The evidence having been received without objection and no motion to strike having been made, defendant cannot here assign its admission as error. (3 Cal. Jur.2d 634.)

[11] Defendant requested that the court instruct the jury in accordance with BAJI 140.[3] The request was denied. The court did not err in refusing this instruction. It is but a statement of a commonplace and is argumentative in form. Cooper v. Smith, 209 Cal. 562, at page 566, 289 P. 614, at page 616; Callahan v. Theodore, 145 Cal. App.2d 336, at page 339, 302 P.2d 333, at page 334; Laursen v. Tidewater Associated Oil Co., 123 Cal.App.2d 813, at page 818, 268 P.2d 104, at page 107.

[12] The defendant requested the court to instruct the jury in accordance with section 510 of the Vehicle Code. (Basic speed law.) The submitted instruction was in the form of BAJI 144 as printed in the fourth edition of that work.

Under the evidence the defendant was entitled to the instruction requested. The plaintiff testified that immediately before the accident he was traveling at approximately 26 miles per hour and the evidence as to the force of the impact would justify the jury in believing that he was traveling at a speed in excess of his estimate. It was a question of fact for the determination of the jury as to whether under the circumstances his speed was a reasonable one. While the court erred in refusing the requested instruction, we have concluded that the defendant was not prejudiced thereby.

By its instructions the court in addition to defining negligence, ordinary care and contributory negligence instructed the jury that one who was guilty of contributory negligence could not recover from another for injuries suffered.[4] It further instructed the jury as follows: "Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases as does the danger that reasonably should be apprehended."[5] The evidence is undisputed that the plaintiff knew that the road was closed to travel by the public and that he had seen certain barricades and signs being put in place and that in approaching the cable he passed between two of them with only six inches to spare on each side. Under the instructions given the jury were told that plaintiff was required to use the amount of caution which an ordinarily prudent person, having the same knowledge of danger as the plaintiff had, would have used under the same circumstances. That this would include caution as to the speed at which he was driving seems evident.

2. We do not have any question here as to the rights and the liabilities of the parties had the plaintiff sustained an injury by reason of some defect in the highway under construction.

3. "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive."

4. BAJI 103 as modified.

5. BAJI 102A.

The speed at which it is unlawful to drive a vehicle under section 510 of the Vehicle Code is one which is not reasonable having due regard for the traffic on, and the surface and width of the highway. In other words, it is a speed greater than that at which a person who is exercising requisite caution under the existing circumstances would drive. For all practical purposes the instruction given by the court and which we have quoted above, placed the same duty upon the plaintiff as would have been placed upon him by the giving of the instruction refused. The jury having been instructed upon the proposition of the caution which the plaintiff was required to exercise, it does not seem probable that they would have arrived at a different verdict had that proposition been specifically directed to the question of speed by giving the requested instruction.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 783

George L. NELSON, doing business as California Club, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California and Alcoholic Beverage Control Board of the State of California, Respondents.

Civ. 9386.

District Court of Appeal, Third District, California.

Jan. 6, 1959.

Mandamus proceeding to review revocation of general on-sale liquor license. The Superior Court, Sacramento County, Albert H. Mundt, J., denied peremptory writ of mandate and the licensee appealed. The District Court of Appeal, Warne, J. pro tem., held that where the license was revoked on each of six counts separately, severally and collectively, and two of the counts were sufficiently alleged and the findings pertaining to them were supported by substantial evidence, the judgment would be affirmed even if the remaining four counts were insufficiently alleged and the findings pertaining to them were not supported by substantial evidence.

Affirmed.

1. Constitutional Law ⇐287

Revocation of general on-sale liquor license on premises allegedly frequented by prostitutes who solicited acts of prostitution was not a violation of substantive and procedural due process even though licensee may have been personally unaware of such activities, where such activities were known to and were encouraged by bartender employed by licensee. West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 24200(b), 25601.

2. Intoxicating Liquors ⇐106(4)

General on-sale liquor license could be revoked for permitting premises to be used as disorderly house in violation of section of Alcoholic Beverage Control Act, even though a violation of that section constituted a misdemeanor. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25601.

3. Intoxicating Liquors ⇐106(4)

Any conduct constituting a violation of any of the sections of the Alcoholic Beverage Control Act is a ground for suspension or revocation of liquor license. West's Am.Bus. & Prof.Code, §§ 23000 et seq., 24200(b), 25601.

4. Intoxicating Liquors ⇐108(10)

In proceeding for revocation of general on-sale liquor license on ground that licensed premises were used as disorderly house and that acts of prostitution were solicited therein and that users of narcotics, prostitutes, pimps and panderers resorted to the premises, the admission into evidence of the record of licensee's bartender for crime of pandering would not be presumed

to have prejudiced the licensee where the record was not before the trial court and was not a part of the record on appeal. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25601.

5. Administrative Law and Procedure ⇐312

In administrative proceedings, the courts are more interested with fair notice to the accused than they are to adherence to the technical rules of pleading. West's Ann.Gov.Code, § 11503.

6. Intoxicating Liquors ⇐108(5)

Where proceeding for revocation of general on-sale liquor license on ground that licensee permitted acts of solicitation for purpose of prostitution was tried on theory that such acts occurred on the licensed premises and the evidence substantially supported such theory, the licensee could not assert on appeal that the charges against him and the findings thereon failed to show that the acts occurred on the licensed premises. West's Ann.Gov.Code, §§ 11503, 11506; West's Ann.Bus. & Prof. Code, § 25601.

7. Intoxicating Liquors ⇐108(10)

Where general on-sale liquor license was revoked on each of six counts separately, severally and collectively and two of the counts were sufficient in their allegations and the findings thereon were supported by sufficient evidence, judgment revoking license would be affirmed even though four counts may have been insufficiently alleged and even though the findings pertaining thereto may not have been supported by substantial evidence. West's Ann.Bus. & Prof.Code, § 24200(b).

Leonard P. Burke, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by William T. Chidlaw, Dep. Atty. Gen., for respondents.

WARNE, Justice pro tem.

An accusation was filed with the Department of Alcoholic Beverage Control charging George L. Nelson, doing business as California Club, the possessor of a general on-sale liquor license, with six violations of the Alcoholic Beverage Control Act. Count I of the accusation charges the keeping of a disorderly house between November 10, 1955, and November 26, 1955. Count II charges that the appellant on the 10th day of November, 1955, permitted one Frances Patterson to solicit an act of prostitution. Count III charges that appellant on the 12th day of November, 1955, permitted one Sally Franklin to solicit an act of prostitution. Count IV charges that appellant on the 17th day of November, 1955, permitted one Ruth Rose to solicit an act of prostitution. Count V charges that appellant between November 10 and November 26, 1955, permitted his licensed premises to be used "as a resort for illegal possessors or users of narcotics, prostitutes, pimps and panderers," and Count VI charges that on November 26, 1955, appellant permitted his licensed premises to be used by one Yvonne Joyner, a known prostitute, to solicit an act of prostitution.

After a hearing upon the accusations, the Department of Alcoholic Beverage Control, hereinafter referred to as the department, rendered its decision finding the charges to be true and revoked appellant's license separately and severally as to each count, and the Alcoholic Beverage Control Appeals Board affirmed the department's decision. The appellant then sought a writ of mandate in the superior court. The court affirmed the decision of the department and denied a peremptory writ of mandate. The appellant has appealed from the judgment of the superior court.

As stated by the trial court, it appears from the evidence "that from November 10th to November 26th, 1955, the premises operated by petitioner were, during the late evening and early morning hours, frequented by known prostitutes, pimps, and panderers and a known narcotics addict, also a known panderer. It is also clear from the evidence that during said period the known prostitutes solicited patrons of the establishment and liquor control agents on those portions of the premises upon

which the activities permitted by the license were conducted. The activities stated were not only known to the bartender, an employee of the petitioner, but were, in fact, encouraged and participated in by him while he was engaged in the course and scope of his employment with petitioner and while on the premises."

Appellant does not question the sufficiency of the evidence to support Counts I and V.

[1] The appellant contends that to revoke his license for the acts of his employees is a violation of "substantive and procedural due process." He argues that, impliedly at least, he, as a licensee, had no knowledge that prostitutes were frequenting his premises or that they were soliciting acts of prostitution. While it is true that there is no direct evidence that the petitioner was personally aware of the stated activities, although on two evenings he was present on the premises when the activity was being carried on, he was aware that there had been a substantial increase in the number of women patronizing the business, a fact which pleased him as he testified that "a bar without a girl in it is a dead bar." In Mantzoros v. State Board of Equalization, 87 Cal.App.2d 140, 196 P. 2d 657, 660, the court held that the licensees could be liable for the action of their employees in making a sale after hours even though it was not shown that the sale was known to, or directed or authorized by the licensees. "* * * The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we could have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. * * * [Citing cases.]" Also see Karides v. Department of Alcoholic Beverage Control, 164 Cal.App.2d 549, 331 P.2d 145; Swegle v. State Board of Equalization, 125 Cal. App.2d 432, 270 P.2d 518; Endo v. State Board of Equalization, 143 Cal.App.2d 395, 300 P.2d 366.

[2, 3] Appellant also contends that the department does not have jurisdiction to consider a case arising under section 25601 of the Alcoholic Beverage Act, since a violation of that section constitutes a misdemeanor and should be tried in a court of law. There is no merit in this contention. Section 24200(b) provides that one of the grounds for revoking a license is: "[V]iolation by a licensee of this division," that is division 9 of the Business and Professions Code. Section 25601 is part of that division, and it is quite clear that any conduct constituting a violation of any of the sections of the Alcoholic Beverage Control Act is a ground for the suspension or revocation of the license. Further, this is a civil proceeding, not a criminal prosecution; hence the fact that section 25601 constitutes a misdemeanor does not limit the power of the department to proceed where the facts are such as to bring it within the provisions of the section. The constitutional provisions and cases relating to criminal proceedings cited by appellant are not applicable.

[4] Appellant also contends that the hearing officer committed prejudicial error in admitting into evidence the record of Don Taylor, appellant's bartender, for the crime of pandering. (Exhibit E.) The exhibit was not before the trial court, nor is it a part of the record on this appeal. "It cannot be presumed on appeal that the appellant has been prejudiced by the introduction of evidence which does not appear in the record." Turano v. Bailey, 86 Cal.App. 402, 404, 260 P. 841.

Appellant also contends that Counts II, III, IV and VI do not state a cause of action and that the findings of fact as to said counts do not support the accusation. Apparently, this contention is based upon the failure to set forth in each of the above mentioned counts an allegation that the acts of solicitation for the purpose of prostitution occurred on the licensed premises. The findings are essentially in the words of the accusation.

[5] While section 11503 of the Government Code provides that the charges shall be set forth in ordinary and concise language the acts or omissions with which the licensee is charged, to the end that the licensee will be able to prepare his defense, and the accusation shall specify the statutes and rules which the licensee is alleged to have violated, but shall not consist merely of charges phrased in the language of the statutes and rules, nevertheless, in administrative proceedings, as stated in Wright v. Munro, 144 Cal.App.2d 843, 848, 301 P.2d 997, 1000 "the courts are more interested with fair notice to the accused than they are to adherence to the technical rules of pleading."

[6] While Counts II, III, IV and VI do not, standing alone, fully comply with the requirements of section 11503, Counts I and V do allege specifically that the acts therein complained of occurred on the licensed premises. Further, the accusation referred to section 25601 of the Alcoholic Beverage Control Act which can only be violated by acts occurring on the premises or in conjunction with the premises. Nor did the appellant at any time prior to the hearing complain of the deficiency of the accusation. While the appellant filed objections under section 11506 of the Administrative Procedure Act, there was no contention that the accusation was uncertain in that it could not be determined therefrom where the acts charged occurred. This is indicative that he was in no way misled or prejudiced. A reading of the transcript of the evidence clearly shows that the case was tried on the theory that all of the acts complained of occurred on the premises, and the evidence substantially supports such theory. When a case is tried on the "assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, * * * neither party can change this theory for purposes of review on appeal." (3 Witkin, California Procedure 2264.)

[7] Even if it could be said that Counts II, III, IV and VI were insufficient and prejudicially defective and that the findings pertaining to said counts were not supported by substantial evidence, the judgment, nevertheless, would still have to be affirmed since the license was revoked on each of the six counts separately, severally and collectively. When a penalty is imposed on each of several counts in such manner, the court need only find that one of the several counts is sufficient. Genser v. State Personnel Board, 112 Cal.App.2d 77, 245 P.2d 1090.

We conclude that there is no merit in this appeal and that the judgment must be and it is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

167 Cal.App.2d 104

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carlos Fernando LUJAN, Defendant and Appellant.

Cr. 6394.

District Court of Appeal, Second District, Division 2, California.

Jan. 13, 1959.

Defendant was convicted of possession of narcotics. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment, and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained conviction and that where judge, before imposing sentence, incorrectly stated that establishment involved was under control of defendant and attorney representing defendant replied that that was correct, defendant was precluded from complaining if court proceeded further upon that faulty assumption.

Affirmed.

1. Poisons ⇐9

In prosecution for possession of narcotics, prosecution had burden of proving possession, actual or constructive, and knowledge of nature of contraband on part of defendant, but such knowledge could be proved circumstantially. West's Ann. Health & Safety Code, § 11500.

2. Criminal Law ⇐260(11)

Question of reasonable doubt in criminal prosecution is for trial court, and not for the appellate tribunal.

3. Poisons ⇐9

Evidence sustained conviction for possession of narcotics. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⇐1137(1)

Where judge, before imposing sentence for possession of narcotics, incorrectly stated that establishment involved was under control of defendant and attorney representing defendant replied that that was correct, defendant was precluded from complaining if court proceeded further upon that faulty assumption. West's Ann.Health & Safety Code, § 11500.

5. Criminal Law ⇐1134(6)

If sentence imposed was a lawful one, any remarks made by judge tending to reveal incorrect reasoning on his part in reaching sentence will be ignored, and it is correctness of judgment that must control, not reasoning back of it.

6. Criminal Law ⇐1134(6)

Where trial court in sentencing defendant for possession of narcotics adhered to record, recited facts correctly and properly sentenced defendant to state prison for term prescribed by law, fact that remarks made by judge tended to reveal incorrect reasoning on his part in reaching result would be ignored. West's Ann.Health & Safety Code, § 11500.

Manuel Valenzuela and Julius Weled, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Appeal from judgment of conviction of possession of narcotics in violation of § 11500, Health & Safety Code. It is claimed that the evidence is insufficient to support the finding of guilty and that the court committed error in sentencing the defendant.

Viewing the evidence in the light of the rules declared in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, and a host of later cases declaring the same principles, there remains no doubt of its sufficiency to support a conviction. Having been informed that one Lopez was using his place at 2210½ South San Pedro Street, Los Angeles, for the meeting of narcotic addicts and was there selling narcotics to them, the police at 1:00 a. m. on February 8, 1958, entered those premises and placed all occupants under arrest. One of them was defendant Lujan. His eyes were glassy, pupils beady, and he was sniffling like he had a cold. One of the arresting officers, who was stipulated to be an expert on the subject, testified that defendant then was under the influence of a narcotic. He asked defendant if he was an addict and defendant said he was. Asked to show his arms, defendant did so and the officer observed puncture wounds on the right one. The officer saw defendant drop a key into a waste basket and took it into his possession. It bore the name and address of the Richard Hotel and had on it room No. 55. Questioned about it, defendant said it was the key to his room. The officers took him to that hotel, asked him if they could search his room, and he replied in the affirmative. As officers Breckenridge and Uno entered the latter went to an upholstered chair, turned over the cushion and found in the seat a box containing empty capsules, an eye-dropper, hypodermic needle, spoon and a rubber contraceptive containing a powdery white substance which proved to be 70 grains of heroin. In a medicine cabinet was a can of lactose. In a desk drawer were found measuring spoons and under the mattress a white handkerchief folded in such manner as to be usable as a tourniquet.

There was also found in the desk drawer a rent receipt which bore date of February 1, 1958 and acknowledged receipt from Carlos Lujan of nine dollars for rent of room 55 "from 2-1 to 2-8." The officers found no clothing or personal belongings in the room. No other person had rented it for that period and there is no evidence of its use by anyone other than defendant.

He testified in his own behalf, claiming that he moved out of room 55 the day before the arrest and that he did not own or know anything about the narcotic and the paraphernalia which were found in room 55. He said that he had rented the room and when his rent was up he just walked out and failed to turn in the key; that his clothes were at his home, 3407 Blanchard Street, and he had no personal belongings at the hotel; also, that he did not drop the key in the waste basket and that the officers took it off his person.

[1, 2] The prosecution had the burden of proving possession, actual or constructive (People v. White, 50 Cal.2d 428, 325 P.2d 985), and knowledge of the nature of the contraband on the part of defendant, which knowledge like any other issue may be proved circumstantially (People v. Blinks, 158 Cal.App.2d 264, 267, 322 P.2d 466; People v. Magdaleno, 158 Cal.App.2d 48, 51, 322 P.2d 89); the question of reasonable doubt is for the trial court, not the appellate tribunal (People v. Poindexter, 51 Cal. 2d 142, 330 P.2d 763).

[3] Counsel for appellant emphasizes the claim that defendant was not shown to have had any connection with the heroin because he had moved out of the hotel room on the previous day. Only defendant's testimony supports that assertion and the trial judge rejected it, not without reason. Appellant had a home of his own but had rented a room in this hotel at previous times; it does not appear that he had taken any of his clothes or personal belongings to the room on this occasion; his rent receipt gave him a right of occupancy through the eighth of February, or until some prescribed hour of that day; certainly his time had not expired at 1:00 a. m.; no one else was occupying the room at the time of search or for almost a week prior to that event. Defendant did not check out at the hotel. He said he just walked out. The key was in his pocket at the time of arrest but he surreptitiously sought to rid himself of it before a search of his person began. He was a confessed addict and was under the influence of a narcotic at the time of his arrest and the later search of his room. His constructive possession of the drug and the equipment for its injection is the natural conclusion from the evidence, as is an intention on his part to return to the room. His knowledge of the nature of the hidden objects is equally clear from the evidence accepted by the court. The proof is amply sufficient to support the conviction.

At the time of hearing of application for probation and sentencing of defendant the trial judge made some remarks which indicate a momentary confusion as to the identity of the defendant and appellant claims prejudice ensuing therefrom. Appellant was charged with a prior felony, violation of § 503, Vehicle Code, and that was found to be true. Probation was denied and defendant was sentenced to the state prison for the term prescribed by law.

[4–6] Before imposing sentence the judge said: "Well, this was an establishment which was under the control of the defendant, if I remember rightly," and the attorney then representing appellant replied: "That is correct." Thus appellant was precluded from complaining if the court perchance proceeded further upon that faulty assumption. But the court, in sentencing this defendant, adhered to the record, recited the facts correctly and properly sentenced him to state prison for the term prescribed by law. The court also remarked: "In addition to these more formal matters, the record shows that the defendant has a considerable police record here, in addition to the matter just referred to." Section 11712 prescribes as punishment for a first conviction of possession of narcotics imprisonment in the county jail for not more than a year or in the state prison for

not more than ten years. The sentence imposed here was undoubtedly a lawful one and any remarks made by the judge tending to reveal incorrect reasoning on his part in reaching a correct result are to be ignored; it is the correctness of the judgment that must control, not the reasoning lying back of it. People v. Grana, 1 Cal.2d 565, 571, 36 P.2d 375; People v. Lindsey, 90 Cal.App.2d 558, 564, 203 P.2d 572; People v. Hudson, 97 Cal.App.2d 572, 577, 218 P.2d 60; People v. Henry, 86 Cal.App.2d 785, 790, 195 P.2d 478; People v. Burdette, 78 Cal.App.2d 591, 594, 178 P.2d 8. Appellant was clearly guilty of the charge upon which he was convicted. There was no miscarriage of justice in sentencing him to the penitentiary.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

166 Cal.App.2d 735

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ellis O. BARBER, Defendant and Appellant.

Cr. 6274.

District Court of Appeal, Second District, Division 1, California.

Jan. 5, 1959.

Hearing Denied March 4, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Herbert V. Walker, J., of grand theft and he appealed. The District Court of Appeal, Fourt, J., held, with regard to defendant's contention that but one offense occurs when fraudulent representations induce victim to enter into contract for sale of stock which provides for installment payments and where separate payments are made pursuant thereto, that evidence showed three separate, distinct and different sales of stock, all based upon false representations made before first sale, and not as an installment type contract.

Affirmed.

1. False Pretenses ⇐49(1)

In prosecution for grand theft, evidence sufficiently established that defendant had been guilty of a fraud and false pretense. West's Ann.Corp.Code, § 26104(a); West's Ann.Pen.Code, § 487, subd. 1.

2. False Pretenses ⇐49(1)

In prosecution for grand theft, wherein defendant contended that but one offense occurs when fraudulent representations induce victim to enter into contract for sale of stock which provides for installment payments and where separate payments are made pursuant thereto, evidence showed three separate, distinct and different sales of stock, all based upon false representations made before first sale, and not as an installment type contract. West's Ann.Pen. Code, § 484.

3. Criminal Law ⇐565

In prosecution for grand theft, evidence, on limitations issue, established that defendant had been absent from state for a period of time. West's Ann.Pen.Code, § 800.

K. E. Nungesser, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Arthur C. De Goede, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from the orders granting probation to the defendant upon charges of grand theft.

In an information filed in Los Angeles county on February 18, 1957, the defendant was charged in four counts (I, III, V and VII) with the crime of violating section 26104(a), Corporations Code, and in three counts (II, IV and VI) with the crime of grand theft (Penal Code, § 487, subd. 1).

The defendant was found not guilty of the charges under the Corporations Code, and guilty of the grand theft charges.

Counts II and IV charged the defendant with taking $500 of the personal property of George McLain, Sr., on or about the days of March 30, 1954 and June 14, 1954, respectively. In count VI the defendant was charged with taking $500 from Richard E. Harvuot on or about July 24, 1954. The information further set forth that the defendant was out of the state of California and not within it for the period from October, 1956 to February 4, 1957, and that he had previously been convicted of the crimes of violation of the Corporate Securities Act and grand theft.

It was stipulated that the cause might be submitted upon the transcript of the preliminary hearing, each side reserving the right to offer additional evidence. The defendant was found guilty as heretofore mentioned, and probation was granted for three years on conditions, among others, that the defendant make restitution and pay fines of $1,000 each on counts II and IV.

A résumé of the facts is as follows: H. B. Turner and the defendant agreed in February, 1952, to form the Death Valley Panamint Mining Company, a corporation, hereinafter referred to as the company. Turner and his partners owned twenty-six mining claims in Death Valley and a five-ton mill. Turner and his partners were to receive 49 per cent of the stock in the company in exchange for their claims and the mill. The defendant was to receive 51 per cent of the stock of the company for his payment of all expenses in the construction of a road to the claims and for his purchase and assignment to the company of two house trailers, a bulldozer and equipment and machinery to build the road. The road was started in March. In March the company was incorporated in Nevada with a capital stock of 500 shares at $100 par value per share. The mill which the Turner group had contributed was transported by burro into the mountains and left disassembled. In June amended articles of incorporation were filed providing for a capital structure of 50,000 shares at $1 par value per share. In that same month the Turner group was issued 12,250 shares of stock and their claims and mill were assigned to the company. At the same time 12,750 shares were issued to the defendant. The defendant finished the construction of the road a short time later, and some work such as building a camp was done. The mill was never assembled. Nothing was done after November, 1952. A bank account of the company, opened in April, 1952, was closed out finally in March, 1953.

A son of the defendant traded to the company some equipment, including a welding outfit, for 2,200 shares of the company's stock. The certificate for this stock was dated September 3, 1952, and was the only stock he ever received.

In November, 1953, the defendant bought for himself a mill and the Arcturus mining claim. This mill was located about eight miles from Baker, California, and was about 75 miles from the mill owned by the company. In December, 1953, the company authorized the purchase of this mill and mine for 100,000 shares of its stock and also resolved that the capital structure of the company be changed to provide for 250,000 shares of $1 par value for each share.

The defendant conducted operations at his mill from November, 1953, until the summer of 1954. He returned the Arcturus claim to the former owner, Gaskins, and bought two other mining claims, the Telegraph and the Telegraph Extension. In exchange for 100,000 shares of stock issued to him in December, 1954, the defendant gave to the company the mill near Baker and the two Telegraph claims in lieu of the Arcturus claim.

Mrs. Madelon Baker traded an automobile for 1,500 shares of the stock of the company in February, 1954. She went to the mill at Baker with Gaskins in January 1954, and met the defendant who told her that she would be receiving large dividends

in about three months. She received the 1,500 shares, which were issued to her directly from the company, for turning her car over to Gaskins. No certificate was ever issued to Gaskins.

Mrs. Baker told McLain about the mine and her investment in the company and he indicated some interest in meeting the defendant and buying some stock. The defendant stopped in McLain's office in February, 1954, and was told by Mrs. Baker that McLain was enthusiastic about the stock. Mrs. Baker introduced the defendant to Mr. McLain. The defendant told McLain that he was in mining activities and that the name of his company was the Death Valley Panamint Mining Company; that the venture was kept very close in the family; that it was a small affair and that no effort was being made to sell any stock outside; that the company had an operating mill just eight miles out of Baker, had a number of very excellent mining claims and that it was a going concern. He further stated that they expected, within a short time, to pay high dividends each month and they needed some capital for salaries at the mill and mine, and for equipment and machinery at the mine, and that was why he, the defendant, wanted to sell some stock. The defendant also stated that the money from the purchase of any stock would go to help expand the operations at the mines, toward corporate purposes, and would be used for payrolls at the mill and mine owned by the company at Baker. McLain asked for a financial statement but never received it.

McLain mailed a check dated February 11, 1954, for $2,000, made payable to the Panamint Mining Company. The check was received and endorsed by the defendant and the money therefrom was deposited in the defendant's bank account in Riverside, California, on February 15, 1954.

McLain mailed another check for $500, made payable to Death Valley Panamint Mining Company, to the company in care of the defendant at Baker. This check was endorsed by the defendant and the money therefrom was deposited in his account on April 7, 1954.

McLain mailed another check for $500, dated June 14, 1954, made payable to Death Valley Panamint Mining Company. The defendant deposited this check in his account at the bank at Riverside on June 21, 1954.

Mrs. Baker also told Richard Harvuot about the company. He was interested and bought 500 of her 1,500 shares. Mrs. Baker and Harvuot went to Baker in the spring of 1954 and she introduced Harvuot to the defendant. Harvuot wanted to buy some stock but was told by the defendant that there was none for sale.

The defendant gave Mrs. Baker 500 shares of his stock for her services, and to show his gratitude to her for being instrumental in bringing McLain's $3,000 to his aid.

The company issued 500 shares to Harvuot on June 5, 1954. This was done in accordance with an understanding arrived at between Mrs. Baker and the defendant, so that it would not be necessary for her to break up her 1,500 share certificate.

A son of the defendant called Mrs. Baker and told her that a friend of his had some stock and was willing to sell at half price. Mrs. Baker said she couldn't buy it but that she had a friend who could. She called the defendant and talked to him about the conversation she had had with his son. The defendant stated that he was displeased with the boy for wanting to sell at half price, but it was legitimate and if she wanted to buy it he, the defendant, would issue the stock directly to her because the stock had never been issued to the boy, who was supposedly a friend of his son. Mrs. Baker talked to Harvuot and he said he would buy at that price. Mrs. Baker was then told by the son that the boy friend had decided not to sell his stock.

The defendant talked to Mrs. Baker and explained that he was in receipt of some very fine engineering reports about the

Telegraph Mine and that he knew McLain and Harvuot would be interested. There was a meeting of Mrs. Baker, Harvuot, McLain and the defendant at Mrs. Baker's home, where the defendant stated that he had purchased the mine for a very good price, that they could go in and haul out the ore and with a mill operating, it was all ready to start moving. The defendant said it was a very fine investment for the company and that he needed capital to develop the mine. He wanted Mrs. Baker and Harvuot to buy more stock. The defendant pointed out to Harvuot that if he bought the stock which his son's friend had for sale it would only result in the money going into the boy's pocket, whereas if he bought stock from him or the company that the money would go into his original investment and into the development of the Telegraph mine, and therefore be a wise thing to do. Harvuot later talked to the defendant and told defendant he would buy half of the 2,000 shares available at $500, if the defendant could arrange it. The defendant told Harvuot to make his check out to him, and this was done. The check was endorsed by the defendant.

In 1955, McLain made a trip to Baker and was told at the property that the defendant was in Los Angeles. McLain wrote to the defendant and attempted to recover some of his money.

A Los Angeles county investigator assigned to the District Attorney's office attempted to serve a warrant on the defendant at Baker on January 31, 1957. The attempt was unsuccessful and it was learned that the defendant was no longer living there. The defendant was arrested on February 7, 1957, and at that time he stated that he had left Baker in October, 1956, and had been living in Las Vegas since about that time.

None of the money received from Harvuot and McLain ever went to the benefit of the company.

The prior conviction was admitted.

The defendant contends on appeal:

(1) The evidence was insufficient to show an intent to commit grand theft by false representation;

(2) Defendant could not have been properly convicted on both Count II and Count IV as together they constituted but one offense; and

(3) The statute of limitations had run on any offense covered by Counts II and IV.

Section 484 of the Penal Code provides in part that any person who shall "* * * by any false or fraudulent representation or pretense, defraud any other person of money, * * * is guilty of theft."

This court, speaking through Mr. Presiding Justice White, said in People v. Massey, 151 Cal.App.2d 623, at pages 658–659, 312 P.2d 365 at page 387: "The elements of the crime of grand theft on this theory [fraud committed by false pretenses] of obtaining money or property by false pretenses are: (1) an intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with the money or other property. (Citing cases.)"

[1] It is not necessary to recite all of the evidence in this case; suffice it to say that enough already has been set forth herein to show, upon a study thereof, that the defendant was guilty of a fraud and false pretense. The evidence disclosed that the venture was not as described by the defendant in that, among other things, the stock was not closely held and it was not a small family affair. Furthermore, the only mill which the company owned was not even assembled and was some 75 miles from Baker. The defendant himself owned the mill near Baker and was operating it for himself. The company was not a going concern and had been dormant since November, 1952. The money from the sale of the stock was not used for the company, but was used by the defendant for his personal expenses. In People v.

Massey, supra, 151 Cal.App.2d at page 659, 312 P.2d at page 387, it was appropriately stated: "What constitutes fraud and false pretense may not be the subject of a definite or invariable rule, but we feel that it may justly be said that included therein are the elements of trick, cunning, dissembling and unfair ways by which another is deceived. Deception deliberately practiced for the purpose of gaining an unfair advantage of another is fraud."

A complete reading of the transcript discloses that the defendant knew that many of the representations he made were false, and that he intended to and did defraud McLain. As to Harvuot, it is clear that the defendant fabricated testimony about who received the money from Harvuot, thereby showing a consciousness of guilt. And in any event, in the present situation, it was not necessary that the property taken inure to the benefit of the defendant. People v. Ashley, 42 Cal.2d 246, 259, 267 P.2d 271; People v. Rabe, 202 Cal. 409, 423, 261 P. 303; People v. Coffelt, 140 Cal.App. 444, 449, 35 P.2d 374.

In our opinion the evidence is sufficient to sustain the contentions of the prosecution.

[2] As to the defendant's second contention, defendant insists that but one offense occurs where fraudulent representations induce the victim to enter into a contract for the sale of stock which provides for installment payments and where separate payments are made pursuant thereto.

We view the evidence as showing three separate, distinct and different sales of stock, all based upon false representations made before the first sale, and not as an installment type contract. See People v. Rabe, supra, 202 Cal. 409, at page 413, 261 P. 303, at page 305, and also People v. Ashley, supra, 42 Cal.2d 246, at page 273, 267 P.2d 271, at page 288, where it is pointed out:

> "The claim of error is predicated upon the denial of a motion to have the prosecution elect between the two counts charging defendant with grand theft from Mrs. Neal, and between the two counts charging him with grand theft from Mrs. Russ. It is contended that only one theft was committed as to each of the prosecuting witnesses. 'Where the proof in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representation, which were still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person.' (Citing case.)"

The defendant relies upon People v. Lima, 127 Cal.App.2d 29, 273 P.2d 268, and Dawson v. Superior Court, 138 Cal.App.2d 685, 292 P.2d 574; but a reading of those cases convinces us that the facts in the instant case and those in the cited cases are very different.

[3] As to the defendant's third contention, namely, that the statute of limitations had run as to counts II and IV: even assuming that counts II and IV are but part of one offense (and not separate offenses, as we believe them to be), the statute of limitations had not, in our opinion, run.

Section 800 of the Penal Code reads in part as follows:

> "An indictment for any other felony than murder, the embezzlement of public money, the acceptance of a bribe by a public official or a public employee, or the falsification of public records, must be found, and information filed, or case certified to the superior court, within three years after its commission. * * *"

It was proved and established that the defendant was absent from the state of California for a period of time, and the statute was tolled during such period. The information was filed three years and eight days after the first payment, and the statute was tolled for about three months, consequently it is clear that the prosecution was not barred.

The order granting probation is affirmed.

WHITE, P. J., and LILLIE, J., concur.

166 Cal.App.2d 750

E. A. MINATTA, Plaintiff and Respondent,

v.

M. W. CROOK, John B. Crook, W. J. Ivey, W. R. Ivarson, Paul V. Allen, Jr., Evelyn Howell and I. M. Harris, individually and as co-partners, doing business under the fictitious name and style of Pacific Fir Sales; First Doe, Second Doe, Third Doe and Fourth Doe; Black and White Company, a partnership, and Blue and Gold Company, a corporation, Defendants.

M. W. Crook, John B. Crook, W. J. Ivey, W. R. Ivarson, Paul V. Allen, Jr., and Evelyn Howell, individually and as co-partners, doing business under the fictitious name and style of Pacific Fir Sales, Appellants.

Civ. 23041.

District Court of Appeal, Second District, Division 2, California.

Jan. 5, 1959.

Action by trucker against co-partnership to recover sum claimed to be due as freight undercharges on lumber which he allegedly hauled for defendants. The defendants moved for change of venue on ground of convenience of witnesses and that ends of justice would be promoted by change. The Superior Court of Los Angeles County, Kenneth N. Chantry, J., entered order denying motion and defendants appealed. The District Court of Appeal, Herndon, J., held that examination of affidavits filed and the entire record disclosed that it could not be said as a matter of law that trial court had abused its discretion in denying defendants' motion for change of venue from county in which five of the six individual defendants resided and where the main office of partnership was located.

Affirmed.

1. Appeal and Error ⇐965
Venue ⇐52(1)

Changes of venue on ground of convenience of witnesses lies essentially within judicial discretion of judge and his rulings will not be disturbed unless it clearly appears as a matter of law that there has been an abuse of discretion.

2. Venue ⇐51, 52(1), 68

Under statute authorizing court to change place of trial when convenience of witnesses and ends of justice would be promoted by change, both convenience of witnesses and ends of justice must concur and moving party has burden of proving that both conditions will be met. West's Ann. Code Civ.Proc. § 397, subd. 3.

3. Appeal and Error ⇐965
Venue ⇐68

Where defendants moved for change of venue on the ground of convenience of witnesses and promotion of the ends of justice, burden was on defendants to establish by affidavit or otherwise that both conditions were met, and upon denial of motion the reviewing court must inquire as to whether there was substantial evidence before trial court that ends of justice would be served by retaining action for trial in county in which it was originated and if there was such evidence on record determination was within the trial court's judicial discretion and order complained of must be affirmed. West's Ann.Code Civ. Proc. § 397, subd. 3.

4. Venue ⇐70

In moving for change of venue on ground of convenience of witnesses and promotion of ends of justice direct evidence of facts showing that ends of justice will be served by granting or denying change is not required, and trial court may rely not only on direct facts set forth in affidavits but also on any reasonable and relevant inference arising therefrom, and weight to be given affidavits is for the trial court to determine. West's Ann.Code Civ. Proc. § 397, subd. 3.

5. Venue ⇐51, 52(1)

Substantial consideration of time, expense and convenience are obviously material to issue of whether convenience of witnesses and the ends of justice would be promoted by change of venue. West's Ann. Code Civ.Proc. § 397, subd. 3.

6. Venue ⇐51, 52(1)

The location of books and records in another county is not relevant to question of convenience of witnesses in hearing on motion for change of venue, but such fact may be considered on question of whether ends of justice will be served by making more expeditious the production of records. West's Ann.Code Civ.Proc. § 397, subd. 3.

7. Venue ⇐70

In action by trucker against copartnership to recover sum allegedly due as freight undercharges on lumber allegedly hauled for copartnership, an examination of affidavits filed with respect to defendants' motion for change of venue and the entire record, failed to disclose as a matter of law that trial court had abused its discretion in denying defendants' motion to change place of trial from county in which five of the six individual defendants lived and in which copartnership had its main office. West's Ann.Code Civ.Proc. § 397, subd. 3.

James L. Patten, Los Angeles, for appellants.

Marvin J. Colangelo, San Francisco, for respondent.

HERNDON, Justice.

This is an appeal by defendants from an order denying their motion for change of venue from Los Angeles County to Humboldt County on the grounds of the convenience of witnesses and that the ends of justice would be promoted by the change. The sole question presented is whether the trial court's ruling constituted an abuse of discretion.

Plaintiff is a truck operator; he seeks to recover the sum of $67,295.79 claimed to be due as freight undercharges on lumber which he allegedly hauled for defendants from sawmills in Northern California to various outlets in Southern California, principally in Los Angeles County. Defendants were sued individually and as copartners doing business as Pacific Fir Sales. Five of the individual defendants reside in Los Angeles County and the main office of the partnership, where the company's records are kept, is in this county. One partner, W. J. Ivey, resides in Humboldt County. The action was originally filed in Los Angeles in April, 1955, and an amended complaint incorporating the results of a complicated freight charge re-rating, on which this action rests, was filed in September, 1956.

The defendants filed an answer on May 29, 1957, in which they admitted they were partners doing business as Pacific Fir Sales, but denied that plaintiff had hauled lumber for them, that plaintiff's trucking rates were below the legal minimum or that any additional sum was due. The answer also alleged as an affirmative defense that plaintiff had contracted directly with the various sawmills which supplied the lumber, and that plaintiff was aware that defendants simply acted as sales agent for the sawmills and "had no interest or ownership in any of said lumber or in any of said mills." Defendants also alleged that plaintiff had made Pacific Fir Sales his agent to collect and turn over the freight charges collected from the consignees of the lumber and that funds which defendants had paid to plaintiff constituted advances on the freight bills

against collections for plaintiff's account from the consignees. A letter from plaintiff to defendants alleged to embody the agreement between them was made part of the answer.

Thereafter, defendants moved to change the venue of the action from Los Angeles to Humboldt County on the ground that "the convenience of witnesses and the ends of justice would be promoted by the change." § 397, subd. 3, Code of Civil Procedure. In support of their motion defendants filed the affidavit of defendant M. W. Crook, in which he revealed the names of six persons whom defendants proposed to call as witnesses necessary to establish their defense. The affidavit recites: that all of these witnesses live in the Humboldt-Siskiyou region, some 500 to 600 miles from Los Angeles; that all of them are actively engaged in the lumber or trucking business in that area; that it would be extremely inconvenient for them to leave their businesses and come to Los Angeles to testify; and that, because of the distance from their place of residence to the place of trial, said witnesses could not be compelled to attend the trial.

Mr. Crook's affidavit concludes with a summary of the expected testimony of the proposed witnesses, including that of one George Vochatzer who allegedly served as plaintiff's manager in the Humboldt area and solicited the sawmills for the hauling work involved herein. The other five proposed witnesses are identified as operators or employees of sawmills from which plaintiff hauled lumber. It is stated that each of these witnesses would testify that plaintiff contracted with his mill directly and that in each transaction Pacific Fir Sales acted simply as a sales agent.

Plaintiff filed four affidavits in opposition to the motion for change of venue, including that of Vince Bordelon, (identified as a "rate expert" engaged by plaintiff in April, 1955, to re-audit plaintiff's freight bills) whom plaintiff proposed to call as an expert witness. Mr. Bordelon's affidavit states that he "has personal knowledge of the facts upon which he will testify at the trial," that he resides and is employed in Los Angeles County and that it would be extremely inconvenient for him to leave his employment to testify at a trial in Humboldt County.

Plaintiff's attorney, Mr. Colangelo, executed two affidavits. In one he indicated that state tariff regulations require a higher freight rate for off-rail than for on-rail destinations, and that the undercharges arose because the original freight bills had been prepared as if each destination was a railhead. He averred that plaintiff proposed to call a number of unidentified persons who could testify as to what rail facilities were in fact available at the several consignee's places of business. The second affidavit indicated that it would be necessary to subpoena the records of defendant Pacific Fir Sales, which were kept in their offices in Los Angeles County.

Finally, plaintiff submitted the affidavit of R. W. McCoy, an ex-employee of plaintiff presently residing and employed in Los Angeles County, who averred that it would be extremely inconvenient for him to attend a trial in Humboldt County because he could not obtain leave from his present employment.

The nature of Mr. McCoy's expected testimony is revealed in the following extracts from his affidavit: "That between the dates of September 30, 1953 and July 31, 1954, deponent was employed as dispatcher for E. A. Minatta, the plaintiff herein; that during the period September 30, 1953–July 31, 1954, he personally assisted E. A. Minatta in the negotiations and arrangements leading up to the agreement between said E. A. Minatta and defendants Pacific Fir Sales. * * * Deponent in his capacity of supervisor of said Oakland Yard of plaintiff received all instructions for the delivery of the lumber from said yard from the defendants herein and he can testify concerning the instructions so received from the defendants, and deponent knows and can testify that defendants agreed to pay to plaintiff the freight charges covering all of said shipments."

[1] The question to be answered is whether the record as above summarized shows an abuse of discretion in the denial of the motion. As recently stated by this court: "Change of venue on the ground of convenience lies essentially within the judicial discretion of the judge and his ruling will not be disturbed unless it clearly appears as a matter of law that there has been an abuse of that discretion." Edwards v. Pierson, 156 Cal.App.2d 72, 76, 318 P.2d 789, 792; Chaffin Construction Co. v. Maleville Bros., 155 Cal.App.2d 660, 662, 318 P.2d 196; Di Giorgio Fruit Corporation v. Zachary, 60 Cal.App.2d 560, 563, 141 P.2d 8.

[2, 3] Pursuant to subdivision 3 of section 397 of the Code of Civil Procedure, the court may, on motion, change the place of trial "When the convenience of witnesses and the ends of justice would be promoted by the change." Both of these conditions—convenience of witnesses and the ends of justice—must concur and "* * * the moving party has the burden of proving that both conditions will be met." Peiser v. Mettler, 50 Cal.2d 594, 328 P.2d 953, 960; Willingham v. Pecora, 44 Cal.App.2d 289, 295, 112 P.2d 328. Since the burden was on appellant to establish by affidavit or otherwise that both conditions of section 397, subd. 3, of the Code of Civil Procedure were met, we must inquire if there was substantial evidence before the trial court that the ends of justice would be served by retaining the action for trial in Los Angeles County. If there is such evidence in the record, the determination was within the trial court's judicial discretion, and the order complained of must be affirmed. Edwards v. Pierson, supra, 156 Cal.App.2d 72, 76, 318 P.2d 789.

[4] There is no requirement that there be direct evidence of the facts showing that the ends of justice will be served by granting or denying the change. "The trial court may rely not only on the direct facts set forth in the affidavits, but also on any reasonable and revelant inference arising therefrom." Harden v. Skinner and Hammond, 130 Cal.App.2d 750, 755, 279 P.2d 978, 981; cf. Benjamin v. Benjamin, 128 Cal.App.2d 367, 371, 275 P.2d 43. And the weight to be given the affidavits in support of and in opposition to the motion was for the trial court to determine. Rios v. Lacey Trucking Co., 123 Cal.App.2d 865, 869, 268 P.2d 160.

[5, 6] There are several logical and valid inferences arising from the instant record which would support a determination by the trial court that the ends of justice would be better served by retaining the action in Los Angeles County. The action was properly brought in the county where five of the six individual defendants reside, where the main office of the defendant partnership is found, and where its records are kept. Attorney Colangelo's affidavit states that the records of defendant partnership must be subpoenaed to establish that "the freight charges were to be paid by Pacific Fir Sales." He also avers that "* * * the obligation for the payment of the freight was assumed by Pacific Fir Sales as an integral part of each transaction, and that the plaintiff herein had nothing whatsoever to do with the determination of the rate for the freight, nor in the negotiations therefor." From these averments it is not unreasonable to infer that the "records" of defendant which might be subpoenaed would include considerable and possibly voluminous memoranda, accounting materials, and correspondence. Although it may be assumed that these records could be made available by service of appropriate process upon the partner residing in Humboldt County, the trial court was not obliged to ignore the obvious advantages of having the records conveniently accessible to the trial court's process for purposes of discovery examination, pre-trial proceedings and the trial itself. Substantial considerations of time, expense and convenience are obviously material to the issue. Harden v. Skinner and Hammond, supra, 130 Cal.App. 2d 750, 755, 279 P.2d 978; see Bartholomae Oil Corporation v. Associated Oil Co., 203 Cal. 176, 179, 263 P. 516. The fact that a defendant's books and records are located in another county is not relevant to the

question of convenience of witnesses, (Peiser v. Mettler, supra, 50 Cal.2d 594, 328 P.2d 953) but such facts may be considered on the question whether the ends of justice will be served by making more expeditious the production of records. Harden v. Skinner and Hammond, supra, 130 Cal.App. 2d at page 755, 279 P.2d at page 981; cf. People v. Spring Valley Co., 109 Cal.App. 2d 656, 667, 241 P.2d 1069.

Also, the action was brought by plaintiff in the county in which most of the deliveries of lumber were made. The affidavits indicate that the physical characteristics of the railhead facilities at each of the several points of destination have a direct bearing upon essential issues in the present litigaton, since the appropriate freight rate depends on the type of rail facilities at the consignee's place of business. The trial court could reasonably have concluded that the ends of justice would be better served by retaining the action for trial in this county where the terminals in question were located and where witnesses qualified to testify as to the nature of the facilities at the several locations would be readily available. Cf. Bartholomae Oil Corporation v. Associated Oil Co., supra, 203 Cal. 176, 179, 263 P. 516.

Further, it does not appear that there would have been an abuse of discretion if the trial court had denied the motion on the grounds of the convenience of witnesses. By his affidavit, Mr. McCoy indicated he "knows and can testify that defendants agreed to pay plaintiff the freight charges covering all of said shipments," and his affidavit shows that he will be inconvenienced if the change in the place of trial is ordered. The trial court was obliged to consider the convenience of plaintiff's witness as well as defendants'. "It is no abuse of the trial court's discretion to deny a motion for a change of the place of trial made on the ground of the convenience of witnesses, if the affidavit of the defendant in opposition to the motion shows that his witnesses will be inconvenienced if the change be ordered." People v. Spring Valley Co., supra, 109 Cal.App.2d 656, 667, 241 P.2d 1069, 1075; Churchill v. White, 119 Cal.App.2d 503, 507, 259 P.2d 974. And "The mere numerical majority of the witnesses on one side or the other does not necessarily determine the merits of the motion." Wood v. Silvers, 35 Cal. App.2d 604, 607, 96 P.2d 366, 367, 97 P.2d 265; People v. Spring Valley Co., supra, 109 Cal.App.2d at page 667, 241 P.2d at page 367. The motion is addressed to the trial court's judicial discretion, and "* * * the moving party must stand upon the strength of his showing rather than upon the weakness, if any, of the opposition." Chaffin Construction Co. v. Maleville Bros., supra, 155 Cal.App.2d 660, 664, 318 P.2d 196, 199.

[7] We adopt and apply to the case at bar the following language from Churchill v. White, supra, 119 Cal.App.2d 503, 507, 259 P.2d 974, 976: "An examination of the affidavits filed herein and the entire record viewed in the light of the rules stated in the cases cited impels the conclusion that it cannot be said as a matter of law that the trial court abused its discretion in denying plaintiff's motion, and ruling, in effect, that plaintiff had failed to prove both of the conditions requisite to a change of the place of trial." See also Pacific Coast Title Ins. Co. v. Land Title Ins. Co., 97 Cal.App.2d 829, 832, 218 P.2d 573.

The order is affirmed.

FOX, P. J., and ASHBURN, J., concur.

167 Cal.App.2d 36

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Daniel Rodriguez TORRES, Defendant and Appellant.

Cr. 1394.

District Court of Appeal, Fourth District, California.

Jan. 8, 1959.

Prosecution for violation of statute providing that any person who while under the influence of intoxicants drives a vehicle and when so driving does "any act forbidden by law" or "neglects any duty imposed by law" which act or neglect proximately causes injury to any other person than himself, is guilty of a felony. The Superior Court, Imperial County, L. J. Mouser, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Mussell, Acting P. J., held that evidence, including testimony that defendant was under the influence of alcohol, was speeding, and injured at least four passengers in another vehicle with which he collided at an intersection, sustained conviction.

Judgment affirmed.

Automobiles ⇐355(6)

In prosecution for violation of statute providing that any person who while under the influence of intoxicants drives a vehicle and when so driving does "any act forbidden by law" or "neglects any duty imposed by law" which act or neglect proximately causes injury to any other person than himself is guilty of a felony, evidence, including testimony that defendant was under the influence of alcohol, was speeding, and injured at least four passengers in another vehicle with which he collided at an intersection, sustained conviction. West's Ann.Vehicle Code, §§ 501, 510, 511.

J. Frederick Rosen, Coachella, for appellant.

Edmund G. Brown, Atty. Gen., and John A. Vander Lans, Deputy Atty. Gen., for respondent.

MUSSELL, Acting Presiding Justice.

Appellant was charged in four counts in an information with violations of section 501 of the California Vehicle Code. He entered a plea of not guilty to all counts, waived trial by jury, and was found guilty on all four counts by the court. He was granted three years probation, conditioned upon his serving ninety days in the county jail and the payment of a fine of $300. His sole contention on his appeal from the judgment is that the evidence was insufficient to support it.

On November 2, 1957, at about 10:00 p. m., appellant was driving a Ford pickup easterly on Main Street in the city of Brawley, when his car struck a Chevrolet automobile being driven south on Eighth Street and through the intersection of Eighth and Main Streets, in said city. Main Street runs east and west and Eighth Street north and south, with stop signs on Eighth Street on both sides of Main. A deputy sheriff, who was driving east on Main Street, testified that the Ford pickup passed him at an estimated speed of from 45 to 50 miles per hour about a block east of Eighth and Main Streets. Appellant was driving a Ford pickup and one Frank Morales was a passenger. After the pickup passed him the deputy observed a Chevrolet automobile headed south on Eighth Street and stopped at its intersection with Main. He heard the pickup truck's brakes screech before it collided with the Chevrolet in the intersection. After the accident and while at the scene, the deputy smelled a strong odor of alcohol on the appellant's breath.

Charlie Hudson, the driver of the Chevrolet, testified that there were six passengers riding with him in his car at the time of the accident; that he brought his car to a complete stop at the stop sign on Eighth before he entered the intersection; that he looked both ways on Main Street and, seeing no cars coming in either di-

rection, proceeded south into the intersection; that he did not see the pickup until it was from one to one and one-half car lengths from his car and he estimated the speed of the pickup at 50 miles per hour when the accident happened.

Doris Jones, Barbara Jones, Vada Smith and Joseph Smith, all passengers in the Chevrolet, were injured in the accident.

Appellant was taken to a hospital in an ambulance and before he left the scene of the accident stated that he would consent to a blood alcohol test. James Reynolds, a police officer who arrived at the scene of the accident within a few minutes after it happened, testified that he smelled the odor of alcohol on appellant's breath and noted that his eyes were watery and bloodshot. A sample of his blood for a blood alcohol test was taken from appellant at the hospital by a technologist. Another technologist took the blood sample to the sheriff's crime laboratory and upon examining it, found that the alcohol content of the blood sample was .231 per cent. He testified that it was his opinion that anyone with a blood alcohol content above .15 per cent would be under the influence of intoxicating beverages; that a person with a blood alcohol content of .231 per cent would have his reflexes and reasoning power impaired; that he would be semi-anesthetized and that his vision would be impaired.

The evidence is amply sufficient to show that the appellant at the time of the accident was driving a vehicle while under the influence of intoxicating liquor.

In People v. Haeussler, 41 Cal.2d 252, 261, 260 P.2d 8, 13, the trial court told the jury that "* * * it was unnecessary to find that Mrs. Haeussler was 'drunk' or 'intoxicated'; it would be sufficient if it were found that intoxicating liquor had 'so far affected the nervous system, brain or muscles as to impair to an appreciable degree the ability to operate the vehicle in a manner like that of an ordinarily prudent and cautious person in the full possession of his faculties, using reasonable care and under like conditions.'" On appeal, the Supreme Court held that the degree to which a person must be influenced by alcohol to warrant a conviction under section 501 of the Vehicle Code was correctly stated in the instruction given.

In People v. Markham, 153 Cal.App.2d 260, 270, 314 P.2d 217, 224, it was held that in a prosecution under this statute it is not necessary to prove any specific degree of intoxication, but that in each case where a person is charged with a violation of section 501 of the Vehicle Code, the question whether the accused was "under the influence of intoxicating liquor" is a question of fact to be determined by the court or jury from all the proven circumstances of the case; that

> "We are satisfied that the prevailing rule in this and many other states is, '* * * that expert testimony is admissible where the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority thereon, and in those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts but the conclusions to which they lead, may be testified to by qualified experts. Of course any such opinion may be accepted or rejected by the jury. (Citing cases.)' People v. Tucker, 88 Cal.App.2d 333, 339, 198 P.2d 941, 944. No distinction is made by the law in weighing evidence, between expert testimony and evidence of other character (citing cases)."

There is substantial evidence in the record from which the trial court could and did infer that the appellant was driving his pickup truck at a speed in excess of that permitted by sections 510 and 511 of the Vehicle Code. The record shows that four persons were injured in the acci-

dent; that appellant was under the "influence of intoxicating liquor"; and that he was driving his truck at an unlawful speed in the business district of the city of Brawley at the time of the accident, which act and neglect proximately caused bodily injuries to the occupants of the Hudson automobile.

Judgment affirmed.

SHEPARD, J., concurs.

166 Cal.App.2d 623

Lloyd H. DURST, Plaintiff and Appellant,

v.

COUNTY OF COLUSA, a body corporate and politic being a subdivision of the State of California, Defendant and Respondent.

Civ. 9491.

District Court of Appeal, Third District, California.

Dec. 30, 1958.

Hearing Denied Feb. 25, 1959.

Action against county for injuries to plaintiff resulting from negligence of county's employee in county hospital in negligently administering blood transfusions to plaintiff while he was a private paying patient in the hospital, wherein the county filed a demurrer. From a judgment of the Superior Court, Colusa County, Warren Steel, J., sustaining the demurrer the plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held, inter alia, that the complaint did not state a cause of action in view of governmental immunity attaching to county in operation of county hospital.

Affirmed.

1. Counties ⇐222

Complaint alleging that plaintiff was a private paying patient in county hospital for purpose of receiving blood transfusions, and that plaintiff was injured because of county employee's negligence in carelessly examining plaintiff and carelessly administering the transfusions of a type other than that of plaintiff's did not state cause of action against county.

2. Counties ⇐144

The operation of a county hospital is a governmental function and hence governmental immunity attaches to such operation with result that counties are not responsible for negligence in care or treatment of patients in such hospital.

3. Counties ⇐146

Where private paying patient in county hospital was injured because of alleged negligence in administering blood transfusions, county was not liable on theory that in employing incompetent and unlicensed technician to perform laboratory tests county created a dangerous and defective condition of public property for which it was liable under statute, since no dangerous or defective condition of property was involved and action was based solely on negligence of county's employee acting within scope of his employment. West's Ann.Gov.Code, § 53051.

4. Counties ⇐146

A county is not liable in absence of a statute for damages resulting from negligence of its employees while performing a governmental function.

5. Counties ⇐146

The imposition of a charge for services by county hospital was not inconsistent with exercise of governmental functions so as to render county liable for negligence of hospital employee in administering blood transfusions to a private paying patient.

Herron & Winn, San Francisco, for appellant.

Donald W. Littlejohn, Colusa County Dist. Atty., Colusa & Rich, Fuidge & Dawson, Marysville, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment in favor of the defendant county in an action to recover damages for personal injuries alleged to have resulted from the negligence of the defendant's agent in caring for plaintiff while he was a patient at the defendant's hospital. The judgment was entered upon the sustaining of a demurrer to plaintiff's complaint without leave to amend.

[1] The complaint alleges that the defendant is a body corporate and politic being a subdivision of the State of California, and at all times maintained and operated Colusa County Memorial Hospital; that at all times relevant to this action defendant employed a laboratory technician, who was acting within the scope of his employment; that plaintiff was a private paying patient for the purpose of receiving blood transfusions; that the plaintiff's blood was examined and typed by defendant, and blood transfusions were given to plaintiff by defendant. It is further alleged that defendant so negligently and carelessly examined plaintiff and so negligently and carelessly administered and performed the blood transfusions that the plaintiff was caused to and did receive blood transfusions of a type other than that of plaintiff's, and as a result thereof plaintiff sustained personal injuries. The complaint also alleges compliance with the various claim statutes prior to the commencement of this action, that is filing a verified claim against the defendant county within the time allowed by law, etc. and the rejection thereof by the board of supervisors of said county.

Such a cause of action does not lie against a county. Griffin v. County of Colusa, 44 Cal.App.2d 915, 113 P.2d 270; Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523; Latham v. Santa Clara County Hospital, 104 Cal.App.2d 336, 231 P.2d 513. Not only did the Supreme Court not see fit to grant a hearing in any of the cited cases, but it has given express approval to the rule of sovereign immunity enunciated therein. Talley v. Northern San Diego Hospital District, 41 Cal.2d 33, 39, 257 P.2d 22.

[2] In his brief plaintiff recognizes the fact that the latest cases which have been decided by the Supreme Court of this state have taken the position that the operation of a county hospital is a governmental function, and that governmental immunity attaches to such operation with the result that the counties have not been held responsible for negligence in the care or treatment of patients in county hospitals. However, he contends that those decisions are unrealistic and unjust and should be overruled. While some appellate courts, on reaffirming the rule, have criticized the doctrine as being outmoded and unjust, relief must be secured from the supreme court or the legislature and not from an intermediate court that is bound by prior decisions.

[3–5] As a further contention appellant attempts to evade the force and effect of the doctrine of sovereign immunity cited in the hereinabove mentioned cases. He alleges that defendant county is not cloaked with sovereign immunity from liability under the factual situation in this case since it employed an incompetent and unlicensed technician to perform laboratory tests and thereby created a dangerous and defective condition of public property for which it is liable under section 53051 of the Government Code. There is no merit in this contention.

It clearly appears to us that under the allegations of plaintiff's complaint no dangerous or defective condition of public property is involved. The action is one based on negligence of one of defendant's employees acting within the scope of his employment. Such an action does not come within any of the provisions of section 53051. A county is not liable in the absence of a statute for damages resulting from the negligence of its employees while performing a governmental function. Morrison v. Smith Bros., 211 Cal. 36, 293 P. 53; Hanson v. City of Los Angeles, 63

Cal.App.2d 426, 147 P.2d 109; Fox v. City of Pasadena, 9 Cir., 78 F.2d 948; Brown-Crummer Inv. Co. v. City of Burbank, D.C., 17 F.Supp. 469. Nor is the imposition of a charge for services by the county hospital inconsistent with the exercise of governmental functions. Calkins v. Newton, supra; Latham v. Santa Clara County Hospital, supra.

Further this court rejected a like contention in an analogous situation in the case of Grove v. County of San Joaquin, 156 Cal.App.2d 808, 320 P.2d 161. In that case, as in the instant case, the complaint indicated that the plaintiff's injuries were not due to any defective condition of public property, a jail, or any general plan of use in operating it.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

166 Cal.App.2d 472

Agnes BAKER, Plaintiff and Respondent,

v.

W. S. SOLARI, as Executor of the Last Will and Testament of Aurora Brignardello, deceased, Defendant and Appellant.

Mary JORDAN, Plaintiff and Respondent,

v.

W. S. SOLARI, as Executor of the Last Will and Testament of Aurora Brignardello, deceased, Defendant and Appellant.

Civ. 17947, 17948.

District Court of Appeal, First District, Division 2, California.

Dec. 23, 1958.

Action for reasonable value of services allegedly rendered decedent during two years before her death. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment in favor of each plaintiff and defendant executor appealed. The District Court of Appeal, Draper, J., held that evidence was sufficient to show that services were rendered at decedent's request, with expectation of plaintiffs, known to decedent, that the services were to be compensated for and that such expectation existed when the services were rendered.

Judgment affirmed.

1. Executors and Administrators ⚖221(2)

In order to support a judgment for reasonable value of services allegedly rendered a decedent, a plaintiff is required to show that the services were rendered at decedent's request with expectation of plaintiff known to decedent, that the services were to be compensated for, and that such expectation existed when the services were rendered.

2. Executors and Administrators ⚖253, 256(6)

Intention of a decedent to pay for services rendered, and expectation of compensation may be inferred from conduct where equity and justice require compensation for services to a decedent, as well as from direct communications, and the question of existence of such intention and expectation is one of fact, and the determination of the trial court is to be affirmed unless it is unreasonable under all the circumstances.

3. Executors and Administrators ⚖205(1)

Services rendered in expectation of a devise of realty would support a judgment for reasonable value of services rendered a decedent.

4. Executors and Administrators ⚖221(5)

In action for reasonable value of services allegedly rendered decedent during two years before her death, evidence was sufficient to show that services were rendered at decedent's request, with expectation of plaintiffs, known to decedent, that the services were to be compensated for and that such expectation existed when the services were rendered.

5. Stipulations ⇐1

A "stipulation" is an agreement between attorneys.

See publication Words and Phrases, for other judicial constructions and definitions of "Stipulation".

6. Stipulations ⇐14(1)

Courts will tend to construe in favor of a stipulating party, or even wholly disregard a stipulation inadvertently made in conflict with a party's theory of his case.

W. S. Solari, San Francisco, Andrew F. Burke, Thomas P. O'Brien, San Francisco, of counsel, for appellant.

Tobin & Tobin, Charles R. Collins, San Francisco, for respondents.

DRAPER, Justice.

Appeals from two judgments are here upon a consolidated record. Plaintiffs are sisters. They filed claims against the estate of Aurora Brignardello for the reasonable value of services allegedly rendered to her during the two years before her death. The executor of her will rejected both claims, and plaintiffs brought these actions. After trial to the court sitting without a jury, judgment was rendered in favor of each plaintiff for $2,000. Defendant executor appeals.

Plaintiffs lived next door to decedent. The latter was 84 years old at the time of her death. She had been ill for some time and there is evidence that she was senile and unable fully to care for herself. There is testimony that she spent a major part of each day of her last two years with plaintiffs, and that they provided her meals daily, took her on frequent visits to her doctor, drove her to places she desired to visit, bought minor items for her, and provided labor and materials for repairs to her home. There is evidence that plaintiffs believed her to have no cash and no assets save her somewhat dilapidated home. In this situation, there was no agreement fixing any compensation for plaintiffs. However, decedent repeatedly said to plaintiffs "No good deed ever goes unrewarded, and you will get your reward." She also said that nobody but the husband of one of the plaintiffs would ever get her house, and that she would see that they had the first opportunity to buy the house at a reasonable price. Her estate amounted to almost $250,000.

[1] The parties agree that, to support the judgment, the record must contain evidence showing that the services were rendered at decedent's request, with the expectation of plaintiffs, known to decedent, that the services were to be compensated for, and that such expectation existed when the services were rendered. See 27 Cal.Jur. 202; 58 Am.Jur. 516. Appellant's sole contention is that the evidence is insufficient to sustain the judgment. There is little question that the services were rendered. Although appellant suggests that decedent did not request them, there is much evidence that she did ask for the aid of respondents.

[2–4] Appellant's principal contention is that there is no evidence to show that respondents' services were rendered with any expectation of compensation, and none that decedent knew respondents expected any material reward. But "'[t]he intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, as well as from direct communications.'" Winder v. Winder, 18 Cal.2d 123, 128, 114 P.2d 347, 350, 144 A.L.R. 935. The question is one of fact, and the determination of the trial court is to be affirmed unless it is unreasonable under all the circumstances. Mayborne v. Citizens' Trust & Savings Bank, 46 Cal.App. 178, 183, 188 P. 1034. In many cases of this type, as here, the evidence would support a finding either way, but such state of the record requires affirmance. Lloyd v. Kleefisch, 48 Cal.App.2d 408, 410, 120 P.2d 97; Payne v. Bank of America, 128 Cal.App.2d 295, 303, 275 P.2d 128. Appellant places great stress upon respondents' testimony that they did not expect payment. But the trial court could view this testimony as referring to cash payment, as being reasonable in the light of respondents' opinion that decedent had no

cash, but as not in any way negativing an expectation of material reward other than cash. Services rendered in expectation of a devise of real property will support a judgment for the reasonable value of the services. Winder v. Winder, supra, 18 Cal. 2d 123, 114 P.2d 347. While the evidence in the case at bar could well support a finding in appellant's favor, we are satisfied that in the testimony as to the declarations, acts and circumstances of the parties there is substantial evidence to support the judgment. It is significant that defendant executor himself testified that respondents "padded this claim so much that I had to reject it. Now, if it had been a fair claim I would have approved it." The claims were for $9,500 each. The court allowed $2,000 each.

Appellant, however, urges that counsel for respondents stipulated in open court that respondents' services were rendered "without expectation of compensation for them." This claim is based upon a statement made during cross-examination of one of respondents. She testified, regarding the aid given by her sister and herself to decedent "We were told to do it for her soul's sake." Appellant's counsel then asked:

> "And you were both doing it for that reason? A. Yes, we were, up to the time we found she had an estate of $350,000 and had taken us in so grossly.
>
> "Q. And it was then for the first time that you expected to get any payment?
>
> "Mr. Collins (respondents' attorney): I will stipulate that that is so, if that will help your case, Mr. Picard.
>
> "Mr. Picard (appellant's attorney): Will you answer it yourself?"

This last question was directed to the witness. The question was read by the reporter, answered by the witness, and appellant's counsel examined her in further detail upon this issue. Later witnesses were similarly examined upon the same issue.

[5, 6] A stipulation is an *agreement* between attorneys. Palmer v. City of Long Beach, 33 Cal.2d 134, 142, 199 P.2d 952. It seems obvious that the attorney for appellant rejected the offered stipulation. His detailed examination of later witnesses shows clearly that he did not accept or rely upon the claimed stipulation as to expectation of payment. Even if the stipulation were accepted, it could hardly be given the effect contended for by appellant. As already pointed out, the evidence warrants the view that even if decedent's apparent financial condition negatived an expectation of payment in money, it did not preclude the expectation of compensation or reward through the asset of decedent's home. Still further, the cases tend to construe in favor of the stipulating party, or even to wholly disregard, a stipulation which is "inadvertently made in conflict with a party's theory of his case." Back v. Farnsworth, 25 Cal.App.2d 212, 220, 77 P.2d 295, 299; see also 1 Witkin, California Procedure, § 56.

Judgments affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

John K. DUNN, Plaintiff and Appellant,

v.

VOGEL CHEVROLET CO., a corporation, and General Motors Corporation, a corporation, Defendants and Respondents.*

Civ. 9262.

District Court of Appeal, Third District, California.

Dec. 31, 1958.

Rehearing Granted Jan. 29, 1959.

For Opinion on Rehearing see 335 P.2d 492.

Action by motorist against garage for alleged negligence in installing a brake hose on motorist's automobile and action against garage and manufacturer of brake hose for negligence in manufacture of brake hose

* Opinion vacated 335 P.2d 492.

and for sale of brake hose to garage for resale and use of such defective hose on motorist's automobile. From a judgment of nonsuit entered by the Superior Court, Sacramento County, Malcolm C. Glenn, J., in favor of garage and manufacturer on one cause of action and from a judgment in favor of garage on jury verdict in other action for personal injuries, the motorist appealed. The District Court of Appeal, Peek, J., held that where motorist took his automobile to garage when brakes failed and mechanic installed a new brake hose and motorist returned and got his automobile after the repair was finished and while driving down a hill after traveling a distance of approximately 70 miles, during which time motorist noticed brakes were spongy, his brakes failed and automobile went out of control and went off highway at a curve at bottom of hill and into a gulley and it was found that threads on male end and those on female end of hose were stripped, doctrine of res ipsa loquitur was applicable.

Judgments reversed.

1. Appeal and Error ⇐927(3)

On appeal by plaintiff from a judgment of nonsuit entered in an action in which plaintiff contended that evidence warranted an instruction on res ipsa loquitur, evidence must be reviewed in light most favorable to the plaintiff.

2. Automobiles ⇐16, 368

Where motorist took his automobile to garage when brakes failed and mechanic installed a new brake hose and motorist returned and got his automobile after repair was finished and while driving down a hill after traveling a distance of approximately 70 miles, during which time he noticed brakes were spongy, his brakes failed and automobile went out of control and went off highway at a curve at bottom of hill, and it was found that threads on male end and those on female end of hose were stripped, doctrine of res ipsa loquitur was applicable in action by motorist against garage and manufacturer of brake hose.

3. Negligence ⇐121(2)

An accident must be of a kind which ordinarily does not occur in absence of someone's negligence, it must be caused by an agency or instrumentality in control of defendant, and it must not have been due to any voluntary action or contributory negligence on part of plaintiff before doctrine of res ipsa loquitur is applicable.

4. Negligence ⇐136(6)

Where evidence is conflicting or subject to different inferences, it is for jury, under proper instructions, to determine whether each of conditions necessary to bring in rule of res ipsa loquitur are present.

Robert A. Zarick, Sacramento, and Anthony J. Scalora, Sacramento, for appellant.

Johnson, Davies & Greve, Sacramento, for respondent Vogel Chevrolet.

Fitzwilliam, & Memering, Sacramento, for respondent General Motors.

PEEK, Justice.

This is an appeal from a judgment of nonsuit entered in favor of defendants Vogel Chevrolet Company and General Motors Corporation on the second cause of action alleged in plaintiff's second amended complaint and from a judgment entered in favor of defendant Vogel Chevrolet upon a jury verdict as to the first cause in an action for personal injuries. The first cause of action alleged negligence on the part of Vogel in installing a brake hose on plaintiff's automobile. The second cause alleged that General Motors negligently manufactured the brake hose and negligently sold the same to Vogel for resale and use and that Vogel was negligent because it used the defective hose on plaintiff's auto.

[1] Since this is an appeal from a judgment of nonsuit and since plaintiff contends that the evidence warranted an instruction on res ipsa loquitur we are confronted with two well established rules, each compelling us to review the evidence in the light most

favorable to plaintiff. See, Dunn v. Pacific Gas & Electric Co., 43 Cal.2d 265, 272 P.2d 745, and Edgett v. Fairchild, 153 Cal.App. 2d 734, 738, 314 P.2d 973.

[2] The evidence so reviewed shows that while plaintiff was driving in downtown Sacramento his brakes failed. The car was taken to the Vogel garage and was assigned for repair to one Alexander, a mechanic in the employ of Vogel. Vogel's practice appears to have been that when a car was brought in for repair, an employee would discuss the condition of the car with the customer and following his diagnosis the car would be assigned to a mechanic accompanied by a time card which set forth the repair instructions. In this case the mechanic was instructed to "replace brake hose, adjust and bleed the brakes." Pursuant to the instructions, Alexander went to the parts department and obtained a new hose. All parts were ordered from General Motors Oakland plant. Brake hoses were packaged and delivered two in a carton, and upon receipt the carton was opened and the hoses placed in a bin where they remained until requested by a mechanic. Only the employees so assigned were allowed in that specific department. When the new parts were taken from the package they were "looked at" and if anything was "obviously wrong it was seen" and the part returned to General Motors. The parts manager recalled no defective hoses being returned during the time in question. After Alexander obtained the hose from the parts department, he examined it, determined it to be satisfactory and proceeded to install it on plaintiff's car. Plaintiff, who was there at that time, looked at the hose, noted that it appeared new, but made no particular inspection and left the garage before it was installed. After installing the hose and checking the brake system, Alexander tested the same and found it to be in good working order. Upon plaintiff's return he was informed the repair was finished. He in turn tested the brakes by stepping on the pedal, found them to be satisfactory, paid his bill and left. He concluded one errand in downtown Sacramento, drove to his home in the northern part of the city, and then to the home of his mother in Grass Valley, altogether a distance of approximately 60 miles. The brakes felt all right to him when he left Sacramento, but on the way to his mother's they appeared "spongy". Following dinner at his mother's he left to visit his brother in Penn Valley, some 10 to 12 miles distant from Grass Valley. The highway in this area traverses rolling foot-hill country. While descending Martell Grade he noticed some deer grazing along the highway. When he stepped on the brake pedal to slow down for the deer, there was a snapping sound, and the pedal went all the way to the floorboard. The car immediately began to pick up speed with the result that it went out of control, making it impossible for plaintiff to negotiate a turn at the bottom of the hill. As a result the car went over the side of the road into a gulley some 30 feet below the road bed. There were no skid or other tire marks on the paved portions of the highway but there were marks on the shoulder. Following the accident the car was towed to a garage in Grass Valley. When the brake system was examined six days after the accident, it was found that the threads on the male end and those on the female part of the hose were stripped. The hose, which was introduced in evidence, also showed that the brass nipple insert on the female end was flattened. The witness Alexander, who was called under Section 2055 of the Code of Civil Procedure, first testified that it would have been impossible to have installed the hose so as to have stripped the threads. However he later testified that when threads are stripped upon installation, "you're in for a lot of trouble."

[3] It is plaintiff's contention that the court erred in failing to give his requested instruction on the doctrine of res ipsa loquitur, as set forth in BAJI, 206–C, Vol. 2, pages 642–643. As stated in Seneris v. Haas, 45 Cal.2d 811, 823, 291 P.2d 915, 53 A.L.R.2d 124, the conditions to be met before the doctrine may be applied are that the accident must be of a kind which ordi-

narily does not occur in the absence of some one's negligence, that it must be caused by an agency or instrumentality in control of the defendant and that it must not have been due to any voluntary action or contributory negligence on the part of plaintiff.

In regard to the first element certainly it cannot be said that brakes ordinarily fail immediately after repair. The testimony relied upon by defendants as dispelling this element as a matter of law does nothing more than present a conflict in the evidence. Defendants further argue that since Vogel had relinquished control of the car to plaintiff the second requisite had not been met. The fact that the accident occurred after plaintiff took the car from the garage does not preclude application of the rule provided there is no evidence that the instrumentality had been improperly handled or that its condition otherwise changed as control was relinquished by defendants. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041. As to the third condition it is defendants' contention that plaintiff was contributorily negligent by driving the car after the brakes were spongy; that the curves where the accident occurred could be negotiated at 30 miles per hour; that there was no evidence of brake fluid on the pavement; that there were tire marks on the shoulder, and that the damaged brake hose was not discovered until six days after the accident all point to the conduct of the driver and not the defective brakes as the cause of the accident. Again this only presents a conflict.

[4] Thus where, as here, "the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present." Baker v. B. F. Goodrich Co., 115 Cal.App. 2d 221, 229, 252 P.2d 24, 29. In amplification of the previous rule the court in the Seneris case, supra, 45 Cal.2d at page 827, 291 P.2d at page 924, further held:

"* * * The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities (Res Ipsa Loquitur in California, Prosser, 37 Cal. L.Rev. 183, 194–195). The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it. Bauer v. Otis, 133 Cal.App.2d 439, 443, 284 P.2d 133. The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved Black v. Partridge, 115 Cal.App.2d 639, 646, 252 P.2d 760; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Knell v. Morris, 39 Cal.2d 450, 247 P.2d 352; Milias v. Wheeler Hospital, 109 Cal.App.2d 759, 241 P.2d 684."

Additionally in the present case there is evidence to show that the defect in the hose was *patent* not *latent*. In discussing a similar situation, the Supreme Court in Escola v. Coca Cola, etc., 24 Cal.2d 453, 459–460, 150 P.2d 436, 439, held:

"If the explosion resulted from a defective bottle containing a safe pressure, the defendant would be liable if it negligently failed to discover such flaw. If the defect were visible, an inference of negligence would arise from the failure of defendant to discover it. Where defects are discoverable, it may be assumed that they will not ordinarily escape detection if a reasonable inspection is made, and if such a defect is overlooked an inference arises that a proper inspection was not made. A difficult problem is presented where the defect is unknown and consequently might have been one

not discoverable by a reasonable, practicable inspection."

A situation even more comparable to the instant case was presented in Northern v. General Motors, 2 Utah 2d 9, 268 P.2d 981. There it was held that where the purchaser of a new truck sustained damages when the steering mechanism, which was alleged to have been defective, broke and caused the truck to turn over, the questions whether the defect in the mechanism existed at the time it was assembled, whether the defect could have been discovered by reasonable inspection, and whether the injury to the purchaser was caused by the failure of the defective steering mechanism, were questions for the jury. In that case the facts showed that the shaft in the steering column, which was completely enclosed until the time of the accident, had a distinct penetration of rust at the place of the break. Such evidence, the court said, was sufficient to support a reasonable inference that the defect existed at the time it was assembled, and that the evidence was likewise sufficient to support the conclusion that the defect was such as could have been discovered by reasonable inspection. The court in the Northern case cited Hooper v. General Motors, 123 Utah 515, 260 P.2d 549, where it was held that where a wheel and rim separated, causing the wheel to collapse, and the evidence showed loose connections, it was some evidence of a defective wheel at the time of the assembly and some evidence of the cause of the accident, and certainly from such evidence reasonable minds could infer that the wheel was defective at the time of assembly.

What we have heretofore said concerning the applicability of the rule res ipsa loquitur to the nonsuit as it applies to both defendants is equally applicable to the first cause of action on which the jury found for the defendant.

Since the case must be reversed for the reasons heretofore set forth, it becomes unnecessary to discuss the further questions raised by plaintiff.

The judgment of nonsuit as to the second cause of action and the judgment entered pursuant to the verdict of the jury on the first cause of action are reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

166 Cal.App.2d 706

FONG HONG MAY, also known as Helen Fong, Plaintiff, Cross-defendant and Respondent,

v.

FONG WAN, etc., et al., Defendants.

Fong Wan, also known as Fong Poy, Individually and as partner in Fong & Sons, Defendants and Appellants.

Edward E. Fong, Individually and as a partner in Fong & Sons and Amy Fong, his wife; Richard R. Fong and Gracina Fong, his wife, Defendants, Cross-complainants and Appellants.

Civ. 17929.

District Court of Appeal, First District, Division 2, California.

Jan. 5, 1959.

Rehearing Denied Feb. 4, 1959.

Hearing Denied March 4, 1959.

Action by wife for divorce on ground of extreme cruelty. The Superior Court, County of Alameda, A. T. Shine, J., rendered judgment, and husband and some of his sons and their wives appealed. The District Court of Appeal, Kaufman, P. J., held that where properties were placed in name of partnership in which husband owned a 70% interest and sons owned 15% interest each, husband dominated partnership, which was a device through which husband held title to properties of which he remained a true owner, partnership was dissolved while divorce action was pending pursuant to plan whereby sons received parcels of real property under verbal agreements that after divorce case was

over property would be returned to husband or to partnership, and husband executed note for more than $273,000 secured by deed of trust on three other properties, properties were properly distributed to wife as community property and deed was properly cancelled on basis that there was evidence of fraud.

Affirmed.

1. Divorce ⇐150(2), 253

In action for divorce on ground of extreme cruelty, findings by reference to pleadings or paragraphs of pleadings were adequate and exact findings as to value of property awarded to either party were not required. West's Ann.Civ.Code, § 94.

2. Divorce ⇐127(4), 130

In action for divorce, evidence sustained wife's right to divorce on ground of extreme cruelty and her testimony was sufficiently corroborated by testimony of her daughter. West's Ann.Civ.Code, § 94.

3. Appeal and Error ⇐1011(1)

Where evidence is conflicting, there is no function for reviewing court to perform other than that of affirming judgment.

4. Divorce ⇐27(1)

In determining whether certain acts and conduct constitute extreme cruelty, each case must be determined according to its particular circumstances. West's Ann. Civ.Code, § 94.

5. Divorce ⇐127(4), 184(6)
Evidence ⇐584(3)

Testimony of one witness entitled to credit is sufficient to establish a fact in a civil case and in a hotly contested divorce case the corroboration required is slight and its sufficiency is largely for trial court.

6. Husband and Wife ⇐266

Agreement as to community nature of assets may be inferred from statements on parties' income tax returns.

7. Husband and Wife ⇐264

In action by wife for divorce on ground of extreme cruelty, evidence of husband and children was not sufficient to overcome presumption of community property especially where records which might have been of assistance in tracing funds had either been burned or disappeared. West's Ann.Civ. Code, §§ 94, 164.

8. Husband and Wife ⇐249

If separate property of husband and wife cannot be traced, commingled property is treated as community property. West's Ann.Civ.Code, § 164.

9. Husband and Wife ⇐264

In action by wife for divorce on ground of extreme cruelty, evidence supported finding that certain instruments prepared and signed by wife under husband's direction establishing certain properties as his separate property were made and delivered only for convenience of husband in order to expedite management of properties, and upon oral understanding that wife was not relinquishing any rights therein. West's Ann.Civ.Code, §§ 94, 164.

10. Divorce ⇐249(3), 275(2)

Where properties were placed in name of partnership in which husband owned a 70% interest and sons owned 15% interest each, husband dominated partnership which was a device through which husband held title to properties of which he remained a true owner, partnership was dissolved while divorce action was pending pursuant to plan whereby sons received parcels of real property under verbal agreements that after divorce case was over property would be returned to husband or to partnership, and husband executed note for more than $273,000 secured by deed of trust on three other properties, properties were properly distributed to wife as community property and deed was properly canceled on basis that there was evidence of fraud.

11. Divorce ⇐252

Where wife obtained divorce on ground of extreme cruelty, and husband had during course of marriage been engaged in 25 to 30 businesses of different kinds, award of businesses to husband in their entirety and award of real property holdings of approximate gross value of $1,350,000, subject to outstanding federal and state

tax liens in excess of $1,000,000, to wife was not an abuse of discretion. West's Ann.Civ.Code, § 94.

William E. Ferriter, San Francisco, Richard E. Macey, Stockton, Czar S. Winters, San Francisco, for appellants.

Suren Toomajian, Oakland, Franklin C. Stark, Oakland (Stark & Champlin, Edward L. Barrett, Jr., Oakland, of counsel), for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from a judgment and decree of the Superior Court of Alameda County, granting a divorce to respondent Mrs. Helen Fong, also known as Fong Hong May. Mrs. Fong filed her complaint for divorce on the grounds of extreme cruelty in February 1954, and requested custody of the four minor children, support and maintenance for herself and the children, an equitable award of community property, attorneys fees and expense money. Appellant Dr. Fong Wan, also known as Fong Poy (hereafter referred to as Dr. Fong), answered and also cross-complained for divorce on the grounds of extreme cruelty. By order of the Court, Mrs. Fong was permitted to file a supplemental complaint which alleged that the two adult sons of Dr. Fong's first marriage, Richard and Edward, held in trust certain community property located in Oakland, which had been transferred to them without consideration and in fraud of Mrs. Fong's rights. The wives of Richard and Edward, Gracina and Amy, respectively, were also added as defendants to determine their claims. The supplemental complaint further named as party defendant, Leslie N. McReynolds, an accountant for Dr. Fong, and alleged that McReynolds had been named as trustee under a deed of trust by which Richard and Edward claimed a lien against certain community property, located in San Francisco, and that this deed of trust was given without consideration and in fraud of Mrs. Fong's rights. McReynolds is not a party to this appeal.

Richard and Edward denied Mrs. Fong's allegations, and by cross-complaint, sought to quiet title to the various properties in their names. Mrs. Fong answered with a denial; Dr. Fong with a disclaimer of any interest in the properties. After eleven days of trial, the court made findings of facts and conclusions of law, ordered Richard and Edward to refrain from disposing of the Oakland properties or using any of the rentals therefrom, and entered an interlocutory judgment and decree of divorce in favor of Mrs. Fong.

Dr. Fong, his sons Richard and Edward, and their wives appeal therefrom, contending that: 1) the trial court failed to make findings on all material issues; 2) the evidence is insufficient to support the findings and judgment; 3) the court erred in its determination of the community property of the parties and made an unjust, inequitable, arbitrary, and capricious division of such community property.

The parties were married on September 27, 1925, and separated on February 18, 1954. During the course of the marriage, Dr. Fong had been engaged in 25 to 30 businesses of different kinds, including night clubs and restaurants in San Francisco and Oakland, and his own business as a Chinese herb doctor in both cities. These business ventures were determined to be a part of the community property and awarded in their entirety to him. Dr. Fong had also acquired real property holdings of an approximate gross value of $1,350,000. These properties were awarded to Mrs. Fong, subject to outstanding Federal and State tax liens in excess of $1,000,000. Of the eight children of the marriage, four were minors at the time of the trial. Mrs. Fong received custody of the children. This portion of the judgment is not challenged by the appellants.

At the time of the trial, Dr. Fong was delinquent for $12,700 in support and maintenance payments for Mrs. Fong and the children and $750 in accounting fees in violation of a court order. In further violation of court orders, Dr. Fong did not keep up the premium payments on cer-

tain life insurance policies. At the trial, Dr. Fong clearly indicated that he had no intention of complying with any court order with which he did not agree, and refused to sign bonds for the support of his minor children.

After a careful perusal of the voluminous record and briefs, we conclude that appellants' contentions are devoid of merit. Rather, the trial court is to be commended for reaching such a just result in the light of voluminous, intricate and conflicting evidence; witnesses requiring interpreters; abuse from Dr. Fong, and Dr. Fong's repeated assertions that he would not comply with the court's orders.

[1] Appellants contend that findings of the trial court were not made upon all material issues and did not comply with the statute. Findings by reference to the pleadings or paragraphs of the pleadings are adequate. Kalmus v. Cedars of Lebanon Hospital, 132 Cal.App.2d 243, 281 P.2d 872; LaMar v. LaMar, 30 Cal.2d 898, 186 P.2d 678. There is no authority for appellants' position that exact findings as to value are required in a case like this one. See Lamb v. Lamb, 131 Cal.App.2d 489, 280 P.2d 793.

[2–5] Appellants' second contention that there is insufficient evidence to support respondent's right to a divorce on grounds of extreme cruelty, is not borne out by the record. While there is conflicting evidence on this issue, the record reveals ample substantial evidence to support the result reached by the trial court. Where the evidence is conflicting, there is no function for the reviewing court to perform other than that of affirming the judgment. Clewett v. Clewett, 136 Cal.App.2d 913, 289 P.2d 512. In determining whether certain acts and conduct constitute extreme cruelty, as defined by Civil Code, § 94, each case must be determined according to its particular circumstances. McFall v. McFall, 58 Cal.App.2d 208, 136 P.2d 580. Respondent's testimony on the issue of extreme cruelty was sufficiently corroborated by the testimony of her daughter, Juanita. The testimony of one witness entitled to credit is sufficient to establish a fact in a civil case. Leffingwell v. Faubion, 89 Cal.App. 157, 160, 264 P. 306. In a hotly contested case the corroboration required is slight and its sufficiency is largely for the trial court. Jones v. Jones, 135 Cal.App.2d 52, 286 P.2d 908.

[6–8] Appellants contend that the trial court had no jurisdiction to award the parcels of real property located in San Francisco to Mrs. Fong as community property, as these properties were the separate property of Dr. Fong. They rely on Dr. Fong's testimony that these properties, although acquired in 1944, were bought with $150,000 in separate funds which Dr. Fong had held, in fact, since before the marriage. Dr. Fong's testimony was contradicted by Mrs. Fong, from statements given by Dr. Fong to Central Bank, and the amended 1944 Federal income tax returns which referred to the properties as purchased with community funds. An agreement as to the community nature of assets may be inferred from statements on the parties' income tax returns. Heck v. Heck, 63 Cal.App.2d 470, 147 P.2d 110; Kenney v. Kenney, 128 Cal.App.2d 128, 274 P.2d 951. Appellants' evidence was not sufficient to overcome the presumption of community property. See Civil Code, § 164, where the presumption is particularly strong in the case of a marriage as long as this one. In re Duncan's Estate, 9 Cal.2d 207, 70 P.2d 174. Even if appellants' evidence is viewed most favorably, records which might have been of assistance in tracing funds had either been burned or disappeared. If separate property cannot be traced, commingled property is treated as community property. Mueller v. Mueller, 144 Cal.App.2d 245, 301 P.2d 90.

[9] Appellants also rely on certain instruments prepared and signed by Mrs. Fong under Dr. Fong's direction, which establish the San Francisco properties as his separate property. Aside from Mrs. Fong's testimony that she couldn't read English and did not know what she signed, there is ample evidence to support the trial

court's finding that these instruments were made and delivered only for the convenience of the husband in order to expedite management of the properties, and upon the oral understanding that Mrs. Fong was not relinquishing any rights therein.

Appellants next argue that the Oakland properties were the assets of the partnership of Fong & Sons, or of Richard and Edward, and that the lien of the San Francisco properties was the property of Richard and Edward. The evidence indicates that when the Oakland properties were acquired, Dr. Fong was not a citizen of the United States; Richard and Edward were. To avoid the effects of the Alien Land Law, Dr. Fong used various devices to permit him to acquire property. Dr. Fong made down payments on some of the properties as "loans" to the persons, who then received record title but never repaid the "loans". Some of the properties were deeded to the sons and other, with the understanding that the property was held in trust for Dr. Fong and would be placed in his name whenever he wanted. Two financial statements, one dated 1933 and one dated 1934, stated that Dr. Fong held unrecorded deeds to some of the Oakland properties. Included among the properties held under unrecorded deeds were two parcels deeded to Richard and Edward as minors, in 1921 and 1923. At the trial, however, Richard and Edward claimed these parcels under 1955 deeds from Fong & Sons. When questioned about the financial statements at the trial, Dr. Fong stated he lied on the statements and usually lied when it was to his advantage.

Dr. Fong became a citizen in 1944. In 1945, the partnership of Fong & Sons was formed. Four of the San Francisco properties and all twelve Oakland properties were placed of record in the name of Fong & Sons. While the partnership records show that Dr. Fong owned a 70% interest and Richard and Edward 15% each, the evidence indicates that the partnership was simply another device through which Dr. Fong held titles to properties of which he remained the true owner. Neither Richard nor Edward in 1945 owned the Oakland properties which they purported to exchange for the interest in the partnership, nor was any money of their own invested in these properties. Their 15% interests were not gifts to them. Mrs. Fong never consented to any gifts to the sons as she did not, until the time of trial, know of the various transactions relating to the Oakland properties, or that funds from Dr. Fong's other businesses went into the Oakland properties. Dr. Fong completely dominated the partnership; he wrote all checks and had charge of all of its money and property. He used the partnership funds freely as his own, paid no interest on huge sums allegedly borrowed from the partnership, and paid no rent on certain properties which were supposedly those of the partnership.

The partnership was dissolved in 1954, while this divorce action was pending, pursuant to the plan of Dr. Fong and Richard and Edward to defeat Mrs. Fong's rights. Richard and Edward received nine parcels of real property in Oakland and the balance due on another Oakland parcel which like two others had been sold. Dr. Fong also executed to them a note for $273,678.10, secured by a deed of trust on the three San Francisco properties. These transfers were made on a verbal agreement that after the divorce case was over, the property would be returned to Dr. Fong or Fong & Sons. On dissolution, there was no audit or appraisal of the partnership assets. The dissolution did not purport to follow the partnership agreement. Appellants could not explain the origin of the $273,678.10 charge against Dr. Fong. Appellants' accountant could not account for a discrepancy of $100,000 in the partnership records.

[10, 11] From the above it is clear that there is evidence of fraud and the trial court properly distributed the Oakland properties to Mrs. Fong as community property and cancelled the deed of trust in the amount of $273,678.10. Nor can we find any indication that the trial court

abused its discretion in the determination and distribution of the community property. Crouch v. Crouch, 63 Cal.App.2d 747, 147 P.2d 678.

There is no merit in appellants' further contentions that all appellants were not properly made defendants; that the pleadings did not properly put in issue the true ownership and equitable ownership of all of the properties; that Richard and Edward were "misled into not raising the defense of the statute of limitations."

We conclude that the judgment finds support in the record before us.

Judgment affirmed.

DRAPER, J., concurs.

DOOLING, Justice (dissenting).

I concur in the judgment. However, I wish to elaborate my reason for agreeing with the somewhat cryptic statement in the opinion that: "There is no authority for appellants' position that exact findings as to value are required in a case like this one."

The only finding as to value is by reference to the first amended complaint. In paragraph VII of that complaint plaintiff alleges on information and belief that the community property is in excess of one million dollars in value. The finding is that all of the allegations of this paragraph are true. While the allegation is made on information and belief the finding is that this allegation is true. This is a sufficient finding of the fact alleged.

The more difficult question is presented by the fact that the court made no finding of the value of the property awarded to either party. Thus it is impossible to determine from the findings what proportion (by value) of the property the court awarded to either party.

The wife obtained the decree on the ground of extreme cruelty. She was thus entitled to receive more than one-half of the community property (Harrold v. Harrold, 43 Cal.2d 77, 82, 271 P.2d 489) and the court in its discretion might have awarded all of the community property to her (Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289).

Were the wife appealing she could properly complain that in the absence of a finding of the value of the respective properties awarded to each it could not be determined that she in fact received the more than one-half to which she is entitled. Villafuerte v. Villafuerte, 125 Cal.App.2d 466, 469, 270 P.2d 526. The husband, who is not entitled as of right to any particular portion of the community property, is in no such position to complain. Pope v. Pope, 102 Cal.App.2d 353, 372 et seq., 227 P.2d 867.

166 Cal.App.2d 652

PAN PACIFIC SASH & DOOR CO., Plaintiff and Respondent,

v.

GREENDALE PARK, INC., Ralmor Corporation, Title Insurance and Trust Company, a corporation, Trustee, George W. Lane, Olga Lane, Bank of America National Trust & Savings Association and Continental Auxiliary Company, a corporation, Trustee, Doe 1 to 5 inclusive, Doe Corporations 1 to 100 inclusive, Defendants.

Greendale Park, Inc., and Ralmor Corporation, a corporation, Appellants.

Civ. 23078.

District Court of Appeal, Second District, Division 3, California.

Dec. 31, 1958.

Action for goods, wares and merchandise sold and delivered to defendants. The defendants filed counterclaim for defective material furnished by plaintiff. The Court allowed the counterclaim and entered judgment in favor of plaintiff, and the defendants appealed. The District Court of Appeal, Patrosso, J. pro tem.,

held that plaintiff was entitled to interest only on the amount for which judgment was awarded and was not entitled to interest on a greater amount on any theory that until allowance of the counterclaim the defendants were indebted to plaintiff in amount of counterclaim.

Affirmed as modified.

1. Corporations ⇐1.7(1)

In action for goods, wares and merchandise sold and delivered to corporate defendants, one of whom allegedly owned tract of land and the other of whom allegedly constructed houses thereon, defendants were not misled by any variance between pleadings raising no issue that corporations were alter ego of each other and proof that such was the case, where defendants were apprised well in advance of trial that plaintiff intended to rely upon doctrine of alter ego in order to charge corporation owning land, and corporations were represented by the same counsel and the officers and principal stockholders of each, who were in possession of all the facts relative to the creation of both corporations and to their relations and transactions with each other, testified upon the trial.

2. Corporations ⇐1.7(1)

Where a corporate defendant is charged with liability, such defendant's denial thereof is sufficient to authorize reception of evidence to establish such liability upon the principle of the alter ego.

3. Corporations ⇐1.7(2)

In action for goods, wares and merchandise sold and delivered to corporate defendants, one of whom allegedly owned tract of land and the other of whom allegedly constructed houses thereon, evidence was sufficient to support findings that the corporation which constructed houses was the alter ego of the corporation which owned the land and that each corporation was but an instrumentality or conduit of the other in the prosecution of the single venture of construction and sale of houses upon the tract.

4. Interest ⇐22(1)

In action for goods, wares and merchandise sold and delivered to defendants, where counterclaim was allowed and judgment was entered for plaintiff, plaintiff was entitled to interest only on the amount for which the judgment was awarded and was not entitled to interest on a greater amount on any theory that until allowance of the counterclaim the defendants were indebted to plaintiff in amount of counterclaim. West's Ann.Code Civ. Proc. § 440.

Frederick L. Botsford, Pasadena, and Gordon Stater, Los Angeles, for appellants.

Adelman & Schwartz, Beverly Hills, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by the defendants Greendale Park, Inc., and Ralmor Corporation from a judgment in favor of plaintiff in the principal sum of $12,535.96 plus interest on the sum of $16,271.41 from September 1, 1955.

The complaint is in two counts. The first seeks to foreclose a mechanic's lien for the value of sash doors, frames and jambs furnished by plaintiff pursuant to an agreement with defendant Ralmor and used in the construction of residences upon 100 lots in a tract of land owned by the defendant Greendale. The second cause of action is in the form of a common count for goods, wares and merchandise sold and delivered to the appellants. Prior to the trial the first count was dismissed and the case went to trial upon the second cause of action alone. Defendants filed separate answers to the second count. Defendant Greendale denied that it was indebted to the plaintiff in any sum. Ralmor, while admitting that it was indebted to plaintiff, pleaded a counterclaim in the sum of $3,735.45 for damage alleged to have been sustained by it as a result of defective material furnished by the plaintiff.

At the pretrial hearing which was held on May 16, 1957, plaintiff stated that, while not pleaded, plaintiff upon the trial would contend "that the ownership of stock in Ralmor Corporation and Greendale Park, Inc. is the same or substantially the same so as to constitute one corporation the alter ego of the other." In response counsel for the defendant stated that it would "object to the introduction of any evidence on the subject of alter ego on the ground that the complaint does not set forth facts sufficient to constitute a cause of action based on the alter ego principle." No request was then or later made by the plaintiff to amend its complaint and the action went to trial upon the second count of the original complaint on July 2, 1957. At the trial following the opening statement of counsel for the plaintiff, defendants' counsel stated that he would object to any evidence tending to establish that each of the defendants was the alter ego of the other, and thereafter objected to all evidence tending to establish this fact. All of these objections were overruled and evidence was received upon the basis of which the trial court made the following findings:

"VI

"That there is a unity of interest and ownership of both defendants Ralmor Corporation and Greendale Park, Inc.

"VII

"That the defendant Ralmor Corporation was and is merely an instrumentality through which the defendant Greendale Park, Inc. conducted its operations as a business convenience.

"VIII

"That both of said defendants are insolvent.

"IX

"That fraud and injustice would result unless both of said corporations were held equally responsible to plaintiff for plaintiff's claim."

[1, 2] As its first ground for reversal of the judgment Greendale contends that the trial court erred in admitting over its objection evidence designed to establish that it and Ralmor were the alter ego of each other upon the ground that such evidence was outside of the issues made by the pleadings. While it is true that the complaint is devoid of any allegation to this effect it now appears to be the established rule in this State that where a defendant is charged with liability his denial thereof is sufficient to authorize the reception of evidence to establish such liability upon the principle of the alter ego or at least that under circumstances such as here present the reception of such evidence does not constitute reversible error. In Gordon v. Aztec Brewing Co., 1949, 33 Cal. 2d 514, at page 523, 203 P.2d 522, at page 527, the court in answering a similar contention to that advanced here by the appellants said:

"It is contended by the defendant that the issue of whether there existed an *alter ego* relationship was not pleaded and was therefore not before the trial court. Defects in the complaint may be cured by allegations of the answer. Vaughn v. Jonas, 31 Cal.2d 586, 603–604, 191 P.2d 432; Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 248-249, 73 P.2d 1163; Marr v. Postal Union Life Ins. Co., 40 Cal.App.2d 673, 680–681, 105 P.2d 649. In its answer the defendant denied that it was engaged in the business of bottling, selling and distributing ABC beer at any time mentioned in the complaint. The question of which entity manufactured the beer and was responsible for the safety of its containers, was thereby sufficiently raised. Furthermore, even if the pleadings were to be considered deficient in this respect, it is clear that the defendant has not been misled to its prejudice by any variance between pleadings and proof. Code Civ.Proc., sec. 469. From the beginning of the proceedings it was prepared to maintain, and did maintain throughout the trial, that the liabilities of the partnership could not be fastened upon the corporation."

Like language is to be found in Wilson v. Nobell, 1953, 119 Cal.App.2d 341, 348, 259 P.2d 720, 724 where it is said:

"Although there was no direct issue raised by the pleadings that the Nobell Research Foundation was the *alter ego* of Albert Nobell it was not prejudicial under the circumstances to admit evidence on that question. Both Nobell and the Foundation were parties to the action and represented by the same counsel. Nobell was a principal witness and in possession of all the facts relative to the creation of the Foundation and its relation to him. When it developed that Nobell was indebted to plaintiff; that he was 'broke' and that he had turned funds and contracts over to the Foundation it became important and proper to inquire into the relationship between Nobell and the Foundation so that the corporation might not be used by him to commit either a fraud or an injustice. Gordon v. Aztec Brewing Co., supra, 33 Cal.2d at page 520, 203 P.2d at page 522 [525]; Associated Oil Co. v. Seiberling Rubber Co., 172 Wash. 204, 19 P.2d 940; Thomson v. L. C. Roney & Co., supra [112 Cal.App.2d 420, 246 P.2d 1017]; Mirabito v. San Francisco Dairy Co., supra [1 Cal.2d 400, 35 P.2d 513; 8 Cal.App.2d 54, 47 P. 2d 530]."

Here as in the cases cited, the defendants were apprised well in advance of the trial that the plaintiff intended to rely upon the doctrine of the *alter ego* in order to charge Greendale; both corporations were parties to the action and represented by the same counsel and the officers and principal stockholders of both corporations who were in possession of all of the facts relative to the creation of both corporations and their relations and transactions with each other testified upon the trial. Under these circumstances conceding that the plaintiff's complaint was deficient in the particular above referred to, it may not be said that defendants were misled to their prejudice by any variance between the pleading and the proof.

[3] Greendale next contends that the evidence is insufficient to support the trial court's findings hereinabove quoted to the effect that Ralmor was the alter ego of Greendale. The evidence upon this score may be epitomized as follows:

Ralmor was incorporated in 1951, its sole stockholders being R. L. Blink and his wife and M. S. Hoffberg and his wife, each owning 50 shares of stock which had been issued at its par value of $1 per share. The same parties composed its board of directors. Mr. Blink was at all times its president and treasurer and Mr. Hoffberg was at all times its vice-president and secretary. Greendale was incorporated in August 1954. Its sole stockholders consisted of Mr. Hoffberg and Mr. Blink each owning 250 shares of stock which had been issued at its par value of $1 per share. Its board of directors consisted of Mr. Hoffberg and Mr. Blink and their attorney. The minutes disclose, however, that the latter was not present and did not participate in any meetings of the board of directors subsequent to September 13, 1954. Mr. Hoffberg was at all times its president and Mr. Blink was at all times its vice-president and secretary. The evidence justified the inference that Greendale was organized for the purpose of acquiring a tract of land in the Antelope Valley and building homes thereon. The property in question had been purchased by Messrs. Hoffberg and Blink and it was conveyed to the corporation subject to an encumbrance in the sum of $100,000 in consideration of the issuance by the corporation to Messrs. Hoffberg and Blink of its promissory note in the sum of $45,000. Both corporations' offices were located in the same premises and they had at least some employees in common.

After the transfer to Greendale of the tract of land previously mentioned and on January 20, 1955, Greendale entered into a building construction contract with Ralmor whereby the latter agreed to construct houses on the 100 lots in the tract at cost plus a fee of $500 per house. On the following day Greendale borrowed from the Bank of America $1,194,000 upon its note secured by a trust deed upon the land which sum, under the agreement with the bank,

was to be disbursed through an escrow as the construction of the houses on the property progressed. In connection with this loan Greendale, Ralmor, Mr. and Mrs. Blink and Mr. and Mrs. Hoffberg executed an agreement with the bank whereby they jointly and severally guaranteed the construction and completion of each house and the full and complete performance of all work required to be done by the plans and specifications and the payment in full for all labor and materials used in connection with said construction work and the completion of each of said houses free and clear of any and all mechanics' liens. Contemporaneous with the execution of the last mentioned agreement another agreement was executed between the bank and the same parties whereby the latter jointly and severally guaranteed to purchase from the bank for the unpaid principal balance plus accrued interest the loan upon any and all houses which had not been paid in full within nine months from the date thereof. Simultaneously Messrs. Greendale and Ralmor executed a written order to the bank wherein and whereby they authorized the bank to pay to Ralmor *or* Greendale the proceeds of the bank loan as the same was disbursed by it under the loan agreement.

Insofar as the record discloses the only business of the corporations during the period with which we are concerned was the construction of the houses upon the tract in question and the sale thereof. The financial records which were introduced in evidence disclosed numerous loans from Greendale to Ralmor and from Ralmor to Greendale. Both corporations appear to have operated largely on money borrowed from Messrs. Blink and Hoffberg and others including one Greendale who purchased $50,000 of Greendale debentures but under an agreement whereby Blink, Hoffberg and Ralmor agreed to repurchase the same for the principal amount upon Mr. Greendale's demand and they were later so purchased by Blink and Hoffberg. Each corporation was heavily indebted and unable to pay its obligations.

Upon the basis of the foregoing evidence the trial court was warranted in concluding, as it did, that each corporation was but an instrumentality or conduit of the other in the prosecution of a single venture, namely, the construction and sale of houses upon the tract in question. Both corporations had the same stockholders, directors and officers, occupied the same premises as their offices and had common employees. Each was without substantial capital. Cf. Automotriz Del Golfo De California S. A. De C. V. v. Resnick, 47 Cal. 2d 792, 796, 797, 306 P.2d 1. When Greendale was without funds required for its operation and Ralmor had funds available a loan was made from the latter to the former and vice versa. Each corporation received the benefit of the materials supplied by the plaintiff and incorporated in the houses which were under construction upon the tract. There was such unity of interest and ownership that the separateness of the two corporations had in effect ceased and an adherence to the fiction of a separate existence of the two corporations would, under the circumstances here present, promote injustice and make it inequitable for Greendale to escape liability for an obligation incurred as much for its benefit as for Ralmor. As said in Thomson v. L. C. Roney & Co., 1952, 112 Cal.App.2d 420, 427–428, 246 P.2d 1017, 1021: "Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will look behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability. D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 420, 6 P.2d 251, 79 A.L.R. 329. Since the separate personality of a corporation is but a statutory privilege it must not be employed as a cloak for the evasion of obligations. The conditions which must be present before the corporate veil will be pierced are outlined in Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673, 676, where the court points out that before the obligations of a corporation can be regarded as

those of another person, the following circumstances must appear: 'First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.' The second requirement suggested in Minifie v. Rowley, supra, is further refined in the following expression: '* * * where the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. (Citing cases.) It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. (Citing cases.) Here confusion would be promoted and an unjust result be accomplished if the maintenance of the two entities controlled by the same persons and having an identical name were permitted to frustrate a meritorious claim.' Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 522–523, 203 P.2d 522, 527."

[4] Finally appellants complain that the trial court erred in allowing interest upon the sum of $16,271.41 rather than on the sum of $12,535.96 for which judgment was awarded and with this contention we are constrained to agree. The arguments advanced by respondent in support of the trial court's action in this particular are (1) that the parties stipulated that plaintiff was entitled to interest from September 1, 1955, and (2) that the amount of appellants' offset in the sum of $3,573.45 "was not established until the time of trial." It is true that the parties stipulated that interest, if allowable, should commence to run from September 1, 1955, but this does not imply a stipulation that interest should be awarded upon a sum greater than that for which the court should award judgment. The second argument is equally without merit for by virtue of the Code of Civil Procedure, section 440, where cross-demands exist between parties they "shall be deemed compensated, so far as they equal each other." See Jones v. Mortimer, 1946, 28 Cal.2d 627, 632, 170 P.2d 893. Thus to the extent that appellants had a right to offset against respondent's claim the amount of damage sustained by reason of the delivery of defective materials plaintiff's claim was satisfied. Appellants never owed plaintiff $16,271.41 but only $12,535.96 for which the court awarded judgment.

The judgment is modified by striking therefrom the words "plus interest in the sum of $2,141.21" and substituting in lieu thereof the following: "together with interest at the rate of 7 per cent per annum from September 1, 1955." As so modified the judgment is affirmed, neither party to recover costs upon appeal.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 661

Caesar BRATTA and Leona L. Bratta, Plaintiffs and Appellants,

v.

CARUSO CAR CO., Inc., et al., Defendants and Respondent.

Civ. 23285.

District Court of Appeal, Second District, Division 3, California.

Dec. 31, 1958.

Action to rescind a conditional sales contract for the purchase of an automobile. From an adverse judgment of the Superior Court, Los Angeles County, Arnold Praeger, J., the purchasers appealed. The District Court of Appeal, Patrosso, J. pro tempore, held that where the purchasers did not pay as part of the down payment the sum of $300 in "cash" as recited in the

contract but only executed a note in such amount, the conditional sales contract was invalid and the purchasers were entitled to rescind.

Judgment reversed.

1. Sales ⇐114, 452, 464

The statute respecting conditional sales was enacted for the benefit and protection of purchasers of motor vehicles under conditional sales contracts, and contracts which do not conform to the requirements of the statute are illegal and as purchaser is not regarded as in pari delicto with seller, he may rescind the contract. West's Ann.Civ.Code, § 2982.

2. Sales ⇐461

Requirement of the statute that conditional sales contracts for motor vehicles contain statements therein specified implies that such statements when set forth in the contract shall be true, the word "cash" in the statute not being used in any other than its usually understood meaning of money. West's Ann.Civ.Code, § 2982.

See publication Words and Phrases, for other judicial constructions and definitions of "Cash".

3. Sales ⇐461

Where purchasers of an automobile on time payments did not pay as part of the down payment the sum of $300 in cash as recited in the contract but only executed a promissory note for such amount, the promise of the purchaser was not "money's worth" or "cash" within the conditional sales statute and hence the contract was invalid, it being immaterial whether the seller of the automobile accepted note as payment. West's Ann.Civ. Code, §§ 2981(f), 2982, subds. 2, 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Money's Worth".

4. Equity ⇐65(1)

Where purchasers of automobile on time did not pay as part of the down payment the sum of $300 in cash as recited in the contract but only executed a note therefor, alleged fact that the purchasers promised to secure a loan from the proceeds of which they agreed to pay their note did not establish that they were before the court with "unclean hands" and hence barred from rescission of the conditional sales contract, since the purchasers were not to be deemed in pari delicto with the seller of the motor vehicle. West's Ann. Civ.Code, §§ 2981(f), 2982, subds. 2, 3.

5. Sales ⇐461

The purpose of the statute respecting conditional sales contracts was to require that all agreements between buyer and seller of a motor vehicle to be set forth in the conditional sales contract and the statute cannot be nullified by the device of stating in the contract that the unpaid balance of the purchase price was a certain sum payable in a certain number of monthly installments whereas in truth the unpaid balance was much larger. West's Ann.Civ. Code, §§ 1642, 2982.

6. Sales ⇐461

The prescribed forms and requisites of the statute respecting conditional sales contract for motor vehicles are mandatory and the failure of the seller to comply therewith renders the contract unenforceable. West's Ann.Civ.Code, § 2982.

Arnett L. Hartsfield, Jr., Margolis, McTernan & Branton, Los Angeles, for appellants.

Cecil W. Collins and Jack B. Tenney, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Plaintiffs appeal from an adverse judgment in an action instituted to rescind a conditional sales contract for the purchase of an automobile executed between the plaintiffs and defendant Caruso Car Company, Inc., which contract was subsequently assigned to the defendant Commercial Credit Corporation. The sole question presented is whether the contract in question conforms to the requirements of section 2982 of the Civil Code.

On August 19, 1956, appellants entered into a written agreement with respondent Caruso for the purchase of a used 1956 Plymouth automobile. As part of the transaction the appellants traded in a 1953 Ford convertible for which they were given credit in the sum of $920. The conditional sales contract executed between the parties contained among other things the following provisions:

"1.	Cash Delivered Price (Including any sales tax and extra equipment)		
	License	27.00	$3,661.80
"2.	Down Payment: Cash	$300.00	
	Trade-in:	$———	
	Make Ford Year 1953		
	Model No. BPC1002865		
	Amount Owing on Trade-in	$———	
	Purchaser's Equity in Trade-in	$920.00	
	Total Down Payment		$1,220.00
"3.	Amount Unpaid on Cash Price		$2,441.80
"6.	Amount of Unpaid Balance		$2,441.80
"7.	Time Price Differential (Finance Charge)		611.00
"8.	Contract Balance (Purchaser's Obligation)		$3,052.80

"Payable in 36 equal consecutive monthly instalments of $84.80 each, the first instalment payable October 4 1956."

In truth and in fact appellants did not pay $300 or any sum in cash as recited in the contract but they executed a promissory note in this amount payable to the respondent Caruso, it being agreed at the time between the parties that the appellants would procure a loan elsewhere in a sufficient amount to pay the note. Caruso referred the appellants to the Public Finance Company in Glendale for the purpose of securing such a loan and in this connection prepared a confidential credit application which was executed by the appellants and which they were directed to take to the office of the Finance Company. In accordance therewith, appellants delivered such application to the Finance Company and were later advised that it would make a loan of $300 to the appellants provided they executed a promissory note in the sum of $475 payable in 19 monthly instalments of $25 each and secured the same by a lien upon appellant's household furniture. The appellants refused to accept the loan upon these terms and on August 31, 1956, gave notice of rescission of the contract to the respondents wherein they offered to return the automobile purchased upon return to them of the Ford automobile which they had transferred to Caruso. Respondents refused to consent to a rescission and the appellants refusing to make any payments on the contract, the automobile was repossessed on November 23, 1956, following which the present action was instituted.

Civil Code, section 2982, as it read at the time of the execution of the contract here in question provided in part as follows: "(a) Every conditional sale contract for the sale of a motor vehicle, with or without accessories, shall be in writing and shall contain all of the agreements between the buyer and the seller relating to the personal property described therein. It shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and when so executed an exact copy thereof shall be delivered by the seller to the buyer at the time of its execution. It shall recite the following separate items as such, in the following order: 1. The cash price of the personal property described in the conditional sale contract. 2. The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property. * * * 3. The amount unpaid on the cash price, which is the difference between Items 1 and 2."

[1] It is now well settled that section 2982 was enacted for the benefit and protection of purchasers of motor vehicles under conditional sale contracts; that such contracts not conforming to the requirements thereof are illegal and as a purchaser is not to be regarded in pari delicto with the seller he may rescind the contract. Carter v. Seaboard Finance Co., 1949, 33 Cal.2d 564, 573, 203 P.2d 758; Lewis v. Muntz Car Co., 1958, 50 Cal.2d 681, 328 P.2d 968.

[2, 3] The requirement of the statute that such conditional sale contracts con-

tain the statements therein specified necessarily implies that such statements when set forth in the contract shall be true for otherwise the very purpose of the statute would be defeated. Here it is admitted that the appellants did not pay as part of the down payment the sum of $300 in cash as recited in the contract but only executed a promissory note in this amount. There is nothing to suggest that the word "cash" in the statute is used in any other than its usually understood meaning of money. People v. Quiel, 1945, 68 Cal.App.2d 674, 678, 157 P.2d 446; In re Estate of Chamberlain, 1942, 56 Cal.App.2d 458, 463, 132 P.2d 488, 491. In the case last cited the court said: "Solvent credits are not cash in the ordinary understanding of the latter term. Upon the former appeal it was said: 'Cash is "current money in hand or readily available."' ([In re Chamberlain's Estate], 46 Cal.App.2d 16, at page 20, 115 P.2d 235, at page 237.) The court there approved of another definition reading: '"Cash" means especially "ready money" at command, subject to free disposal; not tied up in a fixed state. It is almost the equivalent of "loose money."' 1 Bouv. Law Dict., Rawles' Third Revision, p. 428, defines 'cash' as: 'That which circulates as money, including bank bills but not mere bills receivable.' The money represented by the notes of the corporation and also by the book credits was available for distribution to the beneficiaries not upon demand but upon its receipt by the trust from the corporation and upon the decision of the trustees to make distribution. How or when the corporation's notes to the syndicate were payable does not appear. *Promissory notes cannot be treated as cash* in the construction of a will except where the language of the will shows that the testator considered them to be cash and disposed of them as such. Otherwise, as held on the first appeal, the word 'cash' should be given its common and ordinary meaning." (Emphasis added.)

The promise of appellants as evidenced by the execution of the promissory note is no more "cash" than their promise in the contract to pay the balance of the contract price as therein set forth in installments. Each is a mere promise to pay and such a promise does not constitute "cash" within the meaning of the statute. In re Estate of Chamberlain, supra; Pierce v. Bryant, 5 Allen, 91, 93, 87 Mass. 91, 93; State ex rel. Farmers' Mut. Ins. Co. of Nebraska v. Moore, 48 Neb. 870, 67 N.W. 876, 878; Palliser v. United States, 136 U.S. 257, 263, 10 S.Ct. 1034, 34 L.Ed. 514, 517; Citizens' Nat. Bank of Stamford v. Stevenson, Tex.Civ.App., 211 S.W. 644, 645; Commonwealth v. Dow, 217 Mass. 473, 105 N.E. 995, 998; Fidelity Savings State Bank v. Grimes, 156 Kan. 55, 131 P.2d 894, 896.

Respondents point to subdivision (f) of section 2981 of the Civil Code which defines "down payment" as follows: "(f) *'Down payment'* shall mean that part of the cash price which the buyer pays or agrees to pay to the seller in cash or property value or money's worth at or prior to delivery by the seller to the buyer of the personal property described in the conditional sale contract."

From this they argue that the promissory note executed by the appellants was "money's worth" but it is apparent from a mere reading of this provision that it distinguishes between "cash" and "money's worth." Likewise subdivision 2 of section 2982 hereinabove quoted distinguishes between "cash" and "money's worth" for it requires a separate statement in the contract as to what portion of the down payment is made "in cash" and that "represented by the net agreed value of described property traded in" and subdivision 3 of the same section requires a statement of "the amount unpaid on the cash price." Thus the contract here violates both subdivisions 2 and 3 of section 2982 as it falsely states that the amount of $300 had been paid in cash as well as the unpaid balance of the cash price, for after crediting appellants with the value of their trade-in there remained unpaid upon the cash price of $3,661.80 not $2,441.80 as stated in the contract but the sum of $2,741.80,

of which latter sum $300 was evidenced by the appellants' promissory note.

Respondents next argue that whether the promissory note was given and accepted as payment by the respondent Caruso was a question of fact and in this connection they refer to the trial court's finding that the note was given "in lieu of $300 cash as part of the down-payment." However, it is immaterial whether or not Caruso accepted the note as payment for the fact remains that it was not "cash" as stated in the contract, and if, as the trial court found, the note was accepted "in lieu of $300 cash" it is clear that the note was something other than cash. Moreover, Mr. Guccione, the general manager of the used car department of Caruso who was called as a witness for the respondents testified that the note was not taken in part payment of the car.

[4] Respondents also contend that because the appellants promised to secure a loan from the proceeds of which they agreed to pay their note they are before the court with unclean hands and hence barred from securing the relief which they seek. The ready answer is, as previously pointed out, that appellants are not deemed to be in pari delicto with the respondents and hence are not precluded from urging the illegality of the contract.

[5] Respondents further contend that by virtue of section 1642 of the Civil Code the conditional sale contract and the promissory note "are to be taken together and interpreted as a single contract." From this premise they argue that as the "purpose of the statute is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost" the requirement of the statute is met because when the contract and note are read together all items of cost are fully disclosed. The plain language of section 2982, however, discloses that it was the Legislature's purpose to require "all of the agreements between the buyer and the seller" to be set forth in the conditional sale contract. Indeed if respondents' contention in this regard were accepted the statute could be nullified by the simple device, as was done here, of stating in the conditional sale contract that the unpaid balance of the purchase price was $2,441.80 payable in a certain number of monthly installments whereas in truth the unpaid balance was $2,741.80.

[6] Finally respondents contend that section 2982 "is a shield * * * and not a sword" and inasmuch as the appellants "were fully informed of their total obligations involved in the transaction, and they understood the full significance of their agreement" [1] they were in no way deceived or misled with respect thereto. This may be conceded but the concession does not aid the respondents. The Supreme Court has declared that the "prescribed form and requisites" of section 2982 are mandatory and that the failure of a seller to comply therewith renders the contract unenforceable. Carter v. Seaboard Finance Co., supra.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

1. It may be noted that, although the assistant manager of Caruso testified that when he referred appellants to the Public Finance Company he knew that in order to secure a loan of $300 from that company they would be required to execute a note for approximately $475.00 if the loan were repayable in 19 monthly installments, it does not appear that he so informed the appellants. Thus, it may well be doubted if it can be said that the appellants "were fully informed of their total obligations involved in the transaction, and they understood the full significance of their agreement."

167 Cal.App.2d 1

Tadeusz BUDNY, and Felix Florkewicz, Plaintiffs and Appellants,

v.

BANK OF AMERICA, N. T. & S. A., a corporation, as Trustee under the Last Will and Testament of John A. Florkewicz, deceased, Defendant and Respondent.

Civ. 18263.

District Court of Appeal, First District, Division 2, California.

Jan. 8, 1959.

Suit was brought for declaration that testamentary trust was invalid, on ground that it violated rule against perpetuities and rule against restraints on alienation. The Superior Court, County of Alameda, Marvin Sherwin, J., entered judgment adverse to the plaintiffs, and they appealed. The District Court of Appeal, Draper, J., held that where same issue was necessarily before Probate Court previously, and Probate Court's decree of distribution had become final, issue was res judicata.

Judgment affirmed.

Judgment ⇐725(3)

Where issue whether testamentary trust was invalid on ground that it violated rule against perpetuities and rule against restraints on alienation, was necessarily before Probate Court, and Probate Court's decree of distribution had become final, issue was res judicata in subsequent suit in Superior Court for declaration that testamentary trust was invalid, on ground that it violated rule against perpetuities and rule against restraints on alienation. West's Ann.Const. art. 20, § 9; West's Ann.Civ. Code, §§ 715.1, 715.2, 716, 771; West's Ann.Prob. Code, § 1021.

Richard J. Spear, Robert S. Thaman, Oakland, for appellants.

S. Lennart Cederborg, Felton L. Watson, Oakland, for respondent.

DRAPER, Justice.

Plaintiffs' complaint seeks declaration of the invalidity of a testamentary trust, alleging that "administration was had and closed" upon the estate of the testator and quoting the challenged provisions of the trust from the will "and * * * the Decree of Final Distribution." Demurrer to the complaint was sustained without leave to amend, and plaintiffs appeal from the ensuing judgment. The assertion that the trust is invalid is based solely upon its claimed violation of the rule against perpetuities and that against restraints upon alienation. Cal.Const. Art. XX, sec. 9; Civ.Code, §§ 715.1, 715.2, 716 and 771. Appellants' brief concedes that decree of final distribution to the trustees was made November 18, 1954, and has become final. This action was filed July 26, 1956. Plaintiff Budny is a co-trustee with defendant, and plaintiff Florkewicz, a brother of testator, is one of the beneficiaries.

It is unnecessary to determine whether the testamentary trust is vulnerable to the attack here made. That issue was necessarily before the probate court, and its decree of distribution, having become final, is res judicata. Crew v. Pratt, 119 Cal. 139, 51 P. 38; Matter of Trust of Trescony, 119 Cal. 568, 51 P. 951; Smith v. Vandepeer, 3 Cal.App. 300, 85 P. 136; In re Estate of O'Connor, 158 Cal.App.2d 187, 322 P.2d 616. Even where the parties concede that the trust improperly restrains alienation, the decree of distribution cannot be collaterally attacked. Crew v. Pratt, supra. Appellants rely upon language in Wharton v. Mollinet, 103 Cal.App.2d 710, 229 P.2d 861, which they assert to be in conflict with this rule. But this decision was sharply criticized in Wogman v. Wells Fargo Bank & Union Trust Co., 123 Cal.App.2d 657, 664, 267 P.2d 423, and petition for hearing by the Supreme Court in the latter case was denied.

It is clear that plaintiff Budny, to whom distribution was made as a trustee, is within the class of "heirs, devisees and legatees" as to whom the decree of distribution is

final. Prob.Code, § 1021. Similarly, plaintiff Florkewicz, as one of the beneficiaries of the testamentary trust, is bound by the decree. In re Estate of Loring, 29 Cal.2d 423, 431, 175 P.2d 524.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

167 Cal.App.2d 112

Dale E. BUNCH, Plaintiff and Appellant,

v.

Francis HENDERSON, Alta Marie Henderson et al., Defendants and Respondents.

Civ. 5912.

District Court of Appeal, Fourth District, California.

Jan. 13, 1959.

Action to recover a real estate broker's fee. From a judgment of the Superior Court, San Bernardino County, James E. Cunningham, Sr., J., granting a nonsuit the plaintiff appealed. The District Court of Appeal, Shepard, J., held, inter alia, that evidence including showing that brokerage agreement was not exclusive, that plaintiff understood that owner had right to sell his property himself or through another broker without paying any commission to plaintiff, that plaintiff had produced a prospective buyer and that owner sold his property to a third party who allegedly had some dealings with such prospective buyer, failed to show any collusion between the prospective buyer and the owner so as to entitle plaintiff to recover his fee, and hence the trial court's judgment of nonsuit was proper.

Affirmed.

1. Trial ⇐382, 384

On motion for nonsuit trial court must give plaintiff's evidence its full legal weight and disregard all evidence conflicting therewith, and must give plaintiff the advantage of a legitimate inference that may be drawn from the evidence, and after having done so, if there is any evidence of sufficiently substantial character to support a verdict in plaintiff's favor the motion for nonsuit must be denied.

2. Appeal and Error ⇐927(3)

On appeal from judgment for nonsuit, the appellate court must view the evidence in light most favorable to the appellant and such rule is the same whether trial is before court with a jury or before the court alone.

3. Brokers ⇐53, 84(2)

In order for broker to recover his fee he must prove that he produced a buyer, ready, able and willing to buy the realty involved, and that he was procuring cause of the sale and not just one link in a chain of causes, and it is not enough that he impart information that tends to arouse interest.

4. Brokers ⇐86(1)

In action to recover a real estate broker's fee, evidence including showing that brokerage agreement was not exclusive, that plaintiff understood that owner had right to sell his property himself or through another broker without paying any commission to plaintiff, that plaintiff had produced a prospective buyer and that owner sold his property to a third party who allegedly had some dealings with such prospective buyer, failed to show any collusion between the prospective buyer and the owner so as to entitle plaintiff to recover his fee, and hence the trial court's judgment of nonsuit was proper.

Marshall L. Miles, San Bernardino, for appellant.

Paul B. Wilson, Redlands, for respondents.

SHEPARD, Justice.

This is an action to recover a real estate broker's fee. After plaintiff rested his case the trial court granted a nonsuit. Plaintiff appeals from the judgment entered for defendants.

[1, 2] When considering a motion for nonsuit it is the duty of the trial court to give to plaintiff's evidence its full legal weight, to disregard all evidence conflicting therewith, and to give plaintiff the advantage of every legitimate inference that may be drawn from the evidence. After having done so, if there is any evidence of sufficiently substantial character to support a verdict in plaintiff's favor the motion for nonsuit must be denied. Thus, when an appeal is from a nonsuit, the appellate court must view the evidence in the light most favorable to the appellant. Raber v. Tumin, 36 Cal.2d 654, 656 (1) (2), 226 P.2d 574.

The rule is the same whether the trial is before the court with a jury, or before the court alone. Lasry v. Lederman, 147 Cal.App.2d 480, 488(10), 305 P.2d 663.

Viewing the evidence in this light, it appears that on November 22, 1954, defendant Henderson signed a broker's real estate listing with plaintiff's employer assignor for the sale of 74 acres of land near Highland, California. Plaintiff produced a prospective buyer named Ralph Padulla, showed him the property, and introduced him to defendant, making a suggestion for segregated sale of an area 100 x 200 feet containing the principal improvements in order to pay off an encumbrance. No decision was then reached by Padulla. Defendant later sold this property to one Edward Norris and plaintiff was informed of this by defendant near the end of December, 1954. This sale was within the time limit expressed in the plaintiff's brokerage agreement. Plaintiff at no time contended that the brokerage agreement was exclusive, and at the trial testified that it was a "non-exclusive" or "open" listing, and that plaintiff understood by their agreement that defendant had the right to sell the property himself or through another broker without paying any commission to this plaintiff.

In February, 1955, plaintiff was at a meeting of realtors at the office of the Southwest Management Company (where Padulla worked) and met a Mr. C. E. Justice, who worked in the same office as Padulla. Mr. Justice told plaintiff something about the defendant's property, apparently attempting to interest plaintiff in selling it. Plaintiff did not know of, nor offered any proof of, any contractual relationship between Justice and Padulla. Justice apparently was not available for testimony at the trial, and Padulla had died sometime previous thereto.

Norris was a T. V. actor. The deed from defendant to Norris was returned by the Title Company to the same address as that used by Padulla. Norris testified he was acquainted with Padulla; that he saw the property first in the summer of 1954 responsive to a newspaper ad; that he later talked to Padulla about it; that Padulla said he had seen the property and liked it; that he was not sure if this talk was before or after he (Norris) purchased the property; that he (Norris) after purchasing the property had Padulla assist him in selling the property and paid Padulla for such selling; that a piece 100 x 200 feet was sold by Norris to a third party; that the title company was never authorized to send the deed from defendant to Norris to the Padulla address; that Norris had never lived at that address; and that the only reason he could think of for their use of such mailing address was "They claimed he said he was my leg man." The testimony of Norris was as a witness for plaintiff. There was no claim of surprise and no offer to refute any part of it. It stands uncontradicted.

[3] In order for plaintiff to recover he must prove that he produced a buyer, ready, able and willing to buy the realty involved; that he was the procuring cause of the sale and not just one link in a chain of causes. It is not enough that he impart information that tends to arouse interest.

Nelson v. Mayer, 122 Cal.App.2d 438, 445 (5) (6), 265 P.2d 52.

[4] Plaintiff's evidence produces no more than a weak suspicion that there might have been some collusive dealings between Padulla and Norris. Actually, the most reasonable solution is that Padulla, not sufficiently interested himself to buy the property, upon Norris' inquiry gave Norris encouragement and advice just as Norris testified. However that may be, plaintiff's evidence falls far short of any proof of collusion between Padulla and this defendant, and the trial court's judgment of nonsuit was in order.

The judgment is affirmed.

MUSSELL, Acting P. J., concurs.

167 Cal.App.2d 115

Oregon SMITH, Plaintiff and Appellant,

v.

Jerene Appleby HARNISH et al., Defendants and Appellants.

Civ. 5916.

District Court of Appeal, Fourth District, California.

Jan. 13, 1959.

Rehearing Denied Feb. 13, 1959.

Hearing Denied March 11, 1959.

Libel action. The Superior Court, San Bernardino County, Jesse W. Curtis, Jr., J., sustained defendants' demurrer to the complaint without leave to amend and entered a judgment of dismissal and plaintiff appealed. The District Court of Appeal, Shepard, J., held that newspaper article published by defendants, stating that the District Court of Appeal upheld a lower court's judgment of nonsuit in a slander suit defendants' newspaper brought against plaintiff, and that newspaper appealed in the belief that if decision extending legislative privilege to city councilmen were allowed to stand, "the public would have no protection against malicious statements made by unscrupulous members of any minor legislative body", and a second article discussing the question of whether a member of a minor legislative body such as a city council, has the right to say "anything he wishes about anybody in an official proceeding, without regard to the laws of slander" were not libelous, since the language of the first article clearly applied to an indeterminate group of fictitious persons who might at some unstated future time "unscrupulously" defame other persons in a legislative proceeding, and the second article was merely a presentation of a point of view upon an issue that had become one of public interest.

Judgment affirmed.

Libel and Slander ⇐21

Newspaper article published by defendants, stating that the District Court of Appeal upheld a lower court's judgment of nonsuit in a slander suit defendants' newspaper brought against plaintiff, and that newspaper appealed in the belief that if decision extending legislative privilege to city councilmen were allowed to stand, "the public would have no protection against malicious statements made by unscrupulous members of any minor legislative body", and a second article discussing the question of whether a member of a minor legislative body, such as a city council, has the right to say "anything he wishes about anybody in an official proceeding, without regard to the laws of slander" were not libelous, since the language of the first article clearly applied to an indeterminate group of fictitious persons who might at some unstated future time "unscrupulously" defame other persons in a legislative proceeding, and the second article was merely a presentation of a point of view upon an issue that had become one of public interest.

Jack B. Tenney, Los Angeles, for plaintiff.

Wilson & Wilson, San Bernardino, for defendants.

SHEPARD, Justice.

This is an action for libel. Plaintiff alleges that defendants falsely and maliciously published of and concerning plaintiff two newspaper articles for the purpose of exposing him to hatred, contempt and ridicule. The trial court sustained defendants' demurrer to the complaint without leave to amend and entered a judgment of dismissal. Plaintiff appeals.

The first article, insofar as is necessary to understand what is claimed by the plaintiff to be libelous, reads as follows:

"District Court Upholds

"Slander Suit Judgment.

"Ontario—The District Court of Appeal has upheld a lower court's judgment in The Daily Report's slander suit against Oregon Smith * *.

"The suit grew out of remarks made by Smith in 1953, then an Ontario councilman, that The Daily Report was 'following a Communist Party line.'

"When the action came to the Superior Court on March 7, 1955, Smith's attorney * * * argued that 'the defamatory remarks * * * were made at a legislative proceeding and were therefore fully privileged.'

"Judge Raymond Thompson * * * concurred * * * and brought a judgment for nonsuit. This was the ruling which has been upheld by the District Court of Appeal. * * *

"The Daily Report had appealed in the belief that, if the decision were allowed to stand, 'the public would have no protection against malicious statements made by unscrupulous members of any minor legislative body.'"

The second article, insofar as is necessary to understand what is claimed to be libelous, reads as follows:

"Unbridled License

"Does a member of a minor legislative body, such as a city council, have the right to say anything he wishes about anybody in an official proceeding, without regard to the laws of slander?

"He does indeed!

"The question was one which The Daily Report pursued through the courts of the State of California. The answer was the same from the Superior Court, the District Court of Appeal, the Supreme Court: A councilman is a 'legislator' under the law and as such has complete privilege to make any defamatory remarks.

* * * * * *

"The newspaper sued. Smith pleaded immunity. He said he was a 'legislator' * * * The newspaper appealed the decision. It did so in the belief that a member of a minor legislative body, elected by the people and drawing public funds, should not have a privilege which the people do not have.

"Smith's silly statement that The Daily Report was a Communist Party line newspaper was never an issue with the courts. It was conceded to be defamatory—even by the defense!

"In pleading for dismissal Jack Tenney, Smith's attorney, said that the 'complaint as it now appears on the face thereof does not state a cause of action; it shows that the defamatory remarks made by the defendant were made at a legislative proceeding * * *.'

"Tenney's characterizing the remarks as 'defamatory' is in the court record."

It appears from the complaint, and an amendment thereto, that for a number of years "The Daily Report" has been sharply critical of plaintiff, using at times somewhat vitriolic terminology. These matters are set up in the complaint for the apparent purpose of showing malice in fact

by defendants toward plaintiff, and it is apparent that some of them might possibly have been the subject of actions for libel had plaintiff chosen to proceed thereon.

However, in the particular articles alleged in the case here at bar the trial court on demurrer concluded that the alleged defamatory language of the first publication was such that even by innuendo it could not be made to apply to plaintiff; that it clearly applied to an indeterminate group of fictitious persons who might at some unstated future time "unscrupulously" defame other persons in a legislative proceeding.

With this decision we are in agreement, and we believe the case cited by the trial court sufficiently covers the point. Appellant has cited a large number of other cases which he believes indicate a different conclusion. We have been at pains to read all of them and while there is some language which, taken out of context, might give some comfort to plaintiff's position, it is our view that each case when read as a whole is clearly distinguishable from the case at bar.

> "An accusation such as that complained of cannot have the quality of a libel unless there be a certainty as to the individuals accused. There is nothing in the published article that makes a personal application to the plaintiff. He cannot by use of the colloquium make the language which is applicable to so large a group of persons be made specifically to refer to him." (Noral v. Hearst Publications, Inc., 40 Cal.App.2d 348, 350(1), 104 P.2d 860, 862.)

> "The office of an innuendo is to declare what the words meant to those to whom they were published. When the words themselves, under any circumstances, would convey to those who read or hear them a meaning within the statutory definitions, there is no occasion for the pleading of an innuendo. Conversely, if the words under no circumstances could convey a defamatory meaning, then no innuendo can make them defamatory." (Washer v. Bank of America, 21 Cal.2d 822, 828(1), 136 P.2d 297, 301, 155 A.L.R. 1338.)

The trial court likewise held that the article upon which the second count is based is clearly a presentation of a point of view upon an issue that had become one of some public interest; that the particular portions complained of are merely arguments and would be recognized by anyone as such; that under the circumstances here presented they are not such as would sustain a cause of action for libel. With this view we likewise agree.

> "In determining whether or not it is libelous, the article must be read as a whole in order to understand its import and the effects which it was calculated to have upon the minds of those who read it." (Howard v. Southern Cal. etc. Newspapers, 95 Cal.App.2d 580, 584 (2), 213 P.2d 399, 402.

The defense of legislative privilege essentially says: conceding our statement to be defamatory, still we cannot be held liable because we are protected by the cloak of absolute privilege under Civil Code section 47, paragraph 2. In speaking of the defense of privilege, the Supreme Court said: "This defense is essentially one of confession and avoidance * * *." (Stevens v. Snow, 191 Cal. 58, 64(4), 214 P. 968, 970.)

We agree with plaintiff that it would have been error in this case to refuse to permit plaintiff to amend if the basis of the ruling were on the special demurrer. (Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104(9), 114 P.2d 1.) However, plaintiff has nowhere suggested a desire or possibility of amendment except in respect to special damages and such an amendment would not affect the matters we have discussed.

The judgment of dismissal is affirmed.

MUSSELL, Acting P. J., concurs.

167 Cal.App.2d 58

Helen C. MILLS, Plaintiff and Appellant,

v.

George J. RUPPERT, Jr., Barbara A. Ruppert, Raymond Berney (sued herein as Raymond Burney) and Hazel Berney (sued herein as Hazel Burney), Defendants and Respondents.

Civ. 9485.

District Court of Appeal, Third District, California.

Jan. 9, 1959.

Action by tenant against landlords for breach of covenant to repair. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment awarding plaintiff $312.32 for repair of exterior walls and $500 for decrease in rental value for two months, but denied any further damages. Plaintiff appealed. The District Court of Appeal, Schottky, J., held that where motel lease required tenant to keep and maintain premises, except exterior walls and roof, which landlords agreed to repair, and provided that tenant would hold landlords harmless for any damage or injury to any person, or to goods, wares and merchandise of any person, arising from use of premises by tenant or failure of tenant to keep the premises in good repair, landlords were liable for interior wall damage caused by disrepair to exterior wall.

Judgment affirmed as modified and cause remanded with directions.

1. Landlord and Tenant ⇐152(7)

Where motel lease required tenant to keep and maintain premises, except exterior walls and roof, which landlords agreed to repair, and provided that tenant would hold landlords exempt and harmless for any damage or injury to any person, or to goods, wares and merchandise of any person, arising from use of premises by tenant or failure of tenant to keep the premises in good repair, landlords were liable to tenants for interior wall damage caused by disrepair to exterior wall.

2. Landlord and Tenant ⇐166(6)

Where motel lease required tenant to keep and maintain premises, except external walls and roof, which landlords agreed to repair, and provided that tenant waived all claims against lessors for damage to goods, wares, and merchandise from any cause arising at any time, and landlords attempted to repair wall each time they were notified of leaks, and the conditions under which rugs would be deemed a part of the realty under the lease had never become applicable, lessors were not liable for damage to floor covering which had been subjected to water which leaked through the wall.

3. Landlord and Tenant ⇐166(6)

A lease is a matter of private contract between the landlord and the tenant with which the general public is not concerned, and if the parties see fit to contract that the landlords shall not be liable for damages to tenant's property resulting from his negligence or the negligence of his employees, the law permits him to do so and the courts must give effect to and enforce such contracts.

4. Landlord and Tenant ⇐154(3)

In motel tenant's action against landlords for damages for alleged breach of express covenant to keep in repair the exterior walls and roofs, evidence supported finding that tenant suffered loss of only $500 in rentals and not a loss of $1,140 as claimed by tenant.

5. Landlord and Tenant ⇐154(3)

In motel tenant's action against landlords for damages for alleged breach of express covenant to keep in repair the exterior walls and roofs, evidence warranted finding that tenant suffered no damages for injury to the leasehold.

Kasch & Cook, Ukiah, for appellant.

Albert L. Wagner, E. R. Vaughn, Sacramento, for respondents Ruppert.

John E. Nelson, Ukiah, for respondents Burney.

SCHOTTKY, Justice.

Helen C. Mills, lessee, commenced an action against the above-named defendants, lessors, to recover damages for defendants' alleged breach of an express covenant to keep in repair the exterior walls and roofs of the motel building. The complaint alleged that as a result of defendants' breach rain penetrated the walls causing damage consisting of: (a) the expense of making the necessary repairs to the exterior walls ($312.32) and the interior of same ($243.80); (b) damage to wall to wall carpeting and pads from the said water due to the respondents' failure to make repairs; (c) damages due to diminution of reasonable rental value of the premises from the execution of the lease up to the time the repairs were made at $500.00 per month, and thereafter to date of trial; (d) damages to appellant's leasehold interest. The total amount of damages prayed for was $35,000.

The case was tried by the court sitting without a jury. The court awarded plaintiff the sum of $312.32 for repair of the exterior walls and $500.00 for decrease in the rental value for the months of December, 1955, and January, 1956, but denied any further damages. Plaintiff has appealed from said judgment.

The record shows that on July 21, 1954, Helen C. Mills entered into a written lease with Raymond Berney, Hazel Berney, George J. Ruppert, Jr. and Barbara A. Ruppert for the lease of a building known as the City Center Motel in Ukiah, California. The lease was for a term of 10 years at a total rental of $120,000 or $1,000 a month. The lease provided that "Lessee shall, at her sole cost, keep and maintain said premises and appurtenances and every part thereof (excepting exterior walls and roofs which Lessor agrees to repair), including glazing, sidewalks adjacent to said premises and the interior of the premises, in good and sanitary order, condition and repair, * * *." The lease also provided: "7. Lessee, as a material part of the consideration to be rendered to Lessor, hereby waives all claims against Lessor for damages to goods, wares and merchandise, in, upon or about said premises and for injuries to persons in or about said premises, from any cause arising at any time, and Lessee will hold Lessor exempt and harmless from any damage or injury to any person, or to the goods, wares and merchandise of any person, arising from the use of the premises by Lessee, or from the failure of Lessee to keep the premises in good condition and repair, as herein provided."

During the winter of 1954–55, the south wall of the building developed leaks. The lessors notified the contractor and he attempted to repair the wall. However, the attempt was unsuccessful. In June, 1955, Mrs. Mills notified the lessors that the wall had not been waterproofed, and the contractor applied a sealing liquid to it. In November, 1955, the wall leaked again, and again Mrs. Mills notified the lessors. She asked that the wall be repaired in a satisfactory way. Mr. Berney came to the premises with the contractor to inspect the wall, and the lessors agreed to repair it. On December 10, 1955, the contractor arrived to do the work. He obtained the keys to the rooms without Mrs. Mills' knowledge. When she discovered this, she ran up to him and an argument ensued. There is a conflict in the evidence as to whether or not the contractor struck her. In any event, Mrs. Mills ordered him off of the premises. The following Monday Mrs. Mills arranged to have the wall repaired by another person, but due to the torrential rain of the winter, the work was not completed until the end of January. During this period of heavy rainfall, the water came through the wall damaging floor coverings and staining the interior walls of certain rooms. This water damage made certain rooms too damp to rent for a period.

[1] Appellant Helen C. Mills first contends that the trial court erred in not allowing her $243.80 for repairing the interior of the wall. The only question is whether or not the provision in the lease that the lessee should keep and maintain

at her sole expense the premises (excepting exterior walls and roof) prevents her from recovering for the damage to the interior walls caused by the disrepair to the exterior wall. No parol evidence as to the meaning of this phrase was introduced so the interpretation becomes a question of law. We believe this provision should be construed to mean that if damage was caused as a result of something occurring in the interior of the building, Mrs. Mills would suffer the loss; but if the damage was the result of a failure to keep the exterior wall in repair, the loss would fall on the lessors. We are fortified in this belief by the fact that the provision waiving all claims for damage to goods, wares and merchandise from any cause arising at any time specifically exempts damage to certain items. We believe a proper construction would be that by limiting the amount of damage in certain particulars, impliedly, the parties meant that in other particulars there would be no limitation. If so, the lessors would be liable for damages to the interior walls caused by failure to repair the exterior wall. The court found that the amount of damage to the interior walls was $243.80. We believe that appellant should have been awarded this amount.

[2, 3] Appellant also contends that she should have been permitted to recover $883.65 which was the cost of cleaning and replacing floor coverings which had been damaged by water and dampness. The trial court denied recovery because of the clause which provided that the lessee waived all claims against the lessors for damage to goods, wares and merchandise. Such clauses have been held to be valid (Inglis v. Garland, 19 Cal.App.2d Supp. 767, 773, 64 P.2d 501; Werner v. Knoll, 89 Cal.App.2d 474, 475, 201 P.2d 45) except where the lessor has been guilty of what the courts call willful or active negligence. Butt v. Bertola, 110 Cal.App.2d 128, 242 P.2d 32; Barkett v. Brucato, 122 Cal.App. 2d 264, 264 P.2d 978. As stated in Inglis v. Garland, supra, 19 Cal.App.2d Supp. at page 773, 64 P.2d at page 504: "We think it is the law that 'A lease is a matter of private contract between the lessor and the lessee with which the general public is not concerned. And if the parties see fit to contract that the lessor shall not be liable for damages resulting from his negligence or the negligence of his employees, the law permits them to do so; and the courts must give effect to and enforce such contracts.' * * *" And as stated by this court in Werner v. Knoll, supra, 89 Cal.App.2d at page 475, 201 P.2d at page 46: "Clearly said section 1668 does not declare unlawful all contracts, the object of which is to exempt individuals from the consequence of their own acts, but only those contracts which would exempt one from the consequences of his own fraud, willful injury or violation of law whether willful or negligent. It is noteworthy that the only use of the word negligent in said section is in a restrictive sense and only in connection with violations of law. Therefore it necessarily follows, that by the obvious omission from the provisions of said section 1668 of the Civil Code, contracts seeking to relieve individuals from the results of their own negligence are not invalid as against the policy of the law as therein provided, and hence are neither contrary to public policy nor expressed provision of the law as set forth in said section 1667."

The court made a finding that the negligence of the lessors was passive negligence. This finding is supported since each time the lessors were notified of the leaks they made an attempt to repair the wall. Appellant also contends that the rugs were not goods, wares and merchandise, and, secondly, the act of the lessors was not negligence but a breach of the covenant to repair. The lease provided that the lessee shall pay the purchase price and cost of installation of all rugs installed upon said premises and in the event the lessee abandoned the premises, or the lease was terminated because of a breach, the rugs should be deemed a part of the realty. For the purpose of this action, the rugs were not a part of the realty. It was only under

certain conditions that they would become so, and the conditions never became applicable. Under such circumstances, the waiver provision should be held to be applicable and the lessors not liable for damage to the floor coverings. There is no reason why, in a case such as this, a party can not contract against liability for breach of covenant. As stated in 6 Corbin on Contracts, page 870: "* * * a landlord may contract so as to be bound to pay for repairs and yet exempt himself from liability for consequential injuries caused by his failure to perform his contractual duty."

[4] Appellant contends further that the court erred in allowing only $500 for loss of rentals. Appellant submitted figures that indicated that she lost $1140 in rentals from the period of November 25th to January 30th. These figures were based on regular rental fees and on apparently normal occupancy. There was testimony that a large part of the occupants were commercial travelers who received commercial rates and whose occupancy was usually during the week and not on weekends. There was considerable testimony as to the loss of occupancy, and the records kept by appellant, and other evidence, were before the court. It is clear that conflicting inferences can be drawn from the evidence, and the court was not bound to accept appellant's conclusion that she lost $1140 in rentals. We believe that the following statement in the memorandum opinion of the trial court is supported by the record: "[T]he Court thinks that from what the records disclose the rental value of said premises was decreased at most $250.00 a month, and then only for the two months of December, 1955, and January, 1956. The Court, therefore, thinks that she has been damaged to the extent of $500.00 in this respect, and is entitled to judgment for that sum."

[5] Appellant's final contention is that she should have been allowed damages for injury to the leasehold. However, the evidence upon this issue is conflicting, and we believe that the record fully supports the conclusion of the trial court as stated in its memorandum opinion as follows:

> "The last claim of plaintiff is that she suffered $25,000.00 damages by reason of these leaky walls as a direct and proximate cause thereof, in and that the plaintiff's interest in the property as her leasehold and good will was worth $25,000.00 before the damage and was worth nothing after the damage. With this contention the Court is unimpressed. When Mrs. Mills took over this motel it was a newly constructed edifice. It was, and still is, a very attractive place; it was and is excellently situated, almost in the heart of the City of Ukiah. Mrs. Mills is undoubtedly an excellent business manager and motel operator. (The day she signed this lease must have been one of her off days.) Situated as this motel is on the main street of the City of Ukiah, to-wit, State Street, with Highway 101, the Redwood Highway, joining it on each end of the City, with a tremendous amount of traffic going through this area at all times; and under the situations above expressed the operation of the motel had to be a success, and it was a success from the very beginning, and has always been, and it still is. The record, particularly the records which she has presented here, clearly show this. The only damage the Court can see that she has sustained in this regard is the slight damage she sustained for the two months hereinabove mentioned and for which she has been given credit."

The judgment appealed from is modified and the cause is remanded to the trial court with directions to add to the judgment against respondents the sum of $243.80 for repairs to the inside of the exterior wall, making the total amount of the judgment the sum of $1056.12; and as so modified, the judgment is affirmed. The parties to bear their own costs on appeal.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

166 Cal.App.2d 743

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Sylvester HINTON, Jr., Robert Lee Jackson and Robert Reginald Cozine, Defendants.

Robert Lee Jackson and Robert Reginald Cozine, Appellants.

Cr. 6346.

District Court of Appeal, Second District, Division 1, California.

Jan. 5, 1959.

Prosecution resulting in convictions of violation of Section 288a of the Penal Code, rape and kidnapping by the Superior Court of Los Angeles County, Edwin L. Jefferson, J., and defendants appealed from judgments of conviction, orders denying motions for new trial and applications for probation and from orders directing confinement in the state prison. The District Court of Appeal, Fourt, J., held that evidence sustained convictions and that the defendants' confessions, which they subsequently claimed were obtained under duress, were properly admitted as voluntary in nature.

Affirmed.

1. Criminal Law ⇐1153(6)

Where there is conflict of evidence as to whether confessions have been freely and voluntarily made, determination of the question rests in the sound discretion of trial court and if determination is supported by substantial evidence his finding is binding upon reviewing court.

2. Criminal Law ⇐531(3)

In prosecutions resulting in convictions for violation of Section 288a of the Penal Code, kidnapping and rape, there was substantial evidence to support finding of trial judge that defendants' confessions, which they contended were made under duress, were freely and voluntarily given. West's Ann.Pen.Code, §§ 207, 261, subd. 4, 288a.

3. Kidnapping ⇐5
Rape ⇐51(1)
Sodomy ⇐6

Evidence sustained convictions of violations of Section 288a of the Penal Code, rape and kidnapping. West's Ann.Pen. Code, §§ 207, 261, subd. 4, 288a.

4. Criminal Law ⇐1160

Rule, that before verdict of jury which has been approved by trial court can be set aside on ground of insufficiency of evidence it must clearly appear that upon no hypothesis is there sufficient substantial evidence to support conclusion in the court below, is applicable to crime of kidnapping as well as to other crimes. West's Ann. Pen.Code, § 207.

5. Rape ⇐14

Consent to intercourse induced by fear is no consent at all and when a woman reasonably determines that she cannot resist without peril to her life or safety, no further resistance is demanded by the law and the necessity of resistance is to be measured by all of the circumstances of the case. West's Ann.Pen.Code, § 261, subd. 4.

6. Criminal Law ⇐935(1)

Motions for a new trial on ground that verdict was contrary to the evidence was addressed to the sound discretion of the trial court. West's Ann.Pen.Code, § 1181, subds. 6, 7.

7. Criminal Law ⇐935(1)

In prosecutions resulting in convictions of violations of Section 288a of the Penal Code, rape and kidnapping, record did not disclose any abuse of discretion by trial court in denying motions for new trial on ground that verdict was contrary to the evidence. West's Ann.Pen.Code, § 1181, subds. 6, 7.

8. Criminal Law ⇐1023(12)

No appeal lies from order denying application for probation.

9. Criminal Law ⇐982.3(3)

In prosecutions resulting in convictions of violation of Section 288a of the Penal

Code, rape and kidnapping, trial court's determination to deny probation to defendants constituted proper exercise of discretion. West's Ann.Pen.Code, §§ 207, 261, subd. 4, 288a.

Lloyd C. Griffith, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal by Robert Lee Jackson from an order denying a motion for a new trial, from an order denying his application for probation, from an order that he be confined in the state prison and from a judgment finding him guilty of kidnapping, rape and a violation of section 288a, Penal Code. It is also an appeal by Robert Reginald Cozine upon the same grounds and from the same charges.

In an information filed in Los Angeles county each of the above named defendants was charged with seven counts of crime. The first count charged that the defendants stole and took one Louise Van Eyk and carried her from one part of Los Angeles county to another part of the same county, in violation of section 207, Penal Code (kidnapping). The second, fourth and sixth counts charged each defendant, among other things, with a violation of section 261, subd. 4, Penal Code (rape), in that each of said defendants had an act of sexual intercourse with Louise Van Eyk without her consent and against her will. The third, fifth and seventh counts alleged, among other things, that the defendants respectively participated in the act of copulating their sexual organ with the mouth of Louise Van Eyk in violation of section 288a, Penal Code.

Each defendant entered a plea of not guilty to each charge. Hinton later withdrew his plea of not guilty to the first count and entered a plea of guilty thereto. Appellants and their attorney waived a jury trial. In effect, each defendant was found guilty of each count with which he was charged.

A résumé of the facts is as follows: At about 2:00 o'clock a. m., December 1, 1957, Louise Van Eyk was walking to her home on 17th Street in Los Angeles with a friend and neighbor, Patricia Marconi. When the two women were about half a block south of 12th Avenue an automobile driven by Hinton pulled into a driveway directly in front of them, thereby blocking the sidewalk. Two colored men, Jackson and Cozine, started to get out of the automobile. Mrs. Van Eyk and Mrs. Marconi started to cross the street, rather than to wait for the car to back out of the driveway.

When Mrs. Van Eyk was about one-half way across the street one of the men lunged at her. She screamed and started to run, however one of the men grabbed her and pulled her into the waiting car. Mrs. Van Eyk was white, married, twenty-two years old, of small stature, weighing about 95 pounds, and less than five feet in height. Each of the defendants was approximately six feet in height. During the struggle at this point, Mrs. Van Eyk lost one of her shoes. She bit a finger of one man. Mrs. Marconi was able to escape and did so. As she ran she looked back and saw the men dragging Mrs. Van Eyk into the car.

After Mrs. Van Eyk was in the car she continued to scream. She was hit several times and told to "shut up." One of her feet had not been pulled completely into the car and was lodged in the door when it was closed. The continued slamming of the door on her foot caused her to scream as they travelled along in the automobile. Hinton was driving the car and Jackson was riding in the front seat. Mrs. Van Eyk was on the floor in the front of the car and Cozine was in the back seat. One of the men shouted, "Shut that bitch up," following which she was struck on the face. Cozine kept saying, "I want to shoot her," "Shoot the bitch," "I am going to shoot her, I will kill her if she doesn't shut up." The other men told him to "Put the gun away. She is being—she is

quiet now, she is being good." After a considerable drive the car was parked and she was told to get out and keep her eyes down, which she did. She was taken to a wire mesh fence about six and one-half to seven feet high and was directed to climb it. Upon reaching the top of the fence one of the men lifted her off and placed her on the ground. She was again told to keep her eyes down and to make no sound, and was threatened with death if she made any noise. One of the men was in front and two were behind her as they walked along to a door of a building. She was ordered into the building.

When inside of the building one of the men started to pull off her coat; another of the men said, "No, she is going to do a strip. Leave the coat on. She will take it off herself."

The only persons in the house with Mrs. Van Eyk were the three defendants. A phonograph was started and she was directed to take her clothes off and she did so. She was then in the center of a room. She was told to dance, to shake and move her body, and to get down on the floor and lift up her legs.

The acts which thereafter were committed upon Mrs. Van Eyk by each of the defendants and the acts which she was compelled to perform are so lascivious, depraved and vicious as to be almost indescribable. No useful purpose could possibly be served by setting forth herein the revolting details of what took place, other than to say that the evidence amply and sufficiently sustains each charge against each defendant.

Other acts of violence also occurred which are not necessary to relate herein. Quite some time later Hinton re-entered the room and Mrs. Van Eyk tried to explain that she was tired and wanted to go home, was worried and was in pain, and said she was "just begging for them to take me home." Hinton replied that, "the others have had it twice and I haven't." Whereupon he compelled her to commit a lecherous act and then had sexual intercourse with her.

Hinton ordered her to dress. She was taken out an exit other than the gate she had climbed to get into the house. As they left, Jackson was in front of her and Hinton was behind her. Jackson went into the street to see whether it was clear to take her out. She was then taken to a car and told by Jackson to get on the floor. Hinton drove the car. During the ride Jackson forced her to commit another lustful act with him. The car was stopped and Jackson asked Hinton, according to Mrs. Van Eyk's testimony, if he wanted to have me again before they threw me out." Hinton said, "No."

Jackson got out of the car and ordered her to get out and to walk in front of him with her eyes down. He then ordered her to run. She ran down the street and around a corner where she was found by two friends who were among those searching for her. It was then about 5:30 o'clock a. m. and the friends took her home.

While in police custody Jackson freely and voluntarily stated that he had been with Hinton and Cozine on the morning of December 1st, and that they had forced a girl into the car Hinton was driving; that she was taken to 4230 South Main Street, forced to undress and dance, that he had two acts of intercourse with her, and that he had committed other acts with her which constituted one of the crimes herein charged.

Cozine, while in police custody freely and voluntarily stated that while driving on the morning of December 1st, with Hinton and Jackson, Hinton driving, they had seen the two girls walking; that Hinton pulled the car into a driveway; that the girls were hailed; that he and Jackson got out and approached the two girls; that he did not grab the girl he approached, but that Jackson forced the other girl into the car against her will; that the car was driven to Cozine's house and that he, Hinton and Jackson had had intercourse with her.

Jackson and Cozine each asserted that the statements made by them to the police were not freely and voluntarily made; that the officers referred to them as "niggers" and they were put in fear and signed the statements only because of such fear.

It is also apparently the contention of the appellants that Mrs. Van Eyk had an opportunity to escape and did not take advantage of such opportunity, and that she could have made outcries (apparently louder than the evidence shows she did make), and that therefore this court should reverse the judgment.

[1, 2] Considering the matter of the confessions: In each instance in this case, the admission of a confession was preceded by a pre-showing of its free and voluntary character. The appellants made their showing at the time to the trial court claiming that there was force, fear or duress in securing their statements, and the judge evidently did not believe either of them. "* * * Where there is a conflict of evidence as to whether confessions had been freely and voluntarily made the determination of the question rests in the sound discretion of the trial judge, and if it is supported by substantial evidence his finding is binding upon a reviewing court. People v. Dolan, 38 Cal.App.2d 96, 98, 100 P.2d 791. The ruling of the trial court will not be disturbed on appeal unless there has been an abuse of discretion." People v. Cucco, 85 Cal.App.2d 448, 452, 193 P.2d 86, 88.

[3] The evidence is amply sufficient to establish the convictions for each offense charged.

In People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, it was said:

> "* * * The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt * * * before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' * * *"

[4] The rule is applicable to kidnapping, as well as to other crimes. People v. Hight, 94 Cal.App.2d 100, 105, 210 P.2d 270.

The evidence as to the kidnappings heretofore set forth demonstrates without question that it sufficiently supports the convictions, and was sufficiently corroborated. Mrs. Marconi, who witnessed the abduction, told of being with Mrs. Van Eyk and as to how she was forcibly put into the car and transported. Officer Triggs further corroborated the story by testifying to the finding of one of Mrs. Van Eyk's shoes which was lost in the struggle, and further the signed statements of the appellants corroborated the story.

As to the rape charges, the defendants were charged with violation of subdivision 4 of section 261 of the Penal Code, which reads as follows:

> "* * * an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:
>
> * * * * * *
>
> "4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, * * *."

[5] Consent induced by fear is no consent at all. When a woman reasonably determines that she cannot resist without peril to her life or safety, no further resistance is demanded by the law. People v. Harris, 108 Cal.App.2d 84, 89, 238 P.2d 158. The necessity of resistance is to be measured by all of the circumstances of the case,

including the relative strength and ability of the persons, the uselessness of resistance and the degree of force manifested. People v. Burnette, 39 Cal.App.2d 215, 102 P.2d 799; People v. Cassandras, 83 Cal.App.2d 272, 278, 188 P.2d 546.

Mrs. Van Eyk testified, "I was praying that I would live and that is all I was thinking about is that I could live through it, and I was doing everything I could to survive," and the record would seem to bear her out. As said in People v. Harris, supra, 108 Cal.App.2d at page 89, 238 P.2d at page 161, "Her yielding to a superior force rather than suffer the possible consequences was more discreet than to cry up to the stars and be left in the gutter unconscious, if not dead."

[6, 7] Next considering the motions for a new trial: The only grounds urged for a new trial are that the verdict is contrary to the evidence within the meaning of subsections 6 and 7 of section 1181, Penal Code. The matter was addressed to the sound discretion of the trial court. We have found no abuse of that discretion. People v. Shaheen, 120 Cal.App.2d 629, 640, 261 P.2d 752.

[8, 9] No appeal lies from the order denying appellants' application for probation and the trial court's determination to deny probation constituted a proper exercise of discretion. See, People v. Jackson, 89 Cal.App.2d 181, 182, 200 P.2d 204; People v. Walters, 148 Cal.App.2d 426, 427, 306 P.2d 606; People v. Jennings, 129 Cal.App.2d 120, 123, 276 P.2d 124. Indeed, from a reading of the record it is almost inconceivable that a defendant, under the circumstances related in this case, could secure probation. The defendants engaged in a course of conduct which demonstrated beyond question that they are vicious, depraved and corrupt beyond expression. In the writer's opinion the appellants are extremely fortunate to go to the state prison on concurrent terms; there are many places in the world today where the disposition would be very much less favorable to them.

The appellants' counsel in this matter has been of no assistance to this court; in fact he has made our work more arduous than it would have been had no brief been filed. He failed to make even a semblance of compliance with Rule 13 of the Rules on Appeal for the Supreme Court and District Courts of Appeal. He plainly violated both the spirit and the letter of the rules.

The attempted appeals from the orders denying the applications for probation, and the attempted appeals from the orders directing that the defendants be confined in the state prison are, and each is, dismissed.

The appealable judgments and orders denying motions for a new trial are, and each of them is, affirmed.

WHITE, P. J., and LILLIE, J., concur.

167 Cal.App.2d 14

Ralph HUTTON, Plaintiff, Respondent and Cross-Appellant,

v.

Albert PAGNI, Individually and doing business under the name and style of Capital Sheet Metal Works, a sole proprietorship, and Leland Borland (sued herein as Lee Borlin), Defendants, Appellants and Cross-Respondents.

Civ. 9378.

District Court of Appeal, Third District, California.

Jan. 8, 1959.

Hearing Denied March 4, 1959.

Action for injuries sustained by a welder against defendant whom he was assisting in aligning punching dies on a press owned by the defendant's employer. From an order of the Superior Court, Sacramento County, Gordon A. Fleury, J., granting the plaintiff's motion for a new trial after a verdict for defendant and from a judg-

ment entered upon the verdict, the defendants appeal and the plaintiff cross-appeals. The District Court of Appeal, Van Dyke, P. J., held that the evidence would authorize a verdict that the defendant was guilty of negligence proximately causing the plaintiff's injury and hence the trial court properly granted the plaintiff's motion for new trial. The court further held that since the order granting a new trial must be affirmed such affirmance automatically vacated the judgment from which the plaintiff had appealed requiring a dismissal thereof.

Order granting new trial affirmed.

Cross-appeal by plaintiff dismissed.

1. Appeal and Error ⇐979(2)
New Trial ⇐71

A trial court in considering a motion for new trial is not bound by the rule of conflicting evidence and when the motion is granted for insufficiency of evidence it is only in rare cases showing an abuse of discretion that an appellate court will interfere.

2. Negligence ⇐134(4, 11)
New Trial ⇐68

In action for injuries sustained by plaintiff while assisting defendant in aligning punching dies on a press owned by the defendant's employer, evidence would support a verdict that the defendant was negligent in adjusting the dies and that such negligence proximately caused the plaintiff's injuries, and hence the trial court properly granted the plaintiff's motion for a new trial.

3. Negligence ⇐121(3)

In action for injuries sustained by plaintiff, a welder employed by another against defendant whom he was assisting in aligning punching dies on a press owned by the defendant's employer, where jury could find that accident was of the kind which ordinarily does not occur in the absence of someone's negligence and that it was caused by an instrumentality in the defendant's control and not due to any involuntary contribution by the plaintiff, the doctrine of "res ipsa loquitur" applied.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

4. Appeal and Error ⇐1067

In an action for injuries where the doctrine of res ipsa loquitur was applicable, the fact that no instruction on res ipsa loquitur was requested by the plaintiff or given by the trial court was immaterial where there was no reason why the jury might not have drawn inference of negligence without a specific instruction authorizing them to do so.

5. Negligence ⇐121(2)

The doctrine of "res ipsa loquitur" concerns the type of circumstantial evidence upon which a plaintiff may rely to discharge his burden of proving a defendant's negligence.

6. Appeal and Error ⇐790(3)

Where the affirmance of an order granting a new trial to the plaintiff automatically vacated the judgment from which the plaintiff appealed, the appeal from that judgment was dismissed.

Perkins & Carr, Desmond & Miller, Sacramento, for plaintiff-respondent-appellant.

Desmond, McLaughlin & Russell, Sacramento, for defendants-appellants-respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order of the trial court granting plaintiff's motion for a new trial after a defense verdict. There is also presented a cross-appeal taken by plaintiff from the judgment entered upon the defense verdict.

[1] The stated ground upon which the new trial was granted was insufficiency of the evidence to support the verdict of the jury. As stated in Re Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692, 696:

"'* * * The rules of law applicable to an appeal from such an order are well settled. A trial court in considering a motion for new trial is not bound by the rule of conflicting evidence. [Citing cases.] When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. [Citing cases.] It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party.' Hames v. Rust, 14 Cal.2d 119, 123–124, 92 P.2d 1010, 1012."

Respondent, Ralph Hutton, suffered a loss of vision in his left eye as the result of an accident when a fragment of metal penetrated his eye while he was assisting appellant Borland in aligning punching dies on a 100-ton hydraulic press owned by Borland's employer, Pagni. Borland, at the time, was in charge of the punching operations and of the press and was acting in the scope of his employment by Pagni. Hutton was a welder employed by Fontaine & Bean, a sheet metal firm in Sacramento. Although an experienced welder, he had never operated a hydraulic punch or brake press and had had no experience in setting or aligning punching dies in such presses. Hutton's employers fabricated and supplied sinks made of 14-gauge stainless steel. To shear, to brake and to punch the holes in the steel sheets they sent the sheets to Pagni who had a press that would do that work. Hutton was sent to Pagni to transport 12 or 14 sheets of steel to Pagni's works, there to be sheared, braked and punched. Although he had no specific instructions to assist in the work, he also had no orders not to do so. When he arrived at the Pagni plant with the sheets he found that by assisting in the work to be done he would be able to return to his employers with sufficient sheets that had been sheared, braked and punched to enable him to continue his work of completing sinks which were needed by his employer. Borland was assigned by his foreman to do the press work. He and Hutton marked the sheets for shearing and punching, using a pattern supplied for that purpose. They then sheared them, which readied them for punching. Hutton and Borland then went over to the press to set it up for punching. Borland selected the punching dies to be used. The dies consisted of two parts, the punch, commonly referred to as the male die which is set in the head or ram of the press, and the bottom or female die or matrix, which is fastened in place on the bed of the press. When the dies are set the sheet to be punched is inserted between and the punch is then pressed through the metal into a hole in the matrix. The punch fits very closely into the hole in the matrix, the tolerance being about one to two thousandths of an inch. There was expert testimony that there are two customary and approved methods of setting the dies and so adjusting them that the punch will descend smoothly into the matrix without its edge striking the matrix. By one method both dies are in an engaged position on the bed of the press when the press head is lowered to the punch, which is then secured by set screws to the press head. The head is then raised without disengaging the dies and after properly aligning the female die on the press bed it is secured in that position, thus assuring that when the press is operated the punch will descend smoothly into the matrix. Another customary and approved method is to secure the punch to the press head, then hold the female die up to the punch, engage the two and then lower the entire assembly to the press bed when the female die can be secured to the bed. Borland did not employ either method. With Hutton assisting him they first secured the punch in position against the press head by lifting it into place and attaching it by the set screws. The punch assembly weighed about 25 pounds. They then placed the

female die, which weighed about 40 pounds, on the bed of the press and moved it into approximately correct position to receive the punch. They then lowered the press head, with the punch in position, to within about an inch of the top of the matrix and approximately over the hole into which it was to go in operation. Hutton observed that the female die was not lined up laterally so as to admit the punch and he reached over and made a manual adjustment, moving it about an eighth or a quarter of an inch to the right. He then stepped back to get a better look, at which time Borland released the punch which came down and, being improperly adjusted, struck the female die instead of entering into the hole. There was a crunching sound as the punch struck the female die and a chip of metal flew off, piercing Hutton's eye. The method used by Borland was one which, according to the testimony, could be followed, but the testimony also showed that if that method was being followed then when the punch closely approximated the matrix the further lowering ought to be completed by the use of an inching device which would permit lowering the punch as little as one thousandth of an inch at a time, thus affording ample opportunity to accurately adjust the female die to the descending punch so as to properly accommodate it. This device was on the press but Borland did not use it.

[2] It seems obvious to us that the foregoing evidence would support a jury verdict that Borland had been guilty of negligence in adjusting the dies and that that negligence proximately caused Hutton's injury. The jury could infer that of three safe methods Borland ignored all and depended on visual measurement for adjusting the dies; that in view of the great power of the press a failure to so adjust the dies that the punch would descend smoothly into the matrix would probably cause compression fracturing of the metal of the die and the matrix; and that this was just what happened. Several persons at varying distances from the press heard the crunch of metal against metal. We think it unnecessary to elaborate further. We hold that the evidence was sufficient to support a verdict for Hutton had the jury rendered one and that therefore the trial court's order granting a new trial cannot be disturbed on appeal.

[3] There is another reason why in this case and on this record the sufficiency of the evidence to support a verdict for Hutton cannot be challenged. From the evidence the jury could find that the accident resulting in injury to Hutton was of a kind which ordinarily does not occur in the absence of someone's negligence; that it was caused by an instrumentality in the control of Borland; and that it was not due to any voluntary action or contribution on the part of Hutton. The doctrine of res ipsa loquitur could be applied by the jury. Seneris v. Haas, 45 Cal.2d 811, 823, 291 P.2d 915, 53 A.L.R.2d 124. Surely, one engaged in setting dies for punching holes in sheet metal by use of a 100-ton press would be careful not to permit the punch to descend against the matrix to the damage of the metal composing both. There were customarily-used methods by which this could be easily avoided and the particular press here involved was equipped with an inching device to avoid that result if the method actually used by Borland was being followed. The impact of the punch upon the matrix, resulting in the discharge of the steel particle that injured Hutton, could have been found by the jury to have been something that does not ordinarily occur in the absence of negligence in setting the dies.

The jury could likewise have found that the instrumentality causing the injury was under the control of Borland acting in the scope of his employment by Pagni. And, finally, the jury could have found that the accident was not due to any voluntary action or contribution on the part of Hutton.

[4, 5] The fact that no instruction on res ipsa was requested by Hutton or given by the trial court is not material. The doctrine concerns a type of circumstantial evidence upon which a plaintiff may rely to discharge his burden of proving a defend-

ant's negligence. Such evidence was given to the jury in this case. There appears to have been no reason why the jury might not have drawn the inference of negligence without a specific instruction authorizing them to do so. Fedler v. Hygelund, 106 Cal.App.2d 480, 487, 235 P.2d 247; Rose v. Melody Lane, 39 Cal.2d 481, 488, 247 P.2d 335.

[6] For the reasons given, the order granting a new trial is affirmed. Since the affirmance of the order granting a new trial will automatically vacate the judgment from which respondent has appealed, that appeal is dismissed. See Lee v. Cranford, 107 Cal.App.2d 677, 681–682, 237 P.2d 986.

SCHOTTKY and PEEK, JJ., concur.

167 Cal.App.2d 82

Henry Bruno BACKMAN, also known as Henry B. Backman, Individually, and Henry Bruno Backman and Frances Carneal Robinett, Co-Partners, doing business as Waldow Plumbing & Heating Co., Petitioners and Respondents,

v.

STATE of California, DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS, CONTRACTORS STATE LICENSE BOARD, Defendant and Appellant.

Civ. 23036.

District Court of Appeal, Second District, Division 3, California.

Jan. 12, 1959.

Mandamus proceeding to compel contractors' state license board to restore plumbing contractors' licenses and to dismiss proceedings in which order revoking licenses was made. The Superior Court of Los Angeles County, Donald E. Dunbar, J., entered judgment ordering that writ of mandate issue, and the board appealed. The District Court of Appeal, Vallée, J., held that the Superior Court's finding that applicants, in obtaining the licenses, made no misrepresentation of facts in respect to their previous work experience was supported by substantial evidence.

Affirmed.

1. Mandamus ⇦173

In mandamus proceeding to compel contractors' state license board to restore plumbing contractors' licenses and to dismiss proceedings in which order revoking licenses was made, the hearing in the Superior Court is a trial de novo.

2. Mandamus ⇦172

In mandamus proceeding to compel contractors' state license board to restore plumbing contractors' licenses and to dismiss proceedings in which order revoking licenses was made, where the Superior Court reweighed the evidence and made findings, the only function of reviewing court was to determine whether those findings were supported by substantial evidence.

3. Mandamus ⇦168(4)

In mandamus proceeding to compel contractors' state license board to restore plumbing contractors' licenses and to dismiss proceedings in which order revoking licenses was made, Superior Court's finding that applicants, in obtaining the licenses, made no misrepresentation of facts in respect to their previous work experience was supported by substantial evidence. West's Ann.Bus. & Prof.Code, §§ 7068, 7112, 7115, 7122.

4. Licenses ⇦38

In determining whether there is ground for disciplinary action against person licensed as plumbing contractor, the matter of good faith is important. West's Ann. Bus. & Prof.Code, § 7112.

5. Mandamus ⇦168(4)

In mandamus proceeding to compel contractors' state license board to restore plumbing contractors' licenses and to dis-

miss proceedings in which order revoking licenses was made, there was substantial evidence indicating that applicants' experience was such that the registrar could have qualified them as plumbing contractors.

Edmund G. Brown, Atty. Gen., and N. B. Peek, Deputy Atty. Gen., for appellant.

Winston & Winston and Will H. Winston, Long Beach, for respondents.

VALLÉE, Justice.

Appeal by the Contractors' State License Board from a judgment ordering that a writ of mandate issue commanding it to restore to petitioners the licenses to carry on their business as a plumbing contractor and to dismiss the proceedings in which an order revoking the licenses was made.

On July 18, 1955 respondent Backman filed an application with the board for a plumbing contractor's license. At the top of page 3 of the application form provided by the board there was printed: "The right to take an examination is predicated on the construction experience of the person to be examined. The examinee must have had, within the ten years immediately preceding the date of filing this application, not less than four years experience as a journeyman, foreman, supervising employee or contractor in the particular classification of license for which application is made. * * * Credits are allowed for construction experience had in the particular classification of the building and construction industry for which an examination is taken. It is, therefore, advantageous to list fully such experience in detail." Beneath this paragraph were printed headings, under which Backman listed his experience as follows:

"Employed by or Worked for (If self employed—so state)	Worked as: Describe in Detail work Done (See instruction sheet)	From— Month and Year	To— Month and Year
Name Waldow Plmbg. Co. self-emp. (partnership) Address 416 W. Broadway Long Beach, Calif.	Full responsibility and complete managership of company. All estimating and full direction of men and jobs	1/1/54	present
Name Don W. Bivens Plmbg. Address 3393 Orange Ave. Long Beach, Calif.	plumber repair plmbg. and part-time estimator	July, 1952	Dec., 1953
Name Waldow Plmbg. Co. address 416 W. Broadway Long Beach, Calif.	plumber. Due to failing health of Mr. Waldow, examinee (with help of another employee) had full responsibility of shop—estimating and directing jobs, and men	Sept. 1949	July 1952"

The registrar approved the application and Backman took the examination. He failed to pass Part II of the examination by almost three credits; however,

based on the experience listed in his application, and pursuant to section 726[1] of Title 16 of the California Administrative Code, three credits were added by the registrar to his score, giving him a passing grade. On September 7, 1955 he was issued a plumbing contractor's license. On October 14, 1955 Backman and Frances C. Robinett made application for a partnership plumbing contractor's license in their names, doing business as Waldow Plumbing and Heating Company. A partnership license was issued November 3, 1955, without examination, under authority of section 774[2] of Title 16 of the Administrative Code, based on the individual plumbing contractor's license previously issued to Backman.

On April 9, 1956 an accusation was filed by an investigator for the board, charging in substance that Backman had violated sections 7112, 7115, and 7122 of the Business and Professions Code in that, in his application for the individual license, he had misrepresented material facts with respect to his work experience and he had failed to comply with section 7068 of that code and section 724 of Title 16 of the Administrative Code,[3] and was therefore subject to disciplinary action under section 7112 of the Business and Professions Code.[4] It was further alleged that since th partnership license was obtained on the basis of the license issued to Backman individually the partnership was also subject to disciplinary action.

A hearing was held by a hearing officer after which he found that Backman had misrepresented in his application that he had been a journeyman plumber and supervising employee for four years when in fact he had been only an apprentice plumber with no supervising authority for a substantial part of this period; the mis-

1. Section 726: "Experience credits shall be computed and added to the examination grade for experience had within the last 10 years immediately preceding application (service in the armed forces shall extend this 10-year period on a year for year basis), as a journeyman, foreman, supervising employee or contractor, in the same classification within which the applicant applies for license, at the rate of one credit for each six months or the major portion thereof, commencing with and including the fifth year and ending with and including the nineth year of such experience.

"Credits for experience shall be added only to the grade attained in Part II of the examination. A maximum not to exceed 10 credits may be added for experience."

2. Section 774: "No written examination shall be required of any applicant or of any of the personnel of any applicant, who shall have previously personally qualified by written examination within a period of four years immediately preceding the date of filing of application for license in the same classification within which the applicant presently files for license."

3. Section 724: "Every applicant for a contractor's license must have had, within the last ten years immediately preceding the filing of the application, not less than four years experience as a journeyman, foreman, supervising employee or contractor in the particular class within which the applicant intends to engage as a contractor.

"An applicant who was a former license holder or who was a member of a licensee entity actively engaged in conducting the business of such licensee in the same classification applied for may compute his experience as a journeyman, foreman, supervising employee or contractor in the classification applied for without regard to the ten-year limitation.

"An applicant shall not be jeopardized in computing time by his service in the armed forces of the United States during a National Emergency and such length of service may be added to the ten years mentioned above.

"Acceptable technical training in an accredited school will be counted as experience, but in no case will technical training count for more than three years experience.

"The required experience shall be possessed by one member of the applicant entity or by a responsible managing employee therefor and he shall be required to take the examination."

4. Section 7112: "Misrepresentation of a material fact by an applicant in obtaining a license constitutes a cause for disciplinary action."

statement was as to a material fact relative to his experience; in reliance thereon a plumbing contractor's license was issued; and the individual and partnership licenses were subject to disciplinary action. His recommendation that both licenses be revoked was adopted by the board.

Respondents Backman and Robinett petitioned the superior court for a writ of mandamus to compel the board to restore the licenses. The court found: the evidence adduced at the hearing on the accusation is insufficient to sustain the decision of revocation; the evidence before the board showed that respondents are not guilty of any of the charges alleged in the accusation or any of the violations of law charged therein; there is no substantial evidence that respondents had been guilty of any misrepresentation of facts in obtaining the licenses; there is not sufficient evidence to show that Backman made any misstatement of fact whereby he obtained any credit of three points of credit allowed him by the registrar; there is not sufficient evidence to show that Backman made any misstatement of any fact in his application or otherwise relative to his experience, as required by section 7068 of the Business and Professions Code; the evidence is conclusive that Backman neither knew of the granting of credits by the registrar until after he had been granted his license nor did he request the registrar to grant him any credits for his experience in his application or otherwise; the evidence is conclusive that Backman took the examination solely on the basis of his written application which he presented to the board in good faith; the finding of the hearing officer that the registrar, in reliance on Backman's experience record, allowed an additional three points to Backman is not true for the reason there is no misstatement of facts in the application on which the registrar could have relied.

The court further found: Backman was employed as an apprentice plumber from September 1949 until June 10, 1953; during that period he did the work of a journeyman plumber whenever required to do so; from September 1949 to July 1952 Backman was employed by Waldow; during that period he and another employee ran the business; Backman did estimating and all kinds of plumbing work, repairs, new work, and supervising the work; during the time he worked for Bivens—July 1952 to December 1953—he was recognized by his employer as a senior apprentice; soon after he went to work he worked as a journeyman and in the opinion of his employer his work was such as to qualify him as a journeyman, and he gave him a truck and let him go ahead and work in the capacity of a journeyman; Bivens paid him journeyman's wages; he remained on a journeyman's scale as long as he was employed by Bivens and he did everything a journeyman plumber would do and most of the time by himself; he did new construction jobs, repair work, fill in, estimated, sold jobs, and supervised the work of other plumbers; from January 1, 1954 to the time of the hearing Backman had full responsibility and complete managership of Waldow, did all estimating, and had full direction of men and jobs.

The court concluded that Backman did not make any misrepresentation of fact in his application. The board appeals from the judgment ordering issuance of the writ.

Appellant contends that by the use of the word "plumber" in his experience record on the application Backman represented he was a journeyman; and that the failure to state he was not constituted a misrepresentation as a matter of law.

[1] It is well settled that in a proceeding of this kind the hearing in the superior court is a trial de novo. Wisler v. California State Board of Accountancy, 136 Cal. App.2d 79, 84, 288 P.2d 322. "That the trial court in this case was 'authorized by law to exercise its independent judgment on the evidence' is well established. [Citations.] As stated in the last cited case Hohreiter v. Garrison, 81 Cal.App.2d 384, at page 402, 184 P.2d 323, at page 334, 'Thus the ultimate power of decision rests with the trial court. * * * The rule

quoted[5] is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. * * * Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding.'" Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20, 25; Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 246, 217 P.2d 630, 18 A.L.R.2d 593; Nardoni v. McConnell, 48 Cal.2d 500, 310 P.2d 644; Cooper v. State Board of Public Health, 102 Cal.App.2d 926, 932, 229 P.2d 27; Manning v. Watson, 108 Cal.App.2d 705, 712, 239 P.2d 688.

[2] Appellant argues the case as though this court has the power to reweigh evidence. That is not the law. Where, as here, the superior court reweighs the evidence and makes findings, the only function of the reviewing court is to determine whether those findings are supported by substantial evidence. Hutchinson v. Contractors' State License Board, 143 Cal.App.2d 628, 631, 300 P.2d 216.

[3] The question here is whether the evidence, viewed in the light most favorable to respondents, sustains the finding of the trial court to the effect that the charges against Backman were not supported by the weight of the evidence. Manning v. Watson, 108 Cal.App.2d 705, 712, 239 P.2d 688.

The findings of the trial court are supported by substantial evidence. Backman testified that by the use of the word "plumber" in the application he intended to say that he worked as a plumber, did plumbing all by himself, that he was doing regular plumbing work, and that was the sole thing he meant. Frace, the only plumber at Waldow's when Backman first went to work there in 1948, testified that he, Applegate, and Backman took turns doing the work as it came up, with Mr. Waldow acting as dispatcher; in certain instances when more than one man went on a job the one who originally started it would supervise the work of that job and in his opinion would be considered the supervisor. From September 1, 1948 to September 1949 Backman worked for Waldow as an apprentice, and from September 1949 to July 1952 he worked for Waldow as a journeyman. Mrs. Waldow, who went to work in her husband's shop in 1951, testified that Backman shared equal responsibility for running the shop with another plumber, Frace, which included directing and supervising jobs as well as doing plumbing work by himself. In this connection she stated "they were much more efficient than a lot of people that we had there" and that Mr. Waldow hired or fired plumbers on the recommendation of Backman. Bivens, Backman's employer from July 1952 to December 1953, testified: "[A]ctually, the man was put out to work as a journeyman soon after he came to work for me. His work was such as to qualify him, in my mind, for my particular type of work, so I let the man. I didn't hold him back at all. I gave him a truck and let him go ahead and work in the capacity of a journeyman. * * * [H]is work was such that I couldn't afford to hold the man back. * * *" After the first month he paid Backman journeyman's wages.

Backman testified his experience in the plumbing field began in September 1948 when he went to work for Waldow Plumb-

5. The rule quoted is: "[O]n appeal from the judgment of the trial court, 'The rule as to our province is: "In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."'"

ing Company as an apprentice. At that time he worked with a journeyman, delivering materials, working with the tools of the trade, and acting as an "all-round plumbing flunkie and apprentice." In July 1949 he was sent out on jobs and worked by himself. During this time Mr. Waldow's health was such that he permitted Backman, Applegate, and Frace to run the shop. The three men took turns doing the work as it came up, and whoever started a job originally would supervise the work of that job. Backman would indicate on the particular jobs he sold how they were figured and would direct the work to be done. Different techniques were employed in figuring the various jobs, and a determination had to be made in each case as to the best technique in order to save the company money and meet the requirements of the Long Beach code. He further testified that during the period from September 1949 to July 1952 he estimated, supervised, and worked on about 1,000 jobs.

Also in evidence were there certificates "In Support Of Examinee's Experience Qualifications" subscribed and sworn to, and a letter, which were filed with the board in support of Backman's application as follows: 1. A certificate by the chief plumbing inspector for the city of Long Beach which stated he had personally known Backman for seven years and that Backman had worked for Bivens and Waldow as a "plumber." [6] 2. A certificate by

"Employed by or Worked for (If self employed—so state)	Worked as: Describe in Detail Work Done	From—Month and Year	To—Month and Year
Name Waldow Plmbg. Co. self-empl.-partnership Address 416 W. Broadway Long Beach, Calif	Full responsibility and complete managership of company. All estimating and full direction of men and jobs	1/1/54	present
Name Don W. Bivens Plmbg. 3393 Orange Ave Address Long Beach, Calif	plumber repair plmbg. and part-time estimator	July, 1952	Dec. 1953
Name Waldow Plmbg. Co. Address 416 W. Broadway Long Beach, Calif	plumber. Due to failing health of Mr. Waldow, examinee (with help of another employee) had full responsibility of shop—estimating and directing jobs and men."		

the president of Associated Plumbing Contractors of Long Beach which stated he had personally known Backman 3½ years and that Backman had worked for Bivens and Waldow as a "Plumber." 3. A certificate by H. A. Waldow of Waldow Plumbing Company which stated he had personally known Backman seven years and that Backman had worked for him as a "plumber." 4. A letter from the executive manager of Associated Plumbing Contractors of Long Beach which stated that Backman had been always at the top of his class and a leader in the business.[7]

6. The certificate of the chief plumbing inspector for the city of Long Beach stated:

7. The letter of the executive manager of Associated Plumbing Contractors of Long Beach in part read: "I am now requesting your assistance in helping another of our members to obtain his C–36 license before any such emergency occurs such as the case of Mr. Ritz. This new member, Mr. Henry B. Backman, has been the operator of Waldow Plumb-

The registrar had the power under section 725 to permit Backman to take the examination even though he did not "possess the specific experience required in Section 724." Section 725 provides: "When an applicant fails to possess the *specific* experience required in Section 724, but has some *equivalent* of *knowledge* and/or *training* and/or *experience,* the registrar is empowered to pass upon the sufficiency of such combination, and if in his judgment it makes for an equivalent of the required experience, he is authorized to certify to such fact." (Emphasis ours.) The omission of any classification such as journeyman or apprentice was apparent on the face of the application. If the registrar had deemed the application insufficient in any respect he could have returned it to Backman. Section 706 of the rules and regulations of the board which prescribes the form of application states: "Nothing contained herein shall be construed to limit the registrar's authority to seek from an applicant such other information pertinent to the character, experience and past and future methods of doing business as may be deemed necessary in order to pass upon the applicant's qualifications." Under the heading "Power of Registrar to Deny Insufficient Applications" section 710 provides: "The registrar is hereby expressly authorized to refuse the issuance of a license to any applicant who *wilfully* fails or refuses to give the information so requested or to furnish the required signed references." (Emphasis ours.) And section 711 provides: "Incomplete or insufficient applications shall be returned to the applicant with the tendered fee, and the reason for such rejection made known to the applicant." There was nothing in the application or in the instructions with respect to it which required the applicant to state whether he had been employed as journeyman, foreman, supervising employee, or contractor. Counsel for the board so conceded below. We do not agree with counsel for the board that no apprentice would file an application because of the statement appearing thereon that he must have four years experience "as a journeyman." If such were the fact, section 725 of the rules and regulations would be meaningless. Section 725 provides a well-defined exception to the requirements of section 724. The two provisions must be read together and as so read we do not think any apprentice who does not possess the specific experience required in section 724, but has some equivalent in knowledge, training, and experience, is excluded from applying for examination and license.

[4] The board's theory, in effect, is that the term "plumber" in the plumbing industry means "journeyman" and Backman's use of the word misled the board into believing he held the classification of journeyman. Backman did not state in his application, as appellant asserts, that he was a journeyman plumber. He stated he "Worked as" a "plumber." Backman had been doing exactly that. There was evidence that the word "plumber" may mean either a journeyman plumber or an apprentice plumber. The statement in the application that Backman worked as a "plumber" was literally true. The trial court could reasonably conclude that Backman's answer in his application stating that he "Worked as" a "plumber" followed by a detailed description of his experience was not proved untrue. The circumstances

ing Co. since September 1949. He has taken membership in the Association in 1954 and has established a most enviable record of operating a most ethical shop. I have been able to examine his records and find that he has been always at the top of his class and a leader in the business. Mr. Backman graduated from High School in Nebraska and served four years in the United States Navy as a Second Class Petty Officer as a specialist in aircraft hydraulics. He was honorably discharged from the service and now operates his own business as a partner Mr. Waldow who holds the C–36. Due to the very poor health of Mr. Waldow we have encouraged Mr. Backman to try to obtain his own C–36 in order that no unpleasant circumstance might become evident in the passing of his partner."

here are such as to reasonably justify an inference that no misrepresentation of fact was made, as the trial court found. A reasonable inference from the evidence is that the licenses were not issued in reliance on any misrepresentation. The court could reasonably conclude from the evidence that Backman had had 4 years' experience as a plumber or as a supervising employee at the time he filed the application and that he had not made any misrepresentation; that his statement that he "Worked as" a "plumber" and the statement of his experience were not misrepresentations. In determining whether there is ground for disciplinary action, the matter of good faith is important. Sautter v. Contractors' State License Board, 124 Cal.App.2d 149, 156, 268 P.2d 139. See Collins v. Caminetti, 24 Cal.2d 766, 771, 151 P.2d 105, 154 A.L.R. 1141. It would be strange indeed if Backman could be found to have intentionally misrepresented by stating that he had worked as a "plumber" when the chief plumbing inspector of Long Beach, the president of Associated Plumbing Contractors of Long Beach, and Mr. Waldow had used exactly the same terminology in describing his experience. The evidence and the inferences to be drawn therefrom fully support the trial court's finding that no misrepresentation of fact was made.

[5] Appellant also contends that Backman lacked the experience required by section 724; consequently he was not qualified to possess either the individual or the partnership license; and the licenses being void, the trial court could not order them restored. There was no charge in the accusation and the hearing officer made no finding that either Backman or the partnership did not possess the qualifications of a plumbing contractor. The sole charge and finding was that Backman misrepresented material facts in his application. The issue in the superior court as stated by counsel for appellant board was whether Backman "was guilty of a material misrepresentation in violation of Section 7112 of the Business and Professions Code," and "The only question is whether or not Backman realized, was this an innocent mistake." In any event there was ample evidence that Backman, within the last 10 years immediately preceding the filing of the application, had had not less than four years experience which would qualify him for a contractor's license. The certificates of the chief plumbing inspector of Long Beach, the president of Associated Plumbing Contractors of Long Beach, and Mr. Waldow so showed. There is substantial evidence indicating Backman's experience was such that the registrar could have qualified him as a plumbing contractor under either section 724 or 725.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

CITY OF PORT HUENEME, etc., Petitioner and Appellant,

v.

CITY OF OXNARD, etc., et al., Respondents.

CITY OF OXNARD, etc., Petitioner and Respondent,

v.

CITY OF PORT HUENEME, etc., et al., Appellants.*

No. 22954.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1958.

Hearing Granted Feb. 18, 1959.

Actions, consolidated for trial, between two cities attacking annexation proceedings before the respective city councils. The Superior Court, Ventura County, Atwell Westwick, J., entered judgment adverse to one city, and such city appealed. The District Court of Appeal, Nourse, J. pro tempore, held, inter alia, that where territory

* Opinion vacated 341 P.2d 318.

encompassed in city's annexation proceedings was not contiguous to city boundaries as they existed at time the proceedings were presented to city's council but was contiguous to territory subsequently annexed by city, fact that such territory was contiguous at time of adoption of ordinances of annexation was not sufficient to meet requirement of contiguity.

Judgment affirmed in part and reversed in part.

1. Municipal Corporations ⇐33(9)

Annexation protests which did not represent one half of value of territory proposed to be annexed to city were insufficient to defeat the annexation proceeding. West's Ann.Gov.Code, §§ 35300–35326.

2. Municipal Corporations ⇐33(9)

In actions between two cities attacking annexation proceedings before the respective city councils, question whether territory included within one proposed annexation was inhabited within meaning of annexation statute was one of fact. West's Ann.Gov.Code, § 35303.

3. Municipal Corporations ⇐29(4)

In city annexation proceedings, resolution of fact question whether territory included within proposed annexation was inhabited within meaning of annexation statute would not depend upon whether places at which registered voters ate and slept were within boundaries of proposed annexation but upon whether such places of abode were within and were an integral part of parcel included within boundaries of proposed annexation. West's Ann.Gov. Code, § 35303.

4. Municipal Corporations ⇐33(6)

In actions between two cities attacking annexation proceedings before the respective city councils, evidence sustained finding that territory included within one of the annexations was inhabited within meaning of annexation statute. West's Ann.Gov.Code, § 35303.

5. Appeal and Error ⇐891, 1122(1)

Upon application to district court of appeal to take further oral evidence and to make submitted findings of fact contrary to trial court's findings, application which was not supported by an affidavit setting forth the facts to be proved was defective. West's Ann.Rules on Appeal, rule 23(b).

6. Municipal Corporations ⇐33(8)

Where, in actions between two cities attacking annexation proceedings before the respective city councils, issue as to uninhabited character of one of territories to be annexed was clearly raised and was tried, argued, and determined upon stipulated facts, district court of appeal would not resolve conflict between stipulated facts and facts asserted by unsuccessful party and make findings contrary to those made by trial court in order to reverse the judgment. West's Ann.Gov.Code, § 35303.

7. Municipal Corporations ⇐29(4)

Where contiguity of all portions of territory of proposed annexation depended upon less than a 40-foot overlap of the easterly boundary of one tract and the westerly boundary of another, the whole proposed annexation was void. West's Ann.Gov. Code, §§ 35002.5, 35302.

8. Municipal Corporations ⇐29(4)

If any part of territory within boundaries of proposed annexation under the Uninhabited Territory Act of 1939 is not contiguous, whole proceeding is void, even though a part may be contiguous, and council of annexing city does not obtain jurisdiction over any of the noncontiguous territory. West's Ann.Gov.Code, §§ 35002.5, 35302.

9. Municipal Corporations ⇐33(8)

Where, in actions attacking city annexation proceedings, question of contiguity of particular proposed annexation had not been passed upon by trial court but was, at request of district court of appeal, presented to it on briefs, and facts were undisputed, and, if matter were retried, trial court could make no finding except one of noncontiguity, district court of appeal would make such finding. West's Ann. Code Civ.Proc. § 956a.

10. Municipal Corporations ⇐33(1)

First city annexation proceeding to be commenced will prevail over subsequent

proceeding, if first proceeding is otherwise valid. West's Ann.Gov.Code, §§ 35302, 35308, 35309.

11. Municipal Corporations ⇐29(4)

Where territory encompassed in city's annexation proceedings was not contiguous to city boundaries as they existed at time the proceedings were presented to city's council but was contiguous to territory subsequently annexed by city, fact that such territory was contiguous at time of adoption of ordinances of annexation was not sufficient to meet requirement of contiguity, despite the "intercontiguity."

12. Constitutional Law ⇐70(1)

District court of appeal could not, under guise of interpretation, legislate or interpret one act by the provisions of another when the Legislature had expressly provided that only provisions of the pertinent act should govern proceedings had thereunder. West's Ann.Gov.Code, §§ 35100 et seq., 35104, 35141, 35300–35326.

13. Municipal Corporations ⇐33(2)

Until city annexation ordinance was effective, territory included within annexation was not territory over which city could exercise governmental function and was still only territory in process of annexation. West's Ann.Elections Code, § 1770; West's Ann.Gov.Code, §§ 35316, 35317.

14. Municipal Corporations ⇐33(2)

Passage of city annexation ordinance did not effectively annex territory described therein, and ordinance had no effect until conditions specified in annexation legislation had occurred or been fulfilled. West's Ann.Gov.Code, §§ 35316–35318; West's Ann.Elections Code, § 1770.

Jerome H. Berenson, City Attorney City of Port Hueneme, and Burke, Williams & Sorensen, Los Angeles, for appellant City of Port Hueneme.

Joseph W. Goss, City Attorney Oxnard, for respondent City of Oxnard.

NOURSE, Justice pro tempore.

The above entitled matters were consolidated for trial, findings of fact and conclusions of law made in the consolidated cases, and both matters determined by a single judgment.

City of Port Hueneme, hereinafter called "Hueneme," appeals from that judgment.

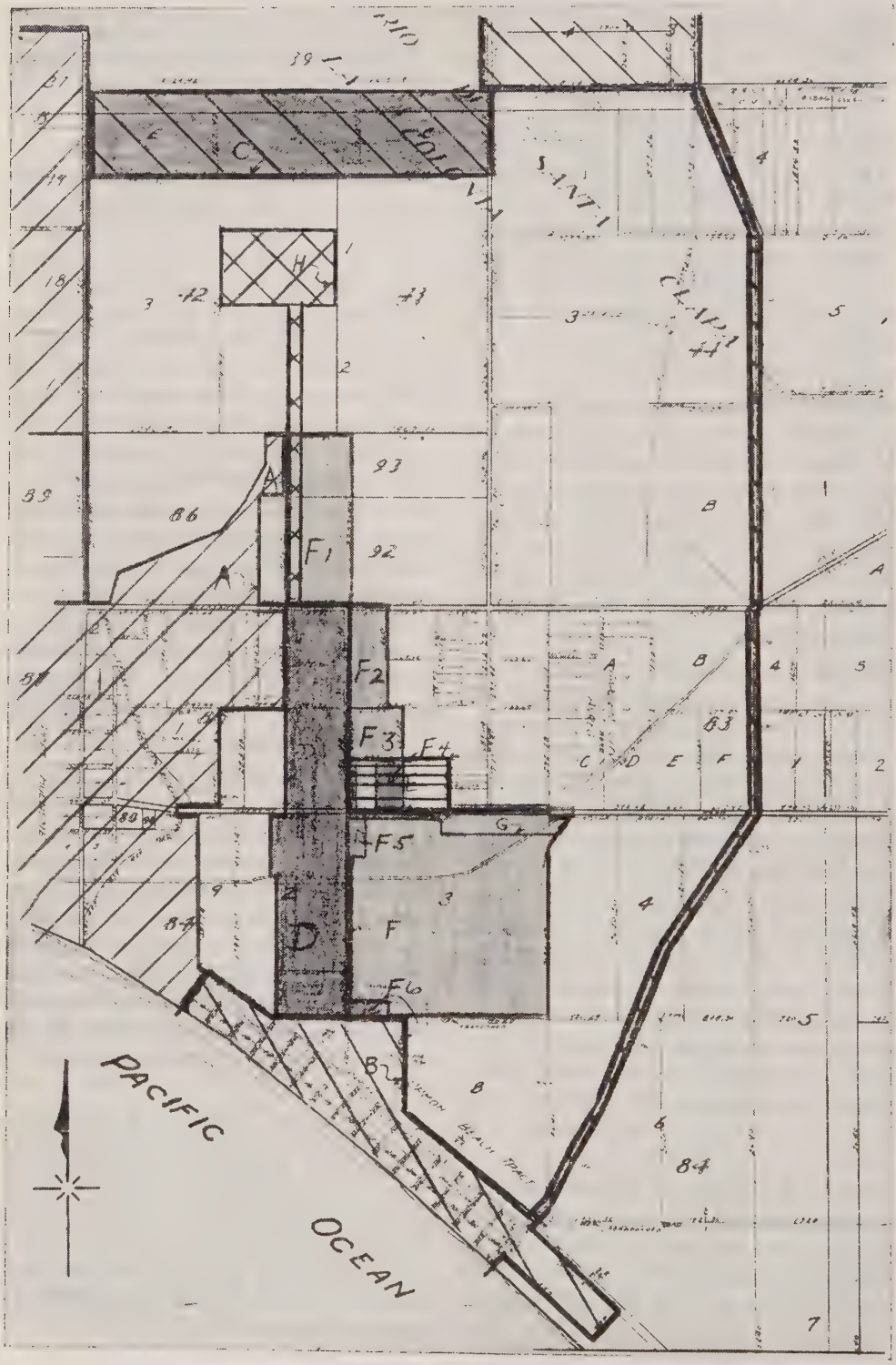
The first action mentioned in the caption is an attack by Hueneme on two annexation proceedings commenced under the "Annexation of Uninhabited Territory Act of 1939" (Gov.Code, §§ 35300–35326) and which were known as Oxnard Annexations 55–3 and 55–5. These proceedings were pending before the City Council of the City of Oxnard, hereinafter called "Oxnard," at the time of the commencement of the action.[1] The second action is an attack by Oxnard upon an annexation proceeding commenced under the Uninhabited Territory Act and which at the commencement of that action was pending before the City Council of Hueneme. This proceeding was known as the Hueneme (Brucker-Lown) Annexation.

The case was tried upon a stipulated statement of facts, admissions in the pleadings, and the exhibits attached to the pleadings in the action, which include maps of the lands covered by the annexation proceedings attacked, portions of the territory that were within the limits of the respective cities at the time of the commencement of annexation proceedings attacked and the territory included within an annexation known as Oxnard Annexation No. 55–2.

A portion of Exhibit "A" attached to the complaint in the action brought by Hueneme is here reproduced as a part of this opinion together with certain symbols which we have added in order to make this map understandable when reproduced in black and white (in the original certain areas are distinguished by colors).[2]

1. Both Oxnard and Hueneme are cities of the sixth class.

2. All map references hereafter made are to the map reproduced.


PACIFIC
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F1
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PORT HUENEME MAP

Portion of Exhibit "A", Case 44530
Immaterial Data Eliminated
Colors Changed To Correspond To Oxnard Map.

LEGEND

	A	Port Hueneme City Limits as of Feb. 23, 1955
	B	Oxnard City Limits as of Feb. 23, 1955
①	C	Oxnard Annexation #55–1; Ordinance #505 adopted Feb. 23, 1955
	D	Oxnard Annexation #55–2; Ordinance #506 adopted Feb. 23, 1955
	E	Proposed Oxnard Annexation #55–3; Resolution of Intent #1602 adopted March 7, 1955
	F	(Second) Proposed Port Hueneme Annexation (Brucker-Lown); Resolution of Intent #289 adopted March 8, 1955
①	G	Proposed Oxnard Annexation #55–4. Withdrawn by Property Owner and terminated
	H	Proposed Oxnard Annexation #55–5; Resolution of Intent #1607 adopted March 14, 1955
②		Parcels containing Registered Voters, excluded from attempted Port Hueneme Annexation

① Immaterial

② From Oxnard Map

The pertinent facts are: On March 7, 1955, and at all relevant times herein, the diagonally hatched territory shown on the map and marked "B" was within the limits of Oxnard and the diagonally hatched territory designated "A" was within the limits of Hueneme.

Prior to February 23, 1955, Oxnard Annexation 55–2 was commenced. By this proceeding it was sought to annex to Oxnard the strip of land which is shaded on the annexed map and designated "D." On February 23, 1955, ordinance Number 506 annexing D to Oxnard passed its second reading before the city council. No referendum petition was filed against this ordinance and it became fully effective on April 5, 1955. Within the territory of D were situated a portion of Oxnard's industrial wasteline and a portion of Oxnard's main interceptor sewer.

On March 4, 1955, the owner of the tract of land which borders Hueneme Road on the north and which is contiguous to D (it is horizontally hatched and marked "E" on the map) submitted to the Ventura County Boundary Commission a petition (Oxnard Annexation 55–3) for the annexation of that tract to Oxnard. On March 7 the boundary commission approved the descrip-

tion and on that day the city council received the petition and adopted its resolution of intention Number 1602 and established April 12, 1955, as the date of public hearing. On April 26, 1955, after public hearing, the City Council of Oxnard adopted ordinance Number 510 purporting to annex the territory within Annexation 55–3.

[1] Prior to March 8, 1955, a petition known as the "First Proposed Brucker-Lown Annexation" was submitted to the county boundary commission for approval of the description of the territory described therein. This territory was comprised of a number of parcels, each under separate ownership. The most northerly of these parcels, known as the "Brucker land," we have designated "F1." The most northerly portion of F1 is contiguous to Port Hueneme. Parcel F1 is adjoined to the south at Pleasant Valley Road by a parcel which we have designated "F2" the northerly boundary of which overlaps the southerly boundary of F1 by a distance of less than 40 feet. (Hueneme asserts the overlap is 38.59 feet, Oxnard claims it to be but 34.26 feet.) F2 is adjoined on the south by F3. F3 is adjoined on the south by a parcel of land which contains that portion of the land contained in Oxnard Annexation 55–3, which lies westerly of the southerly extension across Oxnard Annexation 55–3 of the easterly boundary of F3. This land is adjoined on the south at Hueneme Road by a large tract designated "F" on the map; as originally described this parcel included the portions of that tract which we have designated F5 and F6. At the time this petition was submitted to the boundary commission there were approximately 18 adults living within the territory encompassed by the petition, less than 12 of whom were registered voters.[3] Thereafter and before the approval of the boundaries by the boundary commission, nine of the unregistered residents registered as voters, making a total of 14 registered voters in the area. Hueneme thereupon withdrew the first proposed boundaries and substituted therefor boundaries which excluded from the territory originally described those portions thereof which are designated F4, F5 and F6. F4, F5 and F6 contained residences which were inhabited by a total of eight of said registered voters and the number of registered voters whose places of habitation were within the boundaries of the proposed annexation as those had been amended was, by the exclusion of F4, F5 and F6, reduced to six. The amended description was approved by the boundary commission on March 8 and on that date the petition known as "Port Hueneme Annexation (Brucker-Lown)" was submitted to the Hueneme City Council and on that day it adopted its resolution of intention Number 289. At the public hearing held pursuant to this resolution of intention the owners of parcels F2, F3 and that portion of Oxnard Annexation 55–3 which lay within the Brucker-Lown Annexation protested the annexation.[4] On May 4, 1955, the Council of Hueneme adopted annexation ordinance Number 84 purporting to annex the property within the Brucker-Lown Annexation to Hueneme.

On March 14, 1955, the county boundary commission approved the description contained in a petition for the annexation to Oxnard of certain uninhabited territory consisting of a rectangular-shaped piece of land connected by a strip of land to tract D (Oxnard Annexation 55–2) at its northerly boundary. This tract and strip are cross-hatched and designated on the map as "H." On March 14 the petition for the annexation of H as Oxnard Annexation 55–5 was presented to the City Council of Oxnard and on that date it passed its resolution of intention. On April 26, 1955, the City Council of Oxnard adopted ordi-

3. Territory is deemed uninhabited if less than 12 registered voters reside within it at the time the petition is filed with the counsel. Gov.Code, § 35303.

4. These protests did not represent one-half of the value of the territory proposed to be annexed and were therefore insufficient to defeat the proceeding. Gov.Code, § 35313.

nance Number 511 purporting to annex the territory within Annexation 55–5 to Oxnard. Within the boundaries of Annexation 55–5 is situate a portion of Oxnard's main interceptor sewer.

Neither the land sought to be annexed by Oxnard Annexation 55–3 nor the land sought to be annexed by its Annexation 55–5 was, at the time of the resolutions of intention passed in connection therewith, contiguous to the city of Oxnard as its boundaries existed then, but each of them was contiguous to the lands within Oxnard Annexation 55–2 (tract D on the map). The strip of land which is a part of Oxnard Annexation 55–5 (parcel H on the map) includes a portion of the Brucker land in the Hueneme (Brucker-Lown) Annexation.

The only parcel contained in the Hueneme Bruckner-Lown Annexation which touches upon a boundary of the city of Hueneme as those boundaries existed on March 8, 1955, is parcel F1.

The Hueneme Annexation.

By paragraph 4 of the judgment appealed from it is decreed "That Port Hueneme Resolution 289, Ordinance 84 and the Brucker-Lown Annexation are void and non-effective," and by paragraph 7 of the judgment it was decreed "That the City of Port Hueneme has no rights to be declared in its favor as against the City of Oxnard or any of its Council members under the issues in these cases" and by paragraph 8 of the judgment it is decreed "That the City of Port Hueneme is not entitled to take anything by its Petition for Writ of Mandate and said Petition is denied." By paragraph 14 of the judgment Hueneme and the members of its council were ordered to cease and desist from further proceedings in connection with the Brucker-Lown Annexation and ordered to terminate that proceeding.

The trial court found as a fact that the territory described in the Brucker-Lown petition and in the resolution of intention adopted by the council of Hueneme was inhabited territory and concluded that all proceedings under that annexation were without legal sanction and void because the territory was inhabited within the meaning of Government Code, section 35303.

[2, 3] Whether the territory included within the proposed annexation was inhabited is a question of fact. The resolution of this question of fact does not depend upon whether the registered voters' places of abode, i. e. the places where they ate and slept, were within the boundaries of the proposed annexation but upon whether those places of abode were within and an integral part of a parcel which was included within the boundaries of the proposed annexation. People ex rel. Pennington v. City of Richmond, 141 Cal.App.2d 107, 111–113, 296 P.2d 351. Hueneme concedes that the question is one of fact but contends that the findings of fact and conclusions of law drawn therefrom by the trial court are unsupported by the evidence. With this we cannot agree.

It was stipulated that each of the several parcels, F1, F2, F3, F and that portion of Oxnard Annexation 55–3, which was included in the Hueneme Annexation was in separate ownership and that there was 18 adult residents within the boundaries of the first proposed Brucker-Lown Annexation. It was stipulated that of these adults less than 12, in fact but five, were registered voters. It was further stipulated that before the filing of the amended petition nine of the unregistered adults registered as voters thus raising the number of registered voters within the original boundaries to 14. It was also stipulated that the portion of the Bruckner-Lown Annexation territory which overlapped a portion of Oxnard Annexation 55–3 and which we have designated F4 on the map and those portions of parcel F in the original or first Brucker-Lown proceeding and which we have designated F5 and F6, contained three houses inhabited by eight registered voters and that the land upon which each of the three houses was situated was a part of a larger parcel owned by the same owners and included within the Brucker-Lown Annexation as

amended. The original Brucker-Lown petition treated the parcels of which F4 is a part as one parcel of land and treated F5 and F6 as a part of another parcel.

[4] The facts we have alluded to support an inference that the voters inhabiting the dwellings situate on F4, F5 and F6 were residents of the parcels of which the lands upon which their dwellings were situate were an integral part and the evidence therefor amply supports the finding that the territory included within the Bruckner-Lown Annexation was inhabited. It is too evident for words that the amendment of the Brucker-Lown petition was but an attempt to leave outside the boundaries of the proposed annexation the places of abode of eight registered voters and thus to sever their places of abode from the parcels of which they were an integral part.

[5, 6] Hueneme, appellant herein, has applied to this court to take further oral evidence and to make submitted findings of fact contrary to the findings made by the trial court. The application is defective as it is not supported by an affidavit setting forth the facts to be proved, as required by rule 23(b) of the Rules on Appeal. Further, the facts related in the unverified application are to a large extent in conflict with facts recited in the stipulation of facts on which the trial court in part based its findings and would require this court to resolve that conflict in favor of Hueneme and then to make findings contrary to those made by the trial court in order to reverse the judgment. This we decline to do. Tupman v. Haberkern, 208 Cal. 256, 266, 280 P. 970; Gantner v. Gantner, 39 Cal.2d 272, 281, 246 P.2d 923; Monson v. Fischer, 107 Cal. App. 55, 289 P. 899. The issue as to the uninhabited character of the territory included within the Brucker-Lown petition is clearly tendered by both Oxnard's answer to the Hueneme petition and by Oxnard's own petition and was tried, argued and determined in the lower court upon the facts stipulated to, and there is no contention that the evidence which Hueneme seeks to produce here was not available to it at the trial of the action.

[7, 8] For another reason the judgment of the trial court that the Brucker-Lown Annexation is void should be sustained. Before property may be annexed under the Uninhabited Territory Act of 1939 that property must be contiguous to the city to which annexation is sought. Gov.Code, § 35302; People ex rel. Paganini v. Town of Corte Madera, 97 Cal.App.2d 726, 218 P.2d 810, and if any part of the territory within the boundaries of the proposed annexation is not contiguous the whole proceeding is void even though a part may be contiguous. That is to say, if any part of the territory is noncontiguous the council does not obtain jurisdiction over any of it. Johnson v. City of San Pablo, 132 Cal.App.2d 447, 454, 283 P.2d 57. As we have heretofore pointed out, the contiguity of all portions of the Brucker-Lown Annexation other than parcel F1 depends upon a less than 40 foot overlap of the easterly boundary of F1 and the westerly boundary of F2.

Section 35002.5 of the Government Code provides: "Territory shall not be deemed contiguous as the word 'contiguous' is used in this chapter if the only contiguity is based on a strip of land over 300 feet long and less than 200 feet wide exclusive of highways." This section was enacted in 1951 at the first session of the Legislature after the District Court of Appeal for the First District rendered its decision in City of Burlingame v. County of San Mateo, 90 Cal.App.2d 705, 203 P.2d 807. In that case the court had upheld an annexation by the city of Burlingame of a horseshoe-shaped strip of land 100 feet in width both ends of which wholly abutted upon the boundaries of Burlingame so that the total width of the abutment was 200 feet. It seems evident that it was the intent of the Legislature to remedy the situation illustrated by the decision in the Burlingame case by requiring that territory to be annexed must be continuously contiguous to the boundaries of the annexing city for a distance of not less than 200 feet

if the territory to be annexed is over 300 feet in length and to provide that a contiguity of less than 200 feet at one point should not constitute contiguity. If this is not true then the statute has accomplished no real purpose and a strip of land 200 feet in width but which is contiguous to the city's boundaries for a distance of only two feet would meet the requirements of the statute and a city might checkerboard adjacent but otherwise noncontiguous unincorporated territory without it being practicable to service that territory as a part of the city.

Within the meaning of section 35002.5 of the Government Code that portion of F2 which is within a strip of land of the width by which F2 overlaps F1 is the strip which connects all the portions of the annexation lying south of F2 and which connects the remainder of F2 to the city. F2 and all portions of the annexation lying south thereof were therefore not contiguous to Hueneme at the time of the commencement of the proceedings.

[9] While the question of contiguity of the Brucker-Lown Annexation was not passed upon by the trial court it has, at our request, been presented here on briefs. The facts are undisputed. The trial court could, if this matter were retried, make no finding except one of noncontiguity. We, therefore, make such finding pursuant to the provisions of section 956a of the Code of Civil Procedure.

The Oxnard Annexation.

[10] Oxnard's annexation proceeding 55–3 having been first commenced, that proceeding is valid if the territory encompassed within that proceeding was contiguous to Oxnard within the meaning of section 35302 of the Government Code. Govt.Code, §§ 35308–35309. The same is true as to Oxnard's proceeding 55–5 for the Hueneme Brucker-Lown proceeding being void it did not, under section 35308 of the Government Code preclude the presentation of the petition under proceeding 55–5 to the council of Oxnard nor did it under section 35309 of the Government Code keep that council from acting thereon.

It is not and could not be asserted that the territory encompassed in either Oxnard's proceeding 55–3 or 55–5 was contiguous to the boundaries of Oxnard as they existed at the time those proceedings were presented to the City Council of Oxnard. On the other hand, it is undisputed that both of these territories were contiguous to the territory encompassed in Oxnard Annexation 55–2.[5]

The trial court found that the territories within Annexations 55–3 and 55–5 were contiguous to the territory within 55–2 and that at the time of the adoption of the ordinances of annexation as to Annexations 55–3 and 55–5 "absolute contiguity existed between the City of Oxnard and the territory" comprising each of said annexations, and concluded that, as a matter of law, contiguity to 55–2 was "sufficient and adequate contiguity to permit valid commencement" of said annexation proceedings 55–3 and 55–5 and that the absolute contiguity which existed at the time of the passage of the ordinances of annexation made valid the adoption of those ordinances. On the basis of these findings and conclusions the trial court decreed Oxnard's proceedings 55–3 and 55–5 valid.

Oxnard makes numerous contentions to uphold this portion of the decree. It asserts that section 35302, Government Code, does not require contiguity at the inception of proceedings to annex uninhabited territory but only requires contiguity at the time those proceedings become effective and the new territory is in fact annexed. On this basis they contend that inasmuch as annexation proceeding 55–2 was fully effective at the time of the adoption of the

5. Oxnard concedes that Ordinance 506 providing for the annexation of 55–2 did not become effective until March 25, 1955, and was not effective at the time of the initiation of the proceedings for the annexation of 55–3 or 55–5.

ordinances under the proceedings in Annexations 55–3 and 55–5 (Ordinances Nos. 510 and 511) the conditions of section 35302 had been met and the annexations were valid.

In support of their argument they direct our attention to the fact that in codifying the "Annexation of Uninhabited Territory Act of 1939" the Legislature combined in section 35302 the provisions of sections 1 and 2 of the act and in so doing did not carry into section 35302 the language of section 2 which provided "[a]ny such territory *so proposed* to be annexed * * * must be contiguous thereto" (emphasis added); thus demonstrating, so they claim, the intent of the Legislature not to require contiguity at the inception of the proceedings.

[11] We do not believe this contention is sound. In the first place, it overlooks the fact that the change in the wording of the statute was proposed by the code commission which, in its report submitting the redraft of the 1939 Act as well as the redraft of the "Annexation Act of 1913" and other statutes for codification in the Government Code, expressly stated that it was not its intention by its proposed codification to make any substantive changes in the statutes codified.[6]

In the second place, the statutes of 1939 and 1913 were re-enacted and codified as a part of the Government Code by one act of the Legislature (Stats.1949, ch. 79). By this act, the statutes of 1913 were codified as article 2, of chapter 1, part 2, division 2, title 4 of the Government Code and the 1939 Act, as article 5.

By section 35101[7] it is provided that the provisions of article 2 alone shall apply to proceedings for the annexation of inhabited territory and by section 35301 it is provided that in proceedings for the annexation of uninhabited territory the provisions of article 5 alone shall apply.[8]

The Act of 1913 as originally enacted and as codified expressly permitted the commencement of proceedings for the annexation of territory, which although not contiguous to the city, was contiguous to territory which had reached a certain stage in the process of its annexation to the city and expressly provided for the termination of annexation proceedings for such noncontiguous territory should the proceedings for the annexation of the territory to which it was then contiguous not become effective. Gov.Code, §§ 35104, 35141.

The Legislature, therefore, in codifying the 1939 Act, was fully cognizant of the provisions of the 1913 Act as codified and it would be unreasonable to hold that, in specifically providing that the provisions of article 5 (Gov.Code, §§ 35300–35326) shall alone govern proceedings for the annexation of uninhabited territory, the Legislature intended, by the omission of the words of "the territory proposed to be annexed" from the original statute, to provide for proceedings such as were provided for in the Act of 1913. See People ex rel. Paganini v. Town of Corte Madera, supra, 97 Cal.App.2d 726, 218 P.2d 810.

That this was not the intention of the Legislature we think is demonstrated by the results that would occur from such interpretation of the statute. If the inter-

6. "The commission in its work of revision and codification has adopted a definite policy not to make substantive changes, but to confine its work to a compilation, consolidation, and clarification of the existing law. Such changes in wording as are made, are made to resolve ambiguities or to conform with administrative practice and legislative intent. The revision and codification will present the existing law in such form as to facilitate greatly the making of such substantive changes as are found to be necessary." Report of the California Code Commission, Legislative Session of 1949.

7. All section numbers hereinafter cited are to the Government Code unless otherwise shown.

8. By amendment passed in 1951, the provisions of article 1 were made applicable to both types of proceedings. Stats. 1951, ch. 963.

pretation contended for should be upheld a city could initiate proceedings to annex territory far distant from its boundaries (Gov.Code, § 35310) and thus under the provisions of sections 35308 and 35309 of the Government Code exclude all other municipalities from initiating proceedings for the annexation of that territory until such time as the council of the city first initiating proceedings had adopted an ordinance disapproving the proceedings which it had initiated.

Oxnard asserts, however, that the result we have suggested may be avoided by the court's interpreting section 35302 so as to make it applicable only when what it terms "intercontiguity" exists, i. e. when the uninhabited territory to be annexed is contiguous to territory as to which other annexation proceedings are pending. In effect it would have us, by judicial fiat, read into the 1939 Act provisions similar to the provisions of sections 35104 and 35141.

[12] We cannot, under the guise of interpretation, in effect legislate, nor can we interpret one act by the provisions of another where the Legislature has expressly provided that only the provisions of the pertinent act shall govern the proceedings had thereunder.

Oxnard also directs our attention to In re Lancaster City Ordinance No. 20–1952, 374 Pa. 543, 98 A.2d 33. It was in this case that the Supreme Court of Pennsylvania coined the phrase "intercontiguity" and while its decision supports Oxnard's contention we are not bound by it, nor does its reasoning appeal to us.

[13, 14] Oxnard also asserts that despite the fact that ordinance Number 506 (annexing the territory without Oxnard 55–2) was not effective (Elec.Code, § 1770) but was subject to referendum at the time proceedings were initiated for the annexation of 55–3 and 55–5 and despite the fact that the 55–2 proceedings only became effective upon the filing of a certified copy of ordinance Number 506 with the Secretary of State (§§ 35316 and 35317), the territory encompassed by proceeding 55–2 nevertheless became a part of Oxnard upon the second reading of the ordinance and that therefore 55–3 and 55–5 were contiguous to that city at the time of the commencement of those proceedings. It argues that the 30 days would elapse in "due course of time" and that the transmission of a certified copy of the ordinance to the Secretary of State and the filing of that document with him were purely administrative in character. This contention is without merit for the reason that until the ordinance was effective the territory included within the annexation was not territory over which Oxnard could exercise governmental function and was still only territory in the process of annexation. Oxnard relies upon Rafferty v. City of Covina, 133 Cal.App.2d 745, 285 P.2d 94, to support its contention. There is language used by the court in this decision (133 Cal.App.2d at page 754, 285 P.2d at page 100) which standing alone would seemingly justify the argument made. The court there, however, did not pass upon the question as to whether or not the mere passage of the ordinance constitutes annexation so as to give the annexing city jurisdiction over a subsequent annexation proceeding at a time prior to the effective date of the original ordinance but only passed upon the question as to whether a statute passed after the adoption of the original ordinance acted retrospectively to void an ordinance passed before the enactment of the statute. The decision has no bearing upon the question presented here, viz., Does the passage of an ordinance effectively annex the territory described therein? This question must be answered in the negative under the express provisions of 35316, 35317 and 35318 of the Government Code and section 1770 of the Election Code, for under these sections the ordinance has no effect until the conditions specified therein have occurred or been fulfilled.

The judgment appealed from is affirmed insofar as it decrees that "Hueneme Brucker-Lown Annexation" is void and is

reversed insofar as it decrees that the Oxnard Annexation 55–3 and Oxnard Annexation 55–5 are valid and effective. Each party to bear its own costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

166 Cal.App.2d 677

In The Matter of the ESTATE of Thomas W. WARNER, Jr., Deceased.

Anita Lipton WARNER, Contestant and Appellant,

v.

Jean WARNER, Petitioner and Respondent.

Civ. 23096.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1959.

Hearing Denied Feb. 25, 1959.

Proceeding brought by decedent's fourth wife contesting the admission to probate of a will under which decedent left his estate to his son by his second wife and son's mother. From adverse order and judgment of the Superior Court, Los Angeles County, Fletcher Bowron, J., the fourth wife appealed. The District Court of Appeal, White, P. J., held that evidence was insufficient to establish that decedent, who allegedly was a chronic alcoholic and who had been drunk on various occasions and had taken several cures, lacked testamentary incapacity at time that he executed will.

Order and judgment affirmed.

See, also, 329 P.2d 79.

1. Trial ⇐139(1), 142

A motion for a directed verdict, after jury has been discharged upon its failure to agree, should be denied when there is any substantial evidence, or from the evidence any legitimate inference may be drawn which would support a verdict in favor of the plaintiff. West's Ann.Code Civ.Proc. § 630.

2. Wills ⇐55(6)

In proceeding brought by decedent's fourth wife contesting the admission to probate of a will under which decedent left his estate to his son by his second wife and son's mother, evidence was insufficient to establish that decedent, who allegedly was a chronic alcoholic and who had been drunk on various occasions and had taken several cures lacked testamentary incapacity at time that he executed the will.

3. Wills ⇐370

Affidavit which was not before trial court when order denying motion for revocation of probate of will was made could not be considered on appeal from that order.

4. Wills ⇐52(1)

It takes more than mere guesswork and general conjecture to support a finding contrary to presumption that a testator is competent.

5. Wills ⇐55(6)

Evidence that a testator was a chronic alcoholic and had been drunk on various occasions and had taken several cures does not prove testamentary incapacity unless it is also proved that time of decedent's drunkenness coincided with time of his execution of testamentary document.

6. Wills ⇐52(1)

In absence of proof that intemperate use of alcoholic beverages has actually destroyed testamentary capacity, no presumption will be indulged that it has thus been destroyed.

7. Wills ⇐55(10)

Devise to testator's only son and to son's mother, who was testator's second divorced wife, and disinheriting of testator's fourth wife, who was supported under a decree of separate maintenance and who denied decedent divorce he frequently requested during last seven years of his life, was not such an unnatural or unjust will as

could be considered as any evidence of testator's alleged testamentary incapacity.

Ralph Marks, Los Angeles, Gunther Schiff, Beverly Hills, for appellant.

Marvin M. Chesebro, Los Angeles, for Jean M. Warner, individually and as Co-executrix.

Harriet Pugh, Los Angeles, for Jean M. Warner, as Guardian of the Estate of Thomas W. Warner, Jr., a Minor, and R. E. Allen, as Guardian of the Estate of Grigsby Stroud, a Minor.

Max Wisot, Harry Albert, Long Beach, for Marietta Mordue.

WHITE, Presiding Justice.

Anita Lipton Warner, also known as Nora Warner, appeals from the order and judgment denying her motion for revocation of the admission to probate of her husband's will and codicil.

They were married in 1946. She was the fourth and last wife of the late Thomas W. Warner, Jr. Anita instituted an action for her separate maintenance in 1948. She was given the exclusive use of their home, and her husband was ordered to pay her regularly for her separate maintenance. She then, and continuously thereafter, refused to divorce him, although she instituted and prosecuted many court proceedings against him from the time of their separation until his death in 1955. Examples of such litigous conduct on her part are an attempt to enjoin and restrict decedent's business activity and to impound his assets, and her attempted intervention in decedent's action to recover damages for the loss of his eye which was injured in 1950 by a ricocheting bullet as he walked by a shooting gallery at Catalina.

The will and codicil admitted to probate left the bulk of his estate to his son and to the mother of his only child, his second divorced wife, the respondent, Jean Warner.

About 500 pages of Clerk's Transcript, over 1600 pages of Reporter's Transcript, and 39 exhibits make up the record on appeal.

June 8, 1955, the will dated July 2, 1953 and codicil dated January 27, 1955, were admitted to probate and Letters Testamentary issued to Jean Warner and Manuel Ruiz, decedent's attorney who drew the will for him.

November 23, 1955, appellant filed her "contest of will", seeking revocation of the probate of the will and codicil, on the grounds that at the times of their execution decedent was incompetent and acting under the undue influence of attorney Manuel Ruiz and Jean Warner.

Jury trial was had, three special verdicts returned, and the jury reported its failure to agree as to the balance of the special verdicts submitted. Then, on respondent's motion under Section 630 of the Code of Civil Procedure of California, Judge Bowron directed a verdict confirming the admission to probate of the will and granting a mistrial with reference to the codicil. Appellant's motion for a new trial was denied.

[1] As urged by appellant, a motion under Section 630 for a directed verdict, after the jury has been discharged upon its failure to agree, should be denied when there is any substantial evidence, or from the evidence any legitimate inference may be drawn which would support a verdict in favor of the plaintiff. In re Estate of Arnold, 16 Cal.2d 573, 576, 107 P.2d 25; Palmquist v. Mercer, 43 Cal.2d 92, 95, 272 P.2d 26; In re Estate of Sargavak, 95 Cal.App. 2d 73, 75, 212 P.2d 541.

Only the following verdicts were returned by the jury:

[2] With respect to the due execution of the will dated July 2, 1953, and the codicil dated January 27, 1955, almost identical verdicts were returned, as follows:

"1. That it was signed by Thomas W. Warner, Jr.

"2. That at the time of signing by Thomas W. Warner, Jr. he stated to the two witnesses, Martha Jamin and Olive

Kephart, (Alexander Ruiz and Olive Kephart, as to the codicil) that it was his will (codicil).

"3. That when Thomas W. Warner, Jr. signed the will (codicil), Thomas W. Warner, Jr. signed in the presence of the said two witnesses.

"4. That the two witnesses then signed the will (codicil) in the presence of Thomas W. Warner, Jr.

"5. That the two witnesses signed the will (codicil) in the presence of each other."

The other verdict reached by the jury was: "That Thomas W. Warner, Jr. made marks and interlineations upon Paragraph VI of the Will dated July 2, 1953, with the intention and for the purpose of revoking and cancelling only that portion of Paragraph VI of said Will which is so marked and interlined by him, and that the decedent was mentally competent to do so at that time."

By Paragraph VI of the will of July 2, 1953, decedent gave to Grigsby Stroud, the young son of a friend, $20,000; and to Evelyn Mae Miller (to whom, according to her testimony, he became engaged on Christmas of 1953) his house and furnishings in Reno, and $25,000 in cash.

At the time of the trial, said will had been marked in the following respects. The gift of $20,000 to young Stroud showed the $20,000 had a mark through it and the figure $5,000 was written above it. Also "21st" had been marked out and "30th" written above it to indicate the birthday upon which young Stroud was to receive his gift; and the gift to Mrs. Miller had a large "X" drawn across it.

By said will of July 2, 1953, the residue was left in trust for decedent's son and Jean Warner, his second wife, who divorced him and who is the mother of his son. Those provisions had not been marked in any way.

No verdict was rendered by the jury as to the actual date upon which either document was signed, and none as to testator's mental competence or freedom from undue influence when executing either the will or the codicil admitted to probate and later contested by appellant.

The jury did, however, find that decedent was mentally competent when he made marks and interlineations upon Paragraph VI of the will of July 2, 1953, and that he intended by said marks to cancel or revoke only the portion of said will marked by him.

The evidence is without conflict that decedent marked only the portion making the gift to Stroud, the "X" through the portion of Paragraph VI making the gift to Mrs. Miller having been placed there by Mr. Ruiz at a later date. Decedent so interlined the bequest to young Stroud on the same day that he executed the codicil dated January 27, 1955.

Appellant is mentioned in the will of July 2, 1953, and it is clear from the language thereof that decedent purposely failed to provide for her. Appellant was in no manner prejudiced by the court's revocation of its admission to probate of the gift to Stroud, or the codicil of January 27, 1955. Therefore, in the instant appeal reversal is warranted only in the event the trial court was in error in denying the revocation of the probate of the will dated July 2, 1953.

The jury having failed to reach a verdict as to decedent's mental competency or the exercise of undue influence upon him at the time of the execution of said will of July 2, 1953, the judgment should be reversed if there is in the record any substantial evidence to support a verdict or conclusion that decedent lacked testamentary capacity or was unduly influenced at the time of the execution of said will.

[3] As evidence of decedent's lack of testamentary capacity appellant relies upon the testimony of Evelyn Mae Miller "together with her affidavit in support of the motion for new trial". The affidavit was not before the court when the order denying the motion for revocation of the probate of the will was made and therefore it cannot be considered on the instant appeal

from that order. We have carefully read and considered the testimony given by Mrs. Miller at the trial. A fair summary of that testimony follows.

Mrs. Miller once worked in a bar in Phoenix. She first met decedent in the early part of 1951. Thereafter, he remained in her home for about two years.

She accompanied decedent to the office of his attorney, Mr. Ruiz, one of the defendants and respondents herein, on two occasions in 1952—it could have been the early part of 1953; on the first such occasion a will was discussed and prepared while she waited; she was named in it as a beneficiary and it was executed by decedent in her presence; she saw decedent drink an alcoholic beverage in the office and presence of Mr. Ruiz on the second occasion, which was more of a social visit; they all had dinner at the Statler and decedent "drank an awful lot" and in her opinion became very drunk after the second visit to Mr. Ruiz' office.

She went to see the decedent after his accident when he was in the hospital at Needles in May of 1953 and she remained there with him "almost a complete month". At the end of May he was brought back to her home in Phoenix in an ambulance and she followed in her automobile. He was then bedridden in her home. "It was his back and spine which had been injured and his pelvis and one leg * * * His right side was completely paralyzed * * * He couldn't even sit up."

His first trip after the accident was with her when she and the decedent visited her parents in Prescott July 2nd to 5th inclusive of 1953. He was able to leave the automobile only on his crutches and with the aid of her father when they arrived in Prescott. There he spent most of the time in bed at her mother's home. The first time he left the home of the witness and went to Los Angeles after his accident in Needles was on July 30, 1953.

The decedent started a business known as Classic & Custom Cars in Phoenix about September, 1953. Mrs. Miller became secretary-treasurer of the corporation. Decedent was the controlling stockholder and the president. In her presence, he did "drink at the place of business"; he kept "it all over the place, in the body shop, in the sales room, in the offices, even in my office". She attended two meetings at the place of business called and presided over by decedent when he was very drunk some time in the latter part of 1953 or the early part of 1954; during the time that she worked for the company in Phoenix, decedent did not appear to be competent "when he was drinking".

In her home decedent, once when he was "very drunk", threw a sword at her and missed her and hit the door, making "a tremendous hole in it". He "mistook" her "for some one the night he threw the sword" at her. That was in 1952. During the time she knew decedent it would be easier to name the times when he was sober than the ones when he was drunk. When he was drunk he was slovenly, "he was dirty and he had no control over his organs or kidneys or anything and * * * no coordination with his arms or his legs or anything".

"Many times" she took decedent to "alcoholic institutions". She took him to "an institution in Phoenix called Catalina on four different occasions".

Decedent gave her an engagement ring at Christmas of 1953, and a bracelet, watch and another ring in 1954—the bracelet and the watch on a trip they made to Mexico City, March 29, 1954, and the other ring "when he returned from a trip to his home in Pasadena".

She resigned from her work at the Classic & Custom Cars in the latter part of 1954.

The following is copied from Mr. Ruiz' cross-examination of Mrs. Miller:

"Q. Now, do you recall—Apparently you recall the will where Mr. Warner left you his home in Nevada and $25,000 cash, is that correct? A. I believe that was it, yes.

"Q. And do you recall what he said about that will? Did he make any

statements to you with regard to it? A. Oh, he merely said that if anything should ever happen to him that I should contact Mr. Trautwein or Mr. Ruiz.

"Q. And did he ever tell you that in that will he was disinheriting Nora Warner (the appellant)? A. No, he did not.

"Q. Now, were you present when that will was signed? A. Yes.

"Q. Was he drunk on that occasion? A. No, I don't believe so.

"Q. Did he appear to have his faculties on that occasion? A. He appeared to.

"Q. Now, I will show you Proponents' Exhibit G, and I will ask you to read the last paragraph of Paragraph VI. A. Yes, sir.

"Q. Have you seen that before? A. Yes."

The will then shown to the witness was the one admitted to probate and dated July 2, 1953. As hereinbefore stated, Mrs. Miller had testified that from July 2nd to the 5th, inclusive, of 1953, decedent was at her mother's home in Prescott and she was with him continuously.

She further testified that, after they returned to Phoenix, decedent took water therapy for about two weeks; that she helped him in and out of the pool and then he could use a cane instead of crutches; that she believed the will she saw executed was witnessed by "a girl that worked in the office" and Mr. Ruiz; and that decedent remained sober "from the time he had his accident (in May, 1953) until the time he left to come to Pasadena" (July 30, 1953).

Further testimony of Mrs. Miller is that she is almost positive that she was with the decedent in Mr. Ruiz' office in the "end of 1952. It could have been the early part of 1953", but she is "almost positive it was in 1952". She is positive that decedent did not "come to Pasadena the first of July, 1953". Her address is given in the will of July 2, 1953. She testified that she owned her home at that address for six years and lived there during both 1952 and 1953.

While there is considerable evidence that decedent was in Mr. Ruiz' law office on July 2, 1953, for the purpose of this appeal it must be assumed that Mrs. Miller's testimony was correct—or at least that the jury could have found it true. Therefore, the will of July 2, 1953, was not signed on the date it bears. Section 50 of the Probate Code of California sets forth the requirements for the execution of a valid will, all of which were found by the jury to exist as to the will dated July 2, 1953. Said section does not require that the will bear the date of its execution.

The testimony of the two witnesses who signed the will and of two lawyers other than respondent Ruiz, who were in the office where the will was prepared and also witnessed its execution, is that the will was so executed on July 2, 1953. Considering the jury's special verdict and presuming the truth of Mrs. Miller's testimony that decedent was in Arizona during the entire day of July 2nd, we infer, as the trial court must have done, that the will was prepared to be executed on that date, executed on a later date, and inadvertently the date was not corrected at the time of execution. The testimony of the witnesses to the execution of the will that decedent was then of sound mind and not acting under undue influence, therefore, remains undisputed.

Appellant, however, insists that she has proved that decedent was incompetent at times before and after the execution of said will, and that therefore it must be presumed that such incompetence continued between the instances proved.

[4, 5] It takes more than "mere guesswork and general conjecture" to support a finding contrary to the presumption that a testator is competent. In re Estate of Teed, 112 Cal.App.2d 638, 647, 247 P.2d 54. Evidence, as in the instant action, that testator was a "chronic alcoholic", that he has been drunk on various occasions, and that he has taken several "cures", some

of which consisted of bed rest, massive doses of vitamins, and food, does not tend to prove testamentary incompetence unless it is also proved that the time of decedent's drunkenness coincided with the time of his execution of the testamentary document. In re Estate of Arnold, 16 Cal. 2d 573, 585, 107 P.2d 25; In re Estate of Powers, 81 Cal.App.2d 480, 482, 184 P.2d 319.

Appellant cites and relies upon the decisions in In re Estate of Fosselman, 48 Cal.2d 179, 308 P.2d 336; and In re Estate of Collin, 150 Cal.App.2d 702, 712, 310 P.2d 663, 670, in the latter of which Mr. Justice Fourt, speaking for this court, said: "Proof of testamentary incapacity and of the facts upon which a testator's state of mind depends is not necessarily confined to the exact time or moment of the execution of the will."

In re Estate of Collin, supra, affirmed on appeal a judgment admitting to probate a will dated December 19, 1951, and denying admission to probate a purported will dated October 24, 1952. That decision followed a finding that decedent "was of unsound mind and lacked testamentary capacity and was suffering from insane delusions and hallucinations from February 2, 1952, until his death on November 3, 1952". A reading of the eight-page summary of the evidence in that decision leaves no doubt that the finding of decedent's lack of testamentary capacity on October 24, 1952, is supported.

In Estate of Fosselman, supra, [48 Cal.2d 179, 308 P.2d 337] a judgment denying a petition for probate of a will and codicils was affirmed by the Supreme Court. There the trial court, sitting without a jury, found that at the time said purported testamentary documents were executed and continuously thereafter until the time of her death, decedent was "suffering from senile dementia and was of such mental incompetency as to render her incapable of executing a Will, and was suffering from an insane delusion", that the beneficiary named in the will was "an old family retainer * * * and was a very old friend", when actually she had known her only a few months and only as an employee. The evidence therein summarized supports the court's finding of testamentary incapacity.

No such evidence is called to our attention by appellant in the instant action, and a careful reading of the entire record fails to disclose any evidence of decedent's incompetence beyond his temporary incoherence and instability when drunk. All witnesses who knew him testified that he appeared to be competent when sober. Each of the attesting and other witnesses to the execution of the will dated July 2, 1953, was of the opinion that decedent was then sober and competent.

[6] In the absence of proof that the intemperate use of alcoholic beverages, however long continued the habit is shown to have been, has actually destroyed testamentary capacity, no presumption will be indulged that it has thus been destroyed. In re Estate of Putnam, 1 Cal.2d 162, 165, 34 P.2d 148.

In the instant action, as stated by this court in In re Estate of Garvey, 38 Cal. App.2d 449, 458, 101 P.2d 551, 555, "The evidence of overindulgence in alcoholic liquor as reflected in the record before us falls far short of the quantum required to establish the fact that decedent had become so weakened in his physical and mental powers that he was incapable of the testamentary act. In re Estate of Fisher, 202 Cal. 205, 259 P. 755; In re Estate of Putnam, 1 Cal.2d 162, 165, 34 P.2d 148. Neither does the evidence in the instant case of repulsive or filthy personal habits, ill temper and a disagreeable disposition constitute insanity or unsoundness of mind. (Citations.)."

[7] In the instant action, as in In re Estate of Garvey, supra, there had been interfamily litigation, and the family considered the will unnatural and unjust. As held in the Garvey case, decedent had a right to dispose of his property as he saw fit. Provision for his only son and his son's mother (his second divorced wife) and the disinheriting of his fourth wife, who was supported under a decree of separate main-

tenance and denied decedent the divorce he frequently requested during the last seven years of his life, is not such an unnatural or unjust will as could be considered any evidence of decedent's alleged testamentary incompetence. In re Estate of Garvey, supra, 38 Cal.App.2d at page 459, 101 P.2d at page 555. In re Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897.

We have carefully examined the entire record in the instant appeal, and find no substantial evidence of decedent's mental incapacity to make a will. Nor does the record contain one iota of evidence of any attempt to exert undue influence upon decedent, or that he was at any time so influenced by any person.

The order and judgment from which this appeal was taken is affirmed.

FOURT and LILLIE, JJ, concur.

167 Cal.App.2d 65

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charlie ANDERS and Clifford Jones, Defendants,

Charlie Anders, Appellant.

Cr. 2880.

District Court of Appeal, Third District, California.

Jan. 9, 1959.

Defendant was convicted of possession of marijuana. The Superior Court, Merced County, R. R. Sischo, J., entered judgment, and the defendant appealed. The Third District Court of Appeal, Peek, Acting P. J., held that where chief of police, who had stopped defendant's automobile because of traffic violation, saw a package fly out of the automobile, chief of police was justified in searching the automobile for marijuana, and that evidence sustained conviction.

Judgment affirmed.

1. Searches and Seizures ⇐3(1)

Citation for a traffic violation does not justify search of automobile.

2. Searches and Seizures ⇐3(1)

Where chief of police, who stopped defendant's automobile for traffic violation, saw a package fly out of the automobile, chief of police was justified in searching the automobile for narcotics.

3. Arrest ⇐71

A search incident to a lawful arrest extends to person as well as premises under his control.

4. Poisons ⇐9

Actual finding of marijuana debris in clothing of defendant and in his automobile was sufficient to warrant inference of knowledge thereof on part of defendant in prosecution for possession of the marijuana. West's Ann.Health & Safety Code, § 11500.

5. Poisons ⇐4

In order to sustain a charge of possession of narcotics, it is necessary to show knowledge on part of defendant. West's Ann.Health & Safety Code, § 11500.

6. Poisons ⇐4

In order to sustain a charge of possession of narcotics, possession need not be exclusive. West's Ann.Health & Safety Code, § 11500.

7. Poisons ⇐9

In order to sustain a charge of possession of narcotics, possession may be shown by circumstances as well as by direct evidence. West's Ann.Health & Safety Code, § 11500.

8. Poisons ⇐9

In order to sustain a charge of possession of narcotics, possession shown may be

constructive possession. West's Ann. Health & Safety Code, § 11500.

9. Poisons ⇐9

Evidence sustained conviction for possession of marijuana. West's Ann.Health & Safety Code, § 11500.

10. Criminal Law ⇐369(1)

Generally, evidence of other crimes is inadmissible.

11. Criminal Law ⇐1169(11)

In prosecution for possession of narcotics, alleged error in admission of evidence that defendant and companion had sufficient marijuana to make about 70 marijuana cigarettes, that price for marijuana cigarette was $1 in the area, and that defendant and his companion had in their possession some $94, $24 of which was in one dollar bills, on ground that the evidence was evidence of the selling of narcotics, was not prejudicial error. West's Ann.Health & Safety Code, § 11500.

12. Poisons ⇐9

In prosecution for possession of marijuana, instruction that before defendant could be found guilty of possession, jury must find that he had possession of the marijuana and had knowledge of its presence and the narcotic character thereof was not erroneous. West's Ann.Health & Safety Code, § 11500.

Patrick R. Murphy, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

PEEK, Acting Presiding Justice.

The defendant Anders and his codefendant, one Clifford Jones, were found guilty of a violation of Section 11500 of the Health and Safety Code. Anders alone has appealed. The attorney who was appointed by this court to assist him on appeal has informed the court and the defendant that he finds no merit therein. The defendant who now appears in pro. per. has made three contentions, (1) that the court erred in permitting the introduction of evidence which defendant charges was obtained as the result of an illegal search and seizure, (2) that the evidence was insufficient to sustain the judgment, (3) that the trial court and the district attorney conspired to commit prejudicial error, and (4) that the court improperly instructed the jury on the elements of the offense charged.

The evidence shows that while Chief Young of the Atwater Police Department was driving in the vicinity of that city he observed defendant's vehicle moving at a very slow rate of speed and weaving back and forth on the highway, thereby impeding the normal and reasonable flow of traffic. Young stopped appellant's vehicle and parked his car behind it. Defendant got out of his vehicle and approached Young, who was standing by the left front fender of the police car. Jones, the codefendant, remained seated in the passenger seat on the right side of the vehicle. While Young was citing appellant for the operation of his vehicle without a permit and for violation of Section 514 of the Vehicle Code, Young observed a brown package leave the right side of defendant's car and fall to the ground. It landed near an oil can approximately four feet from the window on the passenger's side of the car. Young examined the package and discovered three cigarettes rolled in wheat straw paper and some debris which he determined to be marijuana. He thereupon placed appellant and Jones under arrest. The car was then searched and marijuana debris was found in the glove compartment. The search also disclosed a cigarette in a jacket owned by Jones. Upon his arrival at the Merced County jail, Anders was required to disrobe. The pockets of his clothing were then examined and like debris was found.

The basis for Anders' first contention appears to be that since admittedly he was stopped only for an alleged traffic violation and since no felony had been committed there could be no reasonable grounds to believe that defendant was the one who

committed it, therefore the subsequent search of his car and his arrest were illegal.

[1–4] The citation for a traffic violation of itself would not have justified a search of the car since that would have had no relation to the traffic violation. But when Chief Young saw the package fly out of the car a situation then was presented comparable to that in People v. Sanson, 156 Cal.App.2d 250, 319 P.2d 422, where the arresting officer saw the two passengers appear to hide something under the seat, or as in People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57, where the officer saw the defendant withdraw his hand from behind the seat. "The real criterion as to the reasonableness of a search is whether or not there has been the commission of a public offense in the presence of a police officer, or whether, under the facts, the police officer has reasonable grounds to believe that the defendant may have committed a felony." People v. Soto, 144 Cal. App.2d 294, 298, 301 P.2d 45, 48. Applying the rule stated to the facts in this case, certainly Chief Young had reasonable grounds to believe that an offense had been committed. Furthermore, as stated in People v. Dewson, 150 Cal.App.2d 119, 130, 310 P.2d 162, 169: "It is well settled that a search incident to a lawful arrest extends to the person as well as the premises under his control." In that case the defendant was arrested under suspicion of dealing in narcotics and narcotics were found in his vehicle. It is also the rule that the actual finding of the narcotics in Anders' clothing and in the automobile owned by him was sufficient to warrant an inference of knowledge thereof on his part. See, People v. One 1940 Chrysler, 77 Cal.App.2d 306, at page 314, 175 P.2d 585.

[5–9] To sustain a charge of possession it is necessary "to show knowledge on the part of the defendant [citation], such possession need not be exclusive, and may be shown by circumstances as well as by direct evidence, and may be constructive as well as physical." People v. Magdaleno, 158 Cal.App.2d 48, 50–51, 322 P.2d 89, 91. Thus the finding of narcotics in and about a room occupied by the accused raises a reasonable inference that the illegal drug is his even though he may share the room with another. People v. Van Valkenburg, 111 Cal.App.2d 337, 244 P.2d 750. A like rule was applied in the Sanson and Blodgett cases, supra, where an automobile was occupied by others as well as the owner driver. It follows that the evidence was amply sufficient to sustain the judgment.

[10, 11] Appellant next contends that it was prejudicial error for the court to allow testimony that he and Jones had sufficient "makings" for about 70 marijuana cigarettes; that the going price in that area was one dollar per cigarette and that he and Jones had in their possession some $94, $24 of which was in one dollar bills, the balance in larger amounts. It is argued that such evidence was inadmissible in that it only tended to prove another crime such as the selling of narcotics, while here defendants were only charged with possession. It is generally true that evidence of other crimes is inadmissible, but even if it be assumed that it was error to admit the evidence, certainly under the facts herein it cannot be held to have been prejudicially erroneous. See, People v. Toms, 163 Cal.App.2d 123, 329 P.2d 90.

[12] Defendant's final contention is that the jury was improperly instructed as to the element of knowledge of the offense charged. The instruction was given in the language of CALJIC 703. It is quite apparent from the reading of that instruction that the court properly instructed the jury that before defendant could be found guilty of possession the jury must find that he had possession of the narcotic and had knowledge of its presence and the narcotic character of the article alleged possessed by the defendant. We find nothing erroneous in said instruction.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, Justice pro tem., concur.

166 Cal.App.2d 789

Jess E. METCALF, Plaintiff and Respondent,

v.

J. W. SHAMEL, Lite Products Sales, Inc., a corporation, J. G. Moser, Defendants and Appellants.

Civ. 23223.

District Court of Appeal, Second District, Division 1, California.

Jan. 7, 1959.

Rehearing Denied Jan. 27, 1959.

Hearing Denied March 4, 1959.

Action to foreclose pledge securing payment of corporation's indebtedness to plaintiff. The Superior Court of Los Angeles County, A. A. Scott, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Fourt, J., held, inter alia, that counterclaim, for damages alleged to have resulted from purported diversion of corporate business to organizations owned and controlled by plaintiff, sought, in effect, recovery for benefit of corporation and that proceeding on such counterclaim was therefore in nature of a shareholder's derivative suit, and that counterclaimant had no constitutional right to trial by jury on issues of counterclaim.

Affirmed.

1. Corporations ⇐123(24)
Novation ⇐12

In action to foreclose pledge of corporate shares, securing payment of corporation's indebtedness to plaintiff, evidence would not sustain defendants' contention that letter had modified pledge agreement and changed status of plaintiff from that of a creditor to a shareholder or defendants' alternative contention that a novation had occurred.

2. Corporations ⇐123(24)

In action to foreclose pledge of corporate shares, securing payment of corporation's indebtedness to plaintiff, evidence would not sustain defendants' contention that plaintiff had breached his duty to corporation as a director thereof. West's Ann.Corp.Code, §§ 820, 821, 824, 825, 3901.

3. Corporations ⇐123(24)

In action to foreclose pledge of corporate shares, securing payment of corporation's indebtedness to plaintiff, evidence would not sustain defendants' contention that pledge agreement had been discharged by subsequent inconsistent security agreement.

4. Jury ⇐14(1)

In action to foreclose pledge of corporate shares, securing payment of corporation's indebtedness to plaintiff, counterclaim for damages alleged to have resulted from purported diversion of corporate business to organizations owned and controlled by plaintiff, sought, in effect, recovery for benefit of corporation and proceeding thereon was in nature of the shareholder's derivative suit, and counterclaimant had no constitutional right to trial by jury on issues of counterclaim.

Von Herzen & Laidig and Walter H. Young, Los Angeles, for appellants.

Dunlap, Holmes, Ross & Woodson, Pasadena, for respondent.

FOURT, Justice.

This is an appeal from a judgment that there was owing to plaintiff Jess E. Metcalf the principal sum of $51,624.20 plus interest on account of the indebtedness of defendant Lite Products Sales, Inc., (hereinafter called Products); that said indebtedness constituted a lien upon the 49% of the 500 shares of the capital stock of defendant Products owned by the defendant J. W. Shamel; and that said lien and pledge be foreclosed by the sale of all right, title and interest of defendant Shamel in and to said shares of the capital stock of Products or so much thereof as shall be necessary to defray the costs and expenses of sale and costs of suit to satisfy the said indebtedness out of the proceeds thereof, paying the balance of any proceeds to defendant Shamel.

The defendant J. G. Moser is an attorney and the pledgeholder of the capital stock

of Products. His answer is in effect a disclaimer, and he is a nominal party only insofar as this appeal is concerned.

Shamel pleaded that the pledge, if ever made, was either invalid or had been terminated or superseded; that no debt was outstanding for said pledge to secure; and that in the transactions surrounding the giving of the pledge, Metcalf had defrauded Shamel and was not in court with clean hands.

The trial court heard considerable testimony (including expert testimony), received into evidence many exhibits, including many documents prepared by certified public accounts, and made extensive findings of fact, the more significant of which are set forth below in a footnote.[1]

[1]. 12. On and subsequent to August 3, 1951, to and including June 1, 1953, Metcalf loaned to Products at various times and in various amounts a total of $298,421.06, evidenced by promissory notes bearing interest at the rate of 4% per annum, compounded annually, as follows:

Date	Amount of Loan
August 3, 1951	$ 10,000.00
August 21, 1951	5,000.00
September 10, 1951	7,000.00
September 17, 1951	10,000.00
October 3, 1951	5,000.00
October 5, 1951	6,756.64
October 10, 1951	35,000.00
November 1, 1951	5,000.00
November 14, 1951	10,000.00
December 4, 1951	6,634.42
December 4, 1951	10,000.00
December 21, 1951	5,000.00
January 10, 1952	10,000.00
January 17, 1952	10,000.00
February 1, 1952	10,000.00
February 25, 1952	25,000.00
June 5, 1952	5,000.00
July 30, 1952	30,000.00
December 23, 1952	10,000.00
March 12, 1953	21,000.00
March 30, 1953	15,000.00
April 30, 1953	10,000.00
April 30, 1953	5,000.00
May 14, 1953	12,000.00
June 1, 1953	20,000.00
Total	$ 298,421.06

14. As of June 29, 1955, Products, for valuable consideration, executed and Metcalf accepted a chattel mortgage of assets of Products to secure the repayment to Metcalf of the last $115,377.12 principal amount of said loans made by Metcalf as aforesaid. Plaintiff has elected to exclude the said portion of said loans from the debt secured by said agreement of August 3, 1951.

15. In accordance with said election, and after deducting all repayments, the unpaid principal amount of said indebtedness, including compounded interest, that is secured by said agreement of August 3, 1951, as of January 31, 1957, is $51,624.20. Said amount bears interest at the rate of 4% per annum compounded annually. Simple interest accrued thereon to and including January 31, 1957, is $2,591.93.

18. That said letter agreement of April 30, 1952 was not intended by either Metcalf or Shamel at the time it was made to take the place of or to amend or modify the said agreement of August 3, 1951, and it did not do so.

19. As between the parties hereto, Metcalf is the owner of 51% and Shamel is the owner, subject to said pledge, of 49% of the outstanding stock of Products and, in like percentages and on said condition, of the preemptive right to any stock of Products or Rental hereafter issued.

44. Separate records and books of account were kept for each of the three corporations in accordance with standard bookeeping and accounting practices and reflect the business transactions of said corporations, including all transactions between and among the said corporations and transactions between each of the said corporations and Metcalf and Shamel. Said records and books of account have at all times from an including March 31, 1953, been kept under the general supervision of Rubin, Rosman & Borak, certified public accountants.

45. The prices charged to Flasher and credited to Products and Rental, respectively, for property of Products and Rental that was purchased, rented or otherwise acquired by Flasher were fair and reasonable. The prices charged to Products and Rental, respectively, and credited to Flasher for property and services acquired or received by Products and Rental from Flasher were fair and reasonable.

52. Said general accounting of January 31, 1956, was properly conducted and the accounts struck as the result thereof were fair to all of the parties involved and accurately reflected the transactions between and among said parties.

Appellants have not contended that the findings of fact and conclusions of law were not sufficient to support the judgment; nor have they contended that there was no legally sufficient evidence to support the findings. In this respect appellants are to be commended because our own independent review of the transcript and exhibits has indicated that as to almost everything which occurred from and after January 1, 1952, the evidence is to some extent and in varying degrees, conflicting.

The Supreme Court in Smith v. Bull, 50 Cal.2d 294, 325 P.2d 463, recently had occasion to consider some problems which are in many respects similar to those involved in the present case. In the Smith case, supra, there was an action by the representative of the estate of a deceased partner against a surviving partner for an accounting and the court said (50 Cal.2d

53. As a result of said general accounting it was determined, and it is the fact, that as of January 31, 1956, Flasher owed the sum of $41,405.45 to Products. Said obligation was discharged by the assumption by Flasher of $41,405.45 of the indebtedness of Products to Metcalf. After said assumption of debt the amount of debt principal owing by Products to Metcalf as of January 31, 1956, was $174,492.17.

55. Neither Metcalf nor the directors of Products or Rental failed to disclose to one another or to Shamel any information relative to the business of Products and Rental or their or his interests therein. All information on those subjects possessed by Metcalf and any of the directors of Products and Rental was at all times available to Shamel.

58. Metcalf discharged fully and did not violate any duty owed by him, as a director or officer of Products or Rental, to either of said corporations or to the shareholders, directors or officers thereof.

59. Neither Metcalf nor Flasher used their relations with Products or Rental, or both, to acquire or exercise any unfair advantage over either or both of said corporations or to deprive either or both of them of any business opportunity.

60. The accounting policies of Products and Rental throughout the existence of said corporations have been reasonable, consistent with good accounting practice and not detrimental to the interests of any defendant or Rental.

63. It is not true that plaintiff wrongfully refused to perform or be bound by any agreement or wrongfully evicted the defendant Shamel or refused to permit him to participate in any manner in the determination of policy or the management or control of any business.

64. It is not true that the defendants, or any of them, were prevented by plaintiff from performing their part, or any part, of any agreement or agreements or from repaying any sum or sums advanced by plaintiff in connection with any business.

65. It is not true that the plaintiff at any time wrongfully or with intent to defraud the defendants, or any defendant, or any person whomsoever, organized several, or any, other business concern or concerns, or with intent to defraud or wrongfully cheat and deprive the defendants, or any defendant, or any person whomsoever, of any income diverted all or any portion of any business income or profit to any other organization or organizations whatsoever.

67. It is not true that plaintiff comes into this Court with unclean hands or contra bones mores or is attempting to use this Court in furthering a design or policy not countenanced or permitted by this or any other court of equity, or that plaintiff is precluded from requesting any relief from this Court.

68. It is not true that on or about April 30, 1952, or at any other time, the plaintiff obtained from defendant Shamel an instrument in writing modifying or changing any previous argeement or agreements between said parties.

70. It is not true that the plaintiff performed any act, or omitted to perform any act, in any transaction or circumstance relevant to this cause, with malice or with fraudulent intent.

71. It is not true that pursuant to any malicious or fraudulent intent plaintiff diverted any business, custom or trade of the defendants, or any of them, or of Rental, to any new business, organization or organizations owned or controlled by the plaintiff.

73. It is not true that as a result of any malicious, unlawful or fraudulent conduct on the part of the plaintiff all or any of the custom or trade of the defendants, or any of them, or of Rental, was lost or transferred to any organization or organizations owned or controlled by the plaintiff.

at page 305, 325 P.2d at page 470), "The weight of the evidence, and the credibility of the witnesses, are matters for the trier of fact. * * * Whether or not defendant was guilty of appropriation and conversion of firm assets, including the goodwill thereof, was a question of fact; * * * The trial court determined the issues here involved adversely to the defendant. When there is substantial evidence or any inference to be drawn from the evidence to support the findings of the trial court, an appellate court will not make determinations of factual issues contrary to those made by the trier of fact. (In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384; Ambriz v. Petrolane Ltd., 49 Cal.2d 470, 477, 319 P.2d 1.)"

In their opening brief, appellants have made various contentions including, among others, that the pledge of stock is being held for loans that preceded the pledge agreement and for loans made by Metcalf to companies which he controlled and from which Shamel had been ousted. Finding 12 specifically sets forth the loans made by Metcalf to Products in the total sum of $298,421.06, covering the period from August 3, 1951 (the date of the pledge agreement) to and including June 1, 1953. Finding 14 specifically sets forth that the last $115,377.12 of said loans was excluded by Metcalf from the pledge agreement, leaving the amount of the judgment as the balance secured by said pledge agreement, as set forth in Finding 15.

[1] The appellants further contend that the aforementioned pledge agreement was modified by a letter dated April 30, 1952, which letter it is asserted changed the status of Metcalf from that of a creditor to a shareholder, or, in the alternative that a novation occurred by the letter agreement of April 30, 1952. In Findings 18 and 68 the effect of the letter of April 30, 1952 was determined adversely to appellants' contention and under the circumstances existing in this case we are bound by that factual determination. In addition, Finding 19 determines that, as between the parties to this action, Metcalf is the owner of 51% of the outstanding stock of Products and that Shamel is the owner, subject to said pledge, of 49% of the outstanding stock of Products.

Appellants have protested many items pertaining to the accounting procedures which were used and to the conclusions drawn from the conflicting evidence adduced. In Findings 44, 45, 52, 53, and 60 the trial court, based upon competent evidence, determined that the accounting policies followed were reasonable, consistent with good accounting practice and not detrimental to the interests of any defendant; that the books of account were properly kept and accurately reflected the transactions between and among the parties, and that the prices indicated thereon for properties, goods and services were fair and reasonable. Under such circumstances this Court is not empowered to redetermine such factual matters (even if we were so minded) as to the reasonableness of the accounting policies followed, the accuracy of the books of account in reflecting the transactions between and among the parties, or the fairness or reasonableness of the prices paid for property and services involved.

[2] Appellants also claim that Metcalf breached his duty to Products as a director thereof. In Findings 55, 58, 59, 63, 64, 65, 66, 67, 70, 71 and 73, it was determined that as to specific matters in issue, Metcalf exercised his powers in good faith and with a view to the best interests of the corporation, as required by Corporations Code, section 821. This court has had occasion in recent cases to comment upon the fiduciary obligation owed by corporate directors to the corporation. See, Crespinel v. Color Corp. of America, 160 Cal.App.2d 386, 325 P.2d 565, and Chase v. Super-Cold Corp., 163 Cal.App.2d 83, 328 P.2d 812. Suffice it to say that the evidence presented in the trial court was conflicting, and that the trial court upon legally sufficient and competent evidence determined that Metcalf exercised his pow-

ers in good faith and with a view to the best interests of the corporation.

Appellants also filed a supplemental brief in which it is contended that Metcalf was guilty of such improper conduct that as a matter of law he is without clean hands or any standing in any court of equity. Appellants then argue from an assumed premise, which is directly contrary to the Findings of Fact, that Metcalf clearly violated the protective mandate of Corporations Code, sections 820, 824, 825 and 3901, and appellants then reach the conclusion, denominated as inescapable, that, "as a matter of law, the hands of Mr. Metcalf are rendered 'unclean.'" Appellants in effect are restating their interpretation of the facts, as might have been proper in the trial court. However, they have made no claim that there was no substantial evidence to support the trial court's contrary findings; and we are of the opinion that there was sufficient substantial evidence to sustain them.

[3] In their supplemental brief appellants also contend "the security agreement of August 3, 1951, under which this action was brought, was discharged by the subsequent inconsistent security agreement of April 30, 1952, thereby destroying the right of foreclosure contained in the earlier agreement." With respect to this contention, the contrary findings by the trial court in our opinion are based upon and supported by competent evidence.

Appellants in their supplemental brief further assert "the balance the trial court determined to be due is completely erroneous; it is based upon improper charges; and it exceeds a limiting amount stated in a pre-trial agreed statement of facts." Again, the arguments presented in connection therewith are of a type which properly should have been addressed to the trial court, and we are not at liberty to consider them. After a careful review of the entire transcript we have concluded that even if it were to be conceded that any errors were made by the trial court in the admission of evidence pertaining to loans made, in view of Finding 14, it would necessarily follow that such errors were not of a sufficiently substantial nature to warrant a reversal therefor.

[4] Appellants' final contention is that appellant Shamel "was deprived of his constitutional right to a trial by jury on the issues of the counterclaim." The minutes of the proceedings in the trial court under date of May 7, 1957 (the day the cause was called for trial), indicate "Plaintiff's motion for a trial without a jury or for trial of the equitable issues first and the ruling on the motion for a non-jury trial is deferred until the conclusion of the trial of the equitable issues." As we read the pleading denominated "Amended Counter Claim" which by stipulation was deemed to be a cross-complaint, damages are alleged to have resulted from a purported diversion of corporate business to organizations owned and controlled by Metcalf. In effect recovery was sought for the benefit of the corporation and the action was in the nature of a shareholder's derivative suit. Under such circumstances, appellant Shamel had no constitutional right to a trial by jury on the issues of the counterclaim.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

166 Cal.App.2d 724

Jerome J. LALA and Rose Lala, Plaintiffs and Appellants,

v.

Jerome S. MAIORANA and Margaret A. Maiorana, also known as Margaret Becker, State of California, United States of America, Doe I, Doe II, Doe III and Doe IV, Defendants.

State of California and Division of Labor Law Enforcement of the State of California, Respondents.

Civ. 23320.

District Court of Appeal, Second District, Division 1, California.

Jan. 5, 1959.

Action for a judicial declaration that plaintiffs owned realty free and clear of all claims and liens asserted by defendants. From a judgment, as modified by the Superior Court, Los Angeles County, Arnold Praeger, J., so as to declare that realty was subject to liens recorded by creditors of plaintiffs' grantees, plaintiffs appealed. The District Court of Appeal, Lillie, J., held that where realty was conveyed to a veteran and another in order to obtain loan thereon under Servicemen's Readjustment Act of 1944, § 501 as amended 38 U.S.C.A. § 694a, for benefit of grantors who had never served in armed forces, such realty, though held in trust by grantees for benefit of grantors, was subject to liens recorded by state and division of labor law enforcement as creditors of grantees.

Judgment affirmed.

1. New Trial ⇐164

Statute authorizing court to change or add to the "findings" and modify judgment, in ruling on motion for new trial in cause tried without a jury, presents an innovation in court procedure, and, though it does not expressly provide for correction of conclusions of law, quoted term, as used therein, is reasonably synonymous with the phrase "findings of fact and conclusions of law" and hence authorizes correction of conclusions of law. West's Ann.Code Civ.Proc. §§ 662, 663.

See publication Words and Phrases, for other judicial constructions and definitions of "Finding".

2. New Trial ⇐164

Conclusion as to existence of liens upon realty was in effect a finding as to indebtedness of realty for and in the amount of such liens, which, though denominated as a conclusion of law, was the statement of an ultimate fact within purview of statute authorizing court to change or add to the findings in ruling on motion for new trial in a cause tried without a jury. West's Ann.Code Civ.Proc. §§ 662, 663.

3. Appeal and Error ⇐1170(10)

Legal effect of finding that conveyance of realty in order to obtain a loan thereon by virtue of status of grantee as a former serviceman was tainted with illegality was a question of law, and hence where cause was tried without a jury, any error in deleting, on motion for new trial, conclusion as to nonavailability of such defense and inserting new conclusion that realty was subject to liens of state and Division of Labor Law Enforcement as creditors of grantees did not result in any miscarriage of justice, since a second trial of cause would necessarily have resulted in a similar judgment. West's Ann.Code Civ.Proc. §§ 662, 663; West's Ann.Const. art. 6, § 4½.

4. New Trial ⇐164

In action tried without a jury, resulting in judicial declaration that plaintiffs were owners of realty free and clear of all claims and liens asserted by defendants, trial court had authority under statute to modify judgment so as to declare that plaintiffs' title to realty was held subject to liens recorded by state and Division of Labor Law Enforcement. West's Ann.Code Civ.Proc. §§ 662, 663.

5. New Trial ⇐164

Where order denying motion for new trial was signed, filed and entered and expressly specified in what respects con-

clusion of law, theretofore filed, was corrected, directed that judgment be entered accordingly, and expressly set forth the respects in which judgment, also theretofore filed, was modified, making specified changes in conclusion of law and judgment by interlineation without signing and filing new findings of fact and conclusions of law did not result in any procedural error or abuse of discretion. West's Ann. Code Civ.Proc. §§ 662, 663.

6. New Trial ⇐163(1)

Where original findings and judgment and order denying a new trial and modifying judgment were signed, filed and entered, order denying a new trial was not lacking in formal sufficiency merely because it required reference to original findings. West's Ann.Code Civ.Proc. §§ 662, 663.

7. Trial ⇐395(2)

Findings need not be in any particular form and are sufficient if they can be made certain by reference to either the pleadings or record.

8. New Trial ⇐164

Statute, authorizing court to change or add to the findings, modify the judgment, or grant a new trial in ruling on motion for new trial in cause tried without a jury, is to be liberally construed to achieve the purposes it was designated to accomplish. West's Ann.Code Civ.Proc. § 662.

9. Armed Services ⇐101

Servicemen's Readjustment Act was intended to benefit and protect veterans only, and a nonveteran may not be permitted to circumvent the act and secure its benefits by using a true veteran as a mere "straw". Servicemen's Readjustment Act of 1944, § 501 as amended 38 U.S.C. A. § 694a.

10. Trusts ⇐136½

Where legal title to realty was conveyed to a veteran and another without change in possession or payment of consideration in order to obtain a loan thereon under Servicemen's Readjustment Act for benefit of grantors who had never served in armed forces, such realty, though held in trust by grantees for benefit of grantors, was subject to liens recorded by state and Division of Labor Law Enforcement as creditors of grantees, though grantors were not indebted to, and did not intend to defraud, lien claimants. Servicemen's Readjustment Act of 1944, § 501 as amended 38 U.S.C.A. § 694a.

11. Action ⇐4

A party to illegal transaction cannot come into a court of law and set up against either another party to transaction or a third party a claim or defense based on a violation of law or an illegal purpose.

12. Contracts ⇐346(1)

Whatever the state of the pleadings, where evidence shows that plaintiff in substance seeks to enforce an illegal contract, court has both the power and the duty to ascertain the facts in order that it may not unwittingly lend its assistance to the consummation or encourgement of what public policy forbids.

13. Fraudulent Conveyances ⇐179(2)

A conveyance in fraud of creditors vests title to property transferred in grantee, except as against creditors of grantor, and while grantee holds title to such property, it is subject to claims of his creditors to the same extent as any other property to which he has title, and neither fraudulent grantor nor grantee can set up the fraudulent character of conveyance as against creditors of grantee.

14. Declaratory Judgment ⇐369

In action for judicial declaration that plaintiffs owned realty free and clear of all claims and liens asserted by grantees and creditors of grantees, to whom plaintiffs had conveyed legal title in order to obtain a loan on realty under Servicemen's Readjustment Act for benefit of plaintiffs, general finding that grantees held the realty in trust for benefit of plaintiffs did not render findings uncertain or inconsistent with finding that realty was subject to liens of grantees' creditors, in view of more specific and detailed findings with respect to nature and unlawful origin of constructive trust under which grantees held title.

Servicemen's Readjustment Act of 1944, § 501 as amended 38 U.S.C.A. § 694a.

15. Appeal and Error ⇐934(2)

Findings must be construed to support the judgment by the reconciliation of seeming ambiguities and uncertainties.

Barry Sullivan, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann and Jay L. Shavelson, Deputy Attys. Gen., for respondent State.

Pauline Nightingale, Los Angeles, Conrad Lee Klein, Hollywood, Joseph Abihider, Los Angeles, for respondent Division of Labor Law Enforcement.

LILLIE, Justice.

Plaintiffs instituted this action to secure a judicial declaration that they were the owners, as joint tenants, of certain improved real property free and clear of all claims and liens asserted by the defendants. A disclaimer was filed by defendants, the Maioranas, to whom plaintiffs had conveyed the subject property, after their failure to plead to the complaint. Defendants State of California and Division of Labor Law Enforcement answered, admitting the transfer to the Maioranas and setting forth the amount and nature of their liens against the property as creditors of the Maioranas. An amended answer of the Division of Labor Law Enforcement raised the affirmative defense of laches and further alleged that the plaintiffs had come to court with unclean hands in that they had transferred title to the Maioranas in order to obtain illegal benefits from the federal government.

The trial court, sitting without a jury, rendered judgment in plaintiffs' favor, which judgment and its supporting findings of fact and conclusions of law were duly signed, filed and entered. Thereafter, defendants State of California and Division of Labor Law Enforcement moved the court for a new trial, reasserting the defense of illegality and requesting that the prior judgment be vacated pursuant to section 663, Code of Civil Procedure, as being "against the law." This motion was denied, but "pursuant to the provisions of section 662 of the Code of Civil Procedure" the trial court "modified" the judgment to the extent that plaintiffs' title was declared to be held subject to the liens recorded by the State and its agency. The modification was accomplished by an express provision in the court's order that one of the conclusions of law be changed to reflect the court's views and the corrected conclusion was set forth thereafter and followed by the recital "Let judgment be entered accordingly." No changes were made in the findings of fact. Plaintiffs have appealed from the judgment as modified.

Briefly recounting the evidence relative to the real property transaction in question, the pivotal portion of which by pre-trial order was undisputed, it appears that in April of 1946 plaintiffs acquired title to the subject property and in November of the same year, without change in possession or payment of consideration, conveyed the premises to the Maioranas. The following month the Maioranas executed a trust deed in favor of a Santa Monica lending agency to secure a loan in the sum of $9,500. It further appears that plaintiffs were the real applicants for the loan which was obtained by virtue of Mr. Maiorana's status as a former serviceman. The proceeds of the loan were then used to pay off existing encumbrances against the property, and all payments on the Santa Monica loan were made by plaintiffs, neither of whom had ever been in the armed forces.

The trial court signed findings of fact incorporating in detail what has heretofore been narrated. As a conclusion of law, however, it found that while the conveyance was "part of an illegal transaction" in violation of certain federal statutes, "no creditor nor any of the appearing defendants were defrauded by such illegal transfer" and hence the defense of illegal-

ity was unavailable. In its order denying a new trial and modifying the judgment, the trial court directed that the conclusion of law relating to the nonavailability of the defense of illegality be deleted and in lieu thereof there be inserted, as a new conclusion, that the premises were subject to the liens of the State and its agency and that the Maioranas had no interest in the subject property. As already pointed out, the order then related "Let judgment be entered accordingly," after which there was a direction that the judgment itself be modified to provide such changes. These changes, both in the conclusions of law and judgment, were effected by interlineation.

On appeal it is contended that the court erred (1) in changing its conclusions of law, (2) in changing its judgment, (3) in making the aforesaid changes by the procedural method followed and (4) in providing that the property be held subject to the liens recorded by the Maiorana creditors.

[1, 2] While respondents' motion for a new trial was based on section 663, Code of Civil Procedure, the court's order was made pursuant to the provisions of section 662. Having reference to new trials, section 662 reads as follows: "In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, * * * and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered * * *." Appellants argue that the foregoing enactment "does not authorize the Court to change the conclusions of law, it may change the Findings of Fact, add to them, take from them, or modify the judgment, that is all that is authorized by said section." Such a narrow or strict construction of the statute does not accord with the views of our reviewing courts which have consistently declined to limit the scope of the section, since it was amended in 1929 (Moore v. Levy, 128 Cal. App. 687, 696, 18 P.2d 362). Said the Supreme Court in Spier v. Lang, 4 Cal.2d 711, 714, 53 P.2d 138, 140: "The obvious purpose of the statute * * * was to give the court on denying the motion for a new trial the broad power to change its findings and to modify its judgment and thus avoid the necessity of a new trial. This was to subserve the ends of justice and to prevent unnecessary delays in cases where the court deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law." Although the section does not expressly provide for the correction of conclusions of law, we think the term "findings" is reasonably synonomous with "findings of fact and conclusions of law," particularly since the statute "presents an innovation in court procedure" (Roraback v. Roraback, 38 Cal.App.2d 592, 597, 101 P.2d 772, 773, 775), otherwise the trial court would be deprived of the broad power to correct its mistaken application of the law to the findings. Spier v. Lang, supra. Too, the mere omission from section 662 of the words "conclusions of law" does not divest the court of authority to correct *both* the findings and conclusions of law. So it was declared in Pacific Home v. County of Los Angeles, 41 Cal.2d 855, at page 857, 264 P.2d 544, at page 546: "Upon denying the motion for a new trial, the court was authorized to vacate the prior findings, conclusions and judgment, and to make new findings and conclusions, and to render a new judgment [citing section 662, Spier v. Lang, supra]." To the same effect are Gottbehuet v. Fox, 130 Cal.App. 2d 336, 340, 278 P.2d 925; Rutledge v. Rutledge, 119 Cal.App.2d 112, 259 P.2d 78; Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 158 P.2d 23. In the case at bar the trial court declined to change its findings of fact but considered itself mistaken as to the application of the law to such find-

ings. Even should the previously stated implication from Spier v. Lang, supra, be unwarranted, it must be borne in mind that "(T)he line of demarcation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases" (Levins v. Rovegno, 71 Cal. 273, 275, 12 P. 161, 162). Here, the trial court's conclusion as to the existence of respondents' liens upon the property was in effect a finding of the property's indebtedness for and in the amount of such liens. A finding of indebtedness is not a conclusion of law but the statement of an ultimate fact (Nisbet v. Rhinehart, 2 Cal.2d 477, 482, 42 P.2d 71), and it makes no difference that the finding is denominated as a conclusion of law (People v. One 1949 Cadillac, 126 Cal.App.2d 410, 412, 272 P.2d 873; Kramer v. Watnick, 63 Cal. App.2d 308, 310, 146 P.2d 947). To the same effect is Gossman v. Gossman, 52 Cal.App.2d 184, 191–193, 126 P.2d 178.

[3] Appellants' contention is without merit for the further reason that the sole issue is one of law involving the legal effect of the finding that the transaction in question was tainted with illegality; as will hereinafter be pointed out, a second trial of the cause would necessarily have resulted in a judgment similar to that from which this appeal is taken, and hence no miscarriage of justice resulted (Const., art. VI, sec. 4½; Bureau of Welfare, California Teachers' Ass'n Southern Section v. Drapeau, 21 Cal.App.2d 138, 151, 68 P.2d 998).

[4] Appellants' second contention relates to the trial court's claimed lack of authority to correct its judgment and enter a different judgment as modified. Contrary to appellants' assertion that the term "modification" denotes "some minor change in substance," section 662 expressly authorizes the court to "modify the judgment, *in whole* or in part." (Emphasis added.) The same contention was decided adversely to appellants in Clarke v. Fiedler, 44 Cal.App.2d 838, 847, 113 P.2d 275, 280, where this court said: "Appellants' contention that the trial court was without power to alter its findings and completely to reverse its prior judgment cannot be sustained. Under the broad power conferred upon the court in this regard by section 662 of the Code of Civil Procedure, the trial court was empowered, in ruling upon the motion for a new trial, if it deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law, to set aside the previous findings and the judgment predicated thereon." A similar situation was presented in Wyman v. Monolith Portland Cement Co., 3 Cal.App.2d 540, 545, 39 P.2d 510, 512, where the trial court ordered judgment in favor of the defendant company and upon the denial of plaintiff's motion for a new trial rendered judgment for the plaintiff. Affirming the new and different judgment the reviewing court said: "The very purpose of the section is to permit a court to correct its own errors without incurring the delay and expense incident to a new trial or appeal." The same construction of the statute is found in In re Estate of Perkins, 21 Cal. 2d 561, 134 P.2d 231, and In re Estate of Busteed, 105 Cal.App.2d 14, 17, 232 P.2d 881. We do not believe appellants' contention to be tenable.

[5–8] It is next urged by appellants that the procedural method followed by the trial court in modifying its judgment was without sanction of law. They argue in effect that new findings of fact and conclusions of law should have been signed and filed, and that it was error to accomplish the change in question by interlineation. The order denying a new trial was signed, filed and entered; it expressly specified in what respects the conclusion of law, theretofore filed, was corrected, and then recited "Let judgment be entered accordingly." Thereupon the order expressly set forth the respects in which the judgment, also theretofore filed, was modified. The changes in the conclusion of law and judgment were then made by interlineation. Since section 662 authorizes a modification of the judgment "on such terms as may be just," neither procedural

error nor abuse of discretion is manifest in the record before us. Furthermore, there is no merit to the implied suggestion that the order denying a new trial was lacking in formal sufficiency because it required reference to the original findings. As stated in Bourke v. Frisk, 92 Cal.App. 2d 23, 32, 206 P.2d 407, 412; "Findings need not 'be in any particular form' * * * Findings are sufficient * * * 'if they can be made certain, either by reference to the pleadings or to the record. * * *'" This principle is particularly applicable to proceedings under section 662, Code of Civil Procedure, the provisions of which "are to be liberally construed to achieve the purposes it was designated to accomplish" (Roraback v. Roraback, 38 Cal.App.2d 592, 597, 101 P.2d 772, 775). Appellants rely on Easterly v. Cook, 140 Cal.App. 115, 123–124, 35 P.2d 164 and Supple v. Luckenbach, 12 Cal.2d 319, 322, 84 P.2d 52, in both of which cases the first of two judgments rendered and based upon unsigned findings was held to be a nullity. Here, as already pointed out, both the original findings and judgment, as well as the order of modification, were duly signed, filed and entered. It is clear therefore neither of appellants' cases is in point.

Appellants' final argument challenges that portion of the modified judgment which decreed that appellants' title be held subject to respondents' liens as creditors of the Maioranas. Since the modified judgment confirmed the court's original finding that the Maioranas at all times in question held the premises "for the benefit of and in trust for the plaintiffs," appellants argue that "trust property may not be taken to pay (the) personal debts of (the) trustee." They admit that their transaction with the Maioranas violated certain federal statutes and was consequently illegal; nevertheless they contend that (1) any defense of illegality was available only to the United States, (2) the evidence was insufficient to establish any intent by appellants to defraud respondents, (3) the transaction being governed by federal statutes, "(T)he State of California could not adjudge the rights of the United States and the lender," and (4) under the pertinent federal legislation the contract in question is voidable at most, and not void. We conclude that each and every one of the foregoing points is without merits.

[9, 10] The loan of $9,500 from the Santa Monica source was sought and secured under the provisions of the Servicemen's Readjustment Act (38 U.S.C.A. § 694a). Discussing that legislation, the court in Diamond v. Willett, La.App., 37 So.2d 338, 341, said: "The acts of Congress herein referred to are designed to give relief to members of the armed forces, of limited means, who honorably served their country during World War II." Hence it is provided in the statute (38 U.S.C.A. § 694a, supra) that the proceeds of the government-guaranteed loan thereunder be used for the payment of property purchased or improved under terms which bear a proper relation to the veteran's present and anticipated income and expenses. The intent to benefit and protect veterans, and veterans only, is plain throughout the statute; accordingly, no more strained construction of the legislation could be conceived than to allow a nonveteran, such as each of these appellants, to circumvent the act and secure its benefits by using, as admittedly they did, a true veteran such as Maiorana as a mere "straw." Other circumventions of the statute, no less censurable, have been properly denounced by our courts as violative of public policy, entirely void and wholly unenforceable (Young v. Hampton, 36 Cal.2d 799, 805–806, 228 P.2d 1, 19 A.L.R.2d 830; Sattler v. Van Natta, 120 Cal.App.2d 349, 352, 260 P.2d 982). To the same effect is Schalow v. Schalow, 163 Cal.App.2d 448, 329 P.2d 592, which involved the purchase of a home pursuant to Military and Veterans Code, sec. 985 et seq.

[11, 12] Appellants' premise that they did not intend to cheat or defraud respondent State and respondent state agency

is utterly fallacious and beside the point. As forcefully stated in Lee On v. Long, 37 Cal.2d 499, 502, 234 P.2d 9, 11: "'No principle of law is better settled than that a party to an illegal transaction cannot come into a court of law and * * * set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim' (citation). *Nor is this established rule limited in its application to parties to the illegal transaction as distinguished from an attempt to set up a claim against a third party based on the law's violation*" (emphasis added). The converse, of course, must necessarily be true when, as here, appellants seek to defend against the affirmative allegation of illegality contained in respondents' pleadings. "Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract * * * the court has both the power and the duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids" (Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 147–148, 308 P.2d 713, 717). Nor is it of any moment that appellants were not indebted to respondents and that the latter will thus benefit to the extent of their liens. The claimed injustice to appellants is "outweighed by the importance of deterring illegal conduct" (Lewis & Queen v. N. M. Ball Sons, supra, 48 Cal.2d at page 150, 308 P.2d at page 719).

[13] Since a violation of the pertinent legislation is a criminal offense (Young v. United States, 9 Cir., 178 F.2d 78), since appellants aided and abetted the violation and are equally responsible (Russell v. United States, 5 Cir., 222 F.2d 197) and since our courts have consistently refused to sanction judicial enforcement of claims arising from such an unlawful transaction (Young v. Hampton, supra; Cole v. Ames, 155 Cal.App.2d 8, 12–13, 317 P.2d 662), it follows that appellants may not validly rely upon their "trust" theory to escape the consequences of their acts. Cases cited by appellants (Miller v. Miller, 55 Cal.App. 2d 199, 205, 130 P.2d 438; Murphy v. Clayton, 113 Cal. 153, 161, 45 P. 267, and Breeze v. Brooks, 71 Cal. 169, 9 P. 670, 11 P. 885) all proceed upon the proposition that the beneficiary of the trust has not acted unlawfully. A far different situation is presented when legal title is vested in another for improper purposes. Thus, in Withrow v. National Surety Co., 122 Cal.App. 242, 10 P.2d 83, plaintiff's conveyance was held to have been conceived in fraud and no enforceable trust arose. "A conveyance in fraud of creditors vests title to the property transferred in the grantee, except as against the creditors of the grantor. While the grantee holds such title, the property is subject to the claims of his creditors to the same extent as any other property to which he has title. Neither the fraudulent grantor nor grantee can set up the fraudulent character of the conveyance as against the creditors of the grantee." 122 Cal.App. at page 247, 10 P.2d at page 85. The foregoing principle is followed in Ramirez v. Hartford Accident & Indemnity Co., 29 Cal.App.2d 193, 197, 84 P.2d 172.

[14, 15] Finally, the trial court's general finding that the Maioranas held the subject property "for the benefit of and in trust for plaintiffs" does not render the findings uncertain and inconsistent as to respondents' liens. More specific and detailed findings were made with respect to the nature of the constructive trust mentioned in the above general finding, particularly its unlawful origin. In such an instance, the specific finding prevails (Lobb v. Brown, 208 Cal. 476, 481, 281 P. 1010). Furthermore, it is settled that findings must be construed to support the judgment by the reconciliation of seeming ambiguities and uncertainties (Richter v. Walker, 36 Cal.2d 634, 639, 226 P.2d 593). No reversible error is manifest.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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In re Max OSSLO and Arthur L. Meyer on Habeas Corpus.

Cr. 6295.

Supreme Court of California,
In Bank.
Dec. 23, 1958.

Habeas corpus proceeding seeking to relieve the petitioners of illegal restraint of probation orders and to require the Superior Court to revoke probation and to sentence the petitioners. The Supreme Court, Schauer, J., held that the record did not establish that the petitioners had accepted probation containing conditions that they as union officials refrain from holding any union office and from accepting any remuneration from any union and that the petitioners could disavow probation and demand sentence.

Judgment in accordance with the opinion.

Carter, J., dissented in part.

1. Habeas Corpus ⚖25.2(4)

Habeas corpus was a proper remedy to effect release from restraint of probation orders and to remand petitioners to Superior Court for sentence. West's Ann. Pen.Code, §§ 1484, 1493.

2. Habeas Corpus ⚖4

Habeas corpus was a proper remedy to effect petitioners' release from restraint of probation orders as against claim that appeal was the proper remedy where question of appealability of the orders had never been decided and petitioners had a vital interest in having sentence imposed as soon as possible. West's Ann.Pen.Code, §§ 1484, 1493.

3. Criminal Law ⚖982.1

Defendant has no right to be granted probation, but "probation" is a privilege, an act of grace, or clemency.

See publication Words and Phrases, for other judicial constructions and definitions of "Probation".

4. Criminal Law ⚖982.5(1)

Defendant has a right to refuse probation.

5. Criminal Law ⚖982.5(1)

Petitioners' right to reject probation after conviction was not defeated on the ground that their failure to request a stay of execution of the probation orders evidenced an irrevocable acceptance of conditions of such orders, where such failure was based on petitioners' mistaken belief that their appeal and release on bail effected a stay. West's Ann.Pen.Code, §§ 17, 182, 245, 1237, 1243.

6. Criminal Law ⚖982.6(4)

Probation orders are to be construed favorably to the defendants.

7. Criminal Law ⚖982.5(1)

Provision in probation orders that defendants should resign their union offices effective such date as the judgment may become final prevailed over provision that the defendants hold no office during any part of the period of probation. West's Ann. Pen.Code, §§ 1237, 1243.

8. Criminal Law ⚖982.5(1)

Where under terms of probation order the first installment of fines did not become

due until 60 days after the defendants' release from custody and the defendants had been free on bail during most of the time since the entry of the probation orders, so that installments of their probationary fines had not become due, failure of defendants to file the affidavits referred to in the probation orders that payment on the fines should come from their own funds and not the union moneys did not evidence a rejection of probation. West's Ann.Pen.Code, §§ 1237, 1243.

9. Criminal Law ⇐1083

Generally pending the appeal the Superior Court has no jurisdiction to vacate a judgment or make any order affecting it.

10. Criminal Law ⇐1023(12)

Under the statute specifying the judgments and orders from which a defendant may appeal, an order granting probation is deemed a "final judgment". West's Ann. Pen.Code, § 1237.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

11. Criminal Law ⇐982.5(1), 982.8, 982.9(1)

While an appeal from a probation order is pending, the trial court, if execution of the order is not suspended, has the power to require the supervision of the probationer and to punish violations of the conditions of the probation by modification of those conditions or revocation of the probation. West's Ann.Pen.Code, §§ 1203.2, 1203.2a, 1203.3, 1237, 1243.

12. Criminal Law ⇐982.9(1)

The mere taking and pressing of an appeal from an order granting probation and seeking reversal of the conviction or a declaration that any of the conditions of the probation are invalid does not merely as such constitute a ground for revocation or modification of the probation. West's Ann. Pen.Code, §§ 1203.2, 1203.2a, 1203.3, 1237, 1243.

13. Criminal Law ⇐982.5(1)

The defendant has a right to refuse probation where its conditions may appear to defendant more onerous than the sentence which might be imposed.

14. Criminal Law ⇐982.5(1)

Where union officials were placed on probation after conviction of an offense and one of conditions of probation was that the defendants should not hold any position or receive any remuneration from any union, defendants did not manifest an acceptance of conditions of probation where they immediately appealed from probation orders and obtained release on bail by order of Supreme Court and attacked terms of the probation as unreasonable and beyond the power of trial court and promptly after denial of certiorari asserted in the trial court their rights to reject probation notwithstanding they did not comply with the trial court's direction when it announced the conditions that the defendants tell the court whether they wanted to accept probation.

15. Criminal Law ⇐982.5(2)

The trial court could not as a condition of granting probation to the defendants make their right to reject the offered probation conditional upon their immediate announcement of rejection.

16. Habeas Corpus ⇐113(5½)

Defendants were not entitled to raise the question of the trial judge's alleged bias and prejudice where the question had not been raised in the lower court. West's Ann.Code Civ.Proc. § 170.

Charles P. Scully, San Francisco, and Thomas Whelan, San Diego, for petitioners.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., James Don Keller, Dist. Atty., and Claude B. Brown, Deputy Dist. Atty., San Diego, for respondent.

SCHAUER, Justice.

By application for habeas corpus petitioners Osslo and Meyer ask that they be relieved of the assertedly illegal restraint of probation orders and that the superior court be required to revoke probation and

to sentence petitioners.[1] The superior court determined that petitioners had "accepted probation" and that the court would not "release them from it." We have concluded that petitioners could disavow probation and demand sentence.

On August 9, 1956, a jury found petitioners guilty of conspiracy to commit assault and of assault by means likely to produce great bodily injury. As is recounted in People v. Osslo (1958), 50 Cal.2d 75, 323 P.2d 397, petitioners are butchers' union officials and the offenses were related to a jurisdictional dispute between petitioners' union and a clerks' union. The physical acts of violence constituting the assault were committed not in person by petitioners but by members of a sailors' union (a union not involved in the jurisdictional dispute) who had been hired by the butchers' union to aid it in that dispute. The condition of probation which resulted in the present controversy requires that petitioners give up their union offices.

On August 27, 1956, the trial court in passing upon petitioners' application for probation stated, "Now, although I am going to grant these defendants probation, of course probation is a privilege and they are going to have to comply with it. If they don't like the terms, of course they don't have to accept probation. *When I get through here, I want you to tell me. You can confer with your clients and tell me whether you want to accept probation.*" (Italics added.) The trial court then stated the conditions upon which it proposed to grant probation. Neither petitioners nor their counsel said anything in open court as to acceptance or rejection of probation. Petitioners were placed in the custody of the sheriff.

As to each petitioner the probation orders of August 27, 1956, provided, among other things, as follows: that imposition of sentence was suspended for ten years; that petitioner be confined (Osslo for six months, Meyer for three months) in a county adult detention facility; that petitioner pay a fine (Osslo $1,500, Meyer $750) from his own funds in monthly installments of $50, the first installment to become due within 60 days from petitioner's "release from custody"; that petitioner annually, on or about December 31, file with the probation officer on a form approved by the court, an affidavit that the payments "have come from his own funds and not from monies received or solicited from any Union or its members"; that "during the period of his probation [petitioner] shall not hold any position * * * in, or receive any remuneration from, any union"; that "effective such date as this judgment may become final, [petitioner] shall resign any [union] position"; and that "this * * * Judge shall retain jurisdiction of this matter throughout the said period of probation and no other * * * Judge shall modify this order without notice to the Judge who tried the case." Petitioners at once appealed to the District Court of Appeal.

On August 29, 1956, there was filed in the superior court a form of affidavit and an order of the trial judge that during probation the probationers shall sign such an affidavit "during * * * January of each year, or more often, if requested." This form of affidavit states, among other things, that affiant has received no funds from any union or union member for the purpose of paying his fine, and "That in accordance with the terms of probation,

1. The petition for habeas corpus named as respondents the Superior Court of the State of California, in and for the County of San Diego, and the Honorable John A. Hewicker, judge of that court, as well as the sheriff of San Diego county. This court ordered that the sheriff show cause "why the relief prayed for in this [habeas corpus] proceeding should not be granted." Although the superior court and the judge thereof were not ordered to show cause, the "Return and Answer to Petition for Writ of Habeas Corpus" was filed on behalf of such court and judge as well as on behalf of the sheriff, and the traverse to the writ again names the three respondents. Therefore, references in this opinion to "respondents" are to the court and judge as well as the sheriff.

affiant has held no * * * office in any * * * Union since September 1, 1956, and that all offices held prior to said date by affiant have been terminated by resignation."

On September 13, 1956, this court on an application for habeas corpus ordered petitioners' release on bail. On their appeal in the District Court of Appeal (People v. Osslo (Cal.App.1957), 310 P.2d 1020, 1030–1031) and thereafter in this court (which granted a hearing after the decision on appeal by the District Court of Appeal) petitioners unsuccessfully urged that the trial court was without power to require, as a condition of probation, that they should not hold any union position or receive remuneration from any union. This court ordered that the provision of the probation orders by which the individual trial judge purported to retain jurisdiction of the cause be stricken; in all other respects the orders were affirmed. (People v. Osslo (1958), supra, 50 Cal.2d 75, 103, 104 [29–32], 323 P.2d 397, 412, 413; rehearing denied.)

Petitioners sought certiorari in the United States Supreme Court. On April 28, 1958, this court denied their application for stay of execution of judgment pending the application for certiorari. On April 29, Mr. Justice Douglas of the United States Supreme Court granted bail. On June 9, 1958, the federal supreme court denied certiorari [357 U.S. 907, 78 S.Ct. 1152, 2 L.Ed.2d 1157] and terminated petitioners' release on bail as of June 23, 1958.

On June 18, 1958, petitioners gave notice that on June 23 they would move the trial court for an order "modifying the judgment * * * and modifying the Order admitting [petitioners] to probation."

On June 23, 1958, petitioners for the first time expressed to the trial court their desire to reject probation. They moved for sentence as misdemeanants [2] and urged that "imposition of a substantial fine would serve the interests of justice." When this motion was denied, petitioners explained that they believed that "honor requires that [they] not give up [their] right to employment by a union," and moved that the court "withdraw the order for probation, and if * * * sentence cannot be made a misdemeanor that * * * your Honor pronounce judgment." The court denied this motion and the further motion for modification of the conditions of probation to permit union employment.

The trial court based its denial of petitioners' motions upon the following stated grounds: "I can't in good conscience make it a misdemeanor" because codefendants of petitioners (the members of the sailors' union employed by petitioners) had been sentenced to state prison and were serving their sentences. "Levying a fine in a case of this kind is useless" because the fine would be paid by assessment of union members. "I think it is going to be conducive to peace in the labor movement if these officials have to control their actions to such an extent that they don't become involved with the Penal Code * * * They are responsible to the criminal courts and * * * if they know it and it is certain if they are convicted they won't be turned loose and have the matter made a misdemeanor, I think we will have peace in the labor movement." If petitioners "didn't want to accept" probation when the probation orders were made, they "should have told me so and I would have sentenced [them] at that time. So they have accepted probation * * * [for the 22 months which had elapsed since the making of the probation orders] and I am not going to release them from it." Petitioners were remanded to the custody of the sheriff.[3]

[1] Habeas corpus is a proper remedy to effect the relief sought by petitioners; i. e., release from the restraint of the probation orders and remand of petitioners to the superior court for sentence. (Pen.

2. The offenses of which petitioners were convicted are punishable either as misdemeanors or as felonies. (Pen.Code, §§ 17, 182, 245.)

3. On August 6, 1958, this court ordered petitioners released on bail pending final determination of this habeas corpus proceeding.

Code, § 1484 [on habeas corpus the court must dispose of petitioner "as the justice of the case may require"]; Pen.Code, § 1493 ["In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto"]; In re Stoliker (1957), 49 Cal.2d 75, 78 [3], 315 P.2d 12; In re Bartges (1955), 44 Cal.2d 241, 247–248 [5–7], 282 P.2d 47; In re McCoy (1948), 32 Cal.2d 73, 76–77 [4], 194 P.2d 531.) [4]

[2] Respondents point out that petitioners have appealed to the District Court of Appeal from the order of June 23, 1958, and urge that appeal is the proper remedy. The order is probably appealable as an order made after judgment affecting the substantial rights of petitioners. (See In re Bine (1957), 47 Cal.2d 814, 817 [6], 306 P.2d 445.) However, since the question of the appealability of such an order has never been decided, since the order to show cause has issued in this proceeding, and since petitioners have a vital interest in having sentence imposed as soon as possible, we shall in this proceeding consider petitioners' right to refuse probation.

[3, 4] The appellate courts of this state have had occasion repeatedly to emphasize that a defendant has no right to be granted probation; probation is a privilege, an act of grace or clemency. (E. g., In re Davis (1951), 37 Cal.2d 872, 874, 236 P.2d 579; In re Trombley (1948), 31 Cal.2d 801, 811 [9], 193 P.2d 734; cases collected in West's Ann.Pen.Code (1956), § 1203, note 3, pp. 310–311, § 1203.1, note 3, p. 337.) It now becomes necessary to emphasize that a defendant has the right to refuse probation, a right of which he cannot lightly be deprived.

[5, 6] The trial court apparently was of the opinion that petitioners' right to reject probation was affected by their failure to seek a stay of execution of the probation orders pending the appeal, for the trial court at the hearing of June 23, 1958, inquired why petitioners "didn't ask for a stay of the probation proceedings so that they wouldn't be governed by the probation orders while the case was up on appeal." [5] We cannot agree that petitioners' failure to request a stay of execution of the probation orders evidenced an irrevocable acceptance of the conditions of those orders. Petitioners' failure to seek a stay of execution was based on their mistaken belief that their appeal and release on bail effected a stay [6] and, therefore, such failure did not

4. Despite petitioners' release on bail, habeas corpus will lie to test the legality of their constructive restraint. (In re Petersen (1958), 51 Cal.2d 177, 331 P.2d 24.)

5. In this connection we note that the trial court is correct in its view that the petitioners did not request a stay of execution. Although in this proceeding counsel for both petitioners and respondents aver that petitioners applied for and the trial court denied a stay of execution, the record on appeal from the probation orders shows only that the trial court denied a stay of execution as to the sailor defendants and that appended to Meyer's notice of appeal is a blank form of order staying execution; it does not show the making in or denial by the trial court of a motion for stay of execution pending appeal as to Osslo and Meyer.

Petitioners do not suggest that they sought a stay of execution in the District Court of Appeal, and they did not seek such a stay in this court while their appeal was pending. Although petitioners in this proceeding allege and respondents do not deny that Justice Douglas of the United States Supreme Court ordered a "stay of execution of judgment," it appears that Justice Douglas ordered only that petitioners be temporarily released on bail (see 357 U.S. 907, 78 S.Ct. 1152, 2 L.Ed.2d 1157).

6. The trial court is correct in its view that petitioners at all times since the making of the probation orders have been subject to probation. At the time petitioners appealed, section 1243 of the Penal Code provided that "An appeal to the Supreme Court or to a district court of appeal from a judgment of conviction stays the execution of the judgment in all cases where sentence of death has been imposed, but does not stay the execution of the judgment in any other case unless the trial or appellate court shall so order." So far as the effect

indicate acquiescence in the terms of probation.

Petitioners take the view that they evidenced rejection of probation by resuming their activity in their union offices immediately upon their release on bail (on September 13, 1956) and by failing, while their appeals were pending, to file either the affidavits referred to in the original probation orders or the somewhat different affidavits set out in the order of August 29, 1956. It appears proper to point out that we do not base our decision that petitioners have the right to disavow probation upon this consideration.

[7] The original probation orders provide both that petitioners shall hold no union office "during the period of probation" (i. e., beginning with the entry of the probation orders on August 27, 1956) and that petitioners shall resign their union positions "effective such date as this judgment may become final." Since the probation orders of August 27 are to be construed favorable to petitioners (In re Bramble (1947), 31 Cal.2d 43, 51 [6, 7], 187 P.2d 411), the provision that they resign their union offices "effective such date as this judgment may become final" (that is, when affirmance on appeal became final; see Pacific Gas & Elec. Co. v. Nakano (1939), 12 Cal.2d 711, 714 [1], 87 P.2d 700, 121 A.L.R. 417; Jennings v. Ward (1931), 114 Cal.App. 536, 537 [1], 300 P. 129) prevails over the provision that they hold no office during any part of the period of probation. Thus, petitioners' resumption of union activity on September 13, 1956, was not inconsistent with the original probation orders properly construed.

[8] The original probation orders of August 27 further provide that each petitioner shall file annually "an affidavit that said payments on said fines have come from his own funds and not from [union] monies." Under the terms of probation, the first installment of the fines did not become due until 60 days after petitioners' "release from custody," that is, until they had remained in custody for the periods prescribed by the probation orders. Petitioners have been free on bail during most of the time since the entry of the probation orders; they have not served their probationary terms of custody; and therefore the installments of their probationary fines have not become due. Thus there has been no occasion for them to file the affidavits referred to in the original probation orders and their failure to do so does not evidence rejection of probation.

The terms of the form of affidavit prescribed by the order of August 29, 1956, differ somewhat from those specified in the original probation orders. The August 29 form of affidavit states, among other things, that "affiant has held no * * * office in any * * * Union since September 1, 1956." This later order does not expressly state that it is intended to modify the previously declared terms of probation, but if it is valid such would be its effect. We need not now decide whether the trial court's statutory power to modify the conditions of or revoke probation "at any time during the term of probation" (Pen.Code, § 1203.3)

of appeal was concerned, an order granting probation was a "judgment" as to which execution was not stayed, for section 1237 of the Penal Code provided (as it now provides) that "An appeal may be taken by the defendant: 1. From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section * * *"; thus a probation order was "deemed" a judgment so far as all the mechanics of appeal were concerned. (In 1957 section 1243 was amended to expressly provide that execution of an order granting probation is not stayed by appeal unless the trial or appellate court so orders.) Petitioners' release on bail while the appeal was pending did not suspend operation of the terms of probation other than the provisions for confinement. (People v. Jennings (1954) 129 Cal.App.2d 120, 122 [2], 276 P.2d 124; cf. In re Davis (1957), 150 Cal.App.2d 790, 791–792, 310 P.2d 1031, where the trial court, when it granted probation, stayed "the judgment and proceedings" pending appeal.)

can be exercised while an appeal from the probation order is pending and, if so, to define its extent. But inasmuch as both the trial court and the petitioners indicate views on the subject which should not be understood to have our approval, and as petitioners must be remanded to the superior court for further proceedings, some discussion of the matter is desirable. (See Code Civ. Proc., § 53.)

[9, 10] The trial court here apparently assumed (since it made the order of August 29, 1956) that it could modify (or clarify) the terms of probation while an appeal was pending, but it also indicated the view that it could not revoke probation while an appeal was pending.[7] It is, of course, the general rule that "Pending the appeal the superior court has no jurisdiction to vacate the judgment or make any order affecting it." (In re Johannes (1931), 213 Cal. 125, 130, 1 P.2d 984 [a case not involving an order granting probation].) It is also true that "within the meaning" of section 1237 of the Penal Code (which specifies the judgments and orders from which a defendant may appeal) an order granting probation is "deemed to be a final judgment." But it could well be argued that deeming an order granting probation to be a final judgment within the meaning of section 1237 (i. e., making it an appealable order and making the scope of review the same as though the appeal were taken from a final judgment of conviction) does not preclude any court from recognizing that for purposes other than those of section 1237 there is a substantial and here pertinent difference between an order granting probation and a final judgment as such.

[11] The final judgment and commitment place the defendant in the custody of the warden or penal authority and remove him from the jurisdiction of the trial court. But probation essentially calls for continuing supervision of the probationer and maintaining jurisdiction and power in the trial court to act in respect to such supervision. For example, section 1203.3 of the Penal Code provides that "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." Section 1203.2 declares that "At any time during the probationary period * * * any probation or peace officer may without warrant, or other process, * * * rearrest any person so placed on probation * * * and bring him before the court * * * and [the court] may thereupon revoke and terminate such probation, if the interests of justice so require * * *." Further indicating a legislative plan that the trial court shall have continuing jurisdiction over a probationer, section 1203.2a expressly provides that "If any defendant who has been released on probation is committed to a prison in this State for another offense, the court which released him on probation shall have jurisdiction to impose sentence, if no sentence has previously been imposed," etc.

[12] From what has been said it would appear to follow that while an appeal from a probation order is pending the trial court, if execution of the probation order is not suspended, should have power to require supervision of the probationer, and to punish violation of the conditions of probation by modification of those conditions or revocation of probation. Further support is given this view by the 1957 amendment of section 1243 of the Penal Code to expressly provide that an appeal does not stay execution of an order granting probation unless the trial or appellate court so orders. Certainly the mere taking and pressing of an appeal from an order granting probation, and seeking reversal of the conviction or a declaration that any of the conditions of

7. The trial court when it made the probation orders stated, "if an appeal is taken and the case is reversed on appeal, if the union wishes to keep you on as an officer, I can't do anything about it, because the minute you file the notice of appeal, I lose jurisdiction on it." Again at the hearing of June 23, 1958, the trial court expressed the view that "you can't touch them when they are up on appeal."

probation are invalid, should not, merely as such, constitute a ground for revocation or modification of probation. It could also be argued that a trial court should not, while an appeal is pending, make any change in the original conditions of probation other than such as might become necessary or expedient by reason of some act or default of the defendant or some event or circumstance not connected with the appeal from the order. In this case, as hereinabove indicated, we do not need to pass upon the extent of the trial court's jurisdiction over the probationers or the terms of their probation while their appeal was pending, but we expressly do not accept as correct or as controlling in this proceeding either petitioners' assumption that they violated probation pending appeal or the trial court's assumptions that it could modify but could not revoke probation pending appeal.

[13] The statutes concerning probation contain no provision as to its acceptance or rejection. However, it is settled that a defendant has the right to refuse probation, for its conditions may appear to defendant more onerous than the sentence which might be imposed. (People v. Osslo (1958), supra, 50 Cal.2d 75, 103 [30], 323 P.2d 397, 413; In re Hays (1953), 120 Cal.App.2d 308, 310 [4], 260 P.2d 1030; People v. Frank (1949), 94 Cal.App.2d 740, 742, 211 P.2d 350; Lee v. Superior Court (1949), 89 Cal.App.2d 716, 717 [1], 201 P.2d 882; People v. Blankenship (1936), 16 Cal.App.2d 606, 610, 61 P.2d 352; People v. Billingsley (1943), 59 Cal.App.2d Supp. 845, 849 [3], 139 P.2d 362.) [8]

[14] It is unnecessary to determine in this case whether a defendant might in some circumstances so manifest "acceptance" of probation as to lose his right to disavow that privilege with the concomitant burdens of its conditions, and thus be placed in the position of being required to intentionally violate probation in order to obtain its revocation and the imposition of sentence. In any event these petitioners did not so manifest "acceptance." Rather, their conduct has been inconsistent with acceptance of the terms of probation. They immediately appealed from the probation orders. They obtained release on bail by order of this court. Upon appeal and then by application for certiorari they attacked the terms of probation as unreasonable and beyond the power of the trial court. Promptly after denial of certiorari they asserted in the trial court their right to reject probation.

[15] It is true that petitioners did not comply with the trial court's direction, when it announced the conditions on which it proposed to grant probation, that they "tell me whether you want to accept probation." But whatever may be within the trial court's permissible scope of conditions for *granting* probation it could not make petitioners' right to *reject* the offered probation conditional upon their immediate announcement of rejection. If petitioners, as soon as the trial court announced the terms upon which it would grant probation, had rejected such offer and demanded sentence, they could not have pressed their contention that the trial court was without power, as a condition of probation, to require them to give up for ten years the union activity which they had chosen as their life's work. Although this contention was legally untenable it was not frivolous. The trial court, in effect, would require petitioners to "accept" the conditions of probation in order to question their legality in the appellate courts.

In People v. Billingsley (1943), supra, 59 Cal.App.2d Supp. 845, 850 [6], 139 P.2d 362, it is said that "Doubtless election to serve the sentence rather than accept probation must be timely made or probation will be deemed to have been accepted." We do not now decide whether a defendant

8. In the light of the cited cases, it must be considered that it is no longer the law that, as held in the case of In re De Voe (1931), 114 Cal.App. 730, 736 [3, 4], 300 P. 874, a defendant who has applied for probation has no right, before his application is acted upon, to withdraw such application and to be sentenced.

might in some circumstances lose his right to disavow probation by failure to make "timely" manifestation of "election to serve the sentence rather than accept probation." In the circumstances of this case petitioners' assertion of that right, made promptly upon the unsuccessful termination (as to all but one provision) of their attacks on the terms of probation by appeal and application for certiorari, was timely.

[6] Petitioners seek to raise the question of the trial judge's bias and prejudice. Without suggesting that they have alleged facts showing bias and prejudice, we decline to pass upon the question because it does not appear to have been raised in the superior court (under Code Civ.Proc., § 170).

For the reasons above stated the petition for habeas corpus is granted and the petitioners are remanded to the custody of the sheriff of San Diego county to be brought before the superior court of that county for proceedings not inconsistent with this opinion. Upon production of petitioners in the superior court as above ordered, that court as to each petitioner, unless it shall decide to admit him to probation upon conditions acceptable to him, shall revoke and terminate probation, arraign him for judgment and (in the absence of legal cause shown) sentence him to such penalty or penalties within the law as such court in its discretion, in the light of all the relevant circumstances, may determine to be appropriate.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.

CARTER, Justice (concurring and dissenting).

I agree with the majority that petitioners must be released from the illegal restraint imposed by the terms of their probation, but the opinion falls far short of granting the relief to which petitioners are entitled, by permitting the trial court to now impose sentence on them. Considering the additional facts revealed at the hearing of petitioners' motions to reject probation, this court has no alternative but to release petitioners from any further restraint, on the ground that they were denied a fair trial in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Denial of a fair and impartial trial in a criminal case, whether the crime charged is a felony or misdemeanor, constitutes a denial of due process of law and is in violation of the Fourteenth Amendment as well as article I, section 13, of the Constitution of California. Moore v. Dempsey, 261 U.S. 86, 91, 43 S.Ct. 265, 67 L.Ed. 543; Chambers v. State of Florida, 309 U.S. 227, 238, 60 S.Ct. 472, 84 L.Ed. 716; Adamson v. People of State of California, 332 U.S. 46, 53, 67 S.Ct. 1672, 91 L.Ed. 1903; see, In re Wells, 35 Cal.2d 889, 221 P.2d 947; In re James, 38 Cal.2d 302, 240 P.2d 596. "A fair trial means a trial before an impartial judge, an honest jury and in an atmosphere of judicial calm." 14 Am.Jur., Crim.Law, § 130; McKay v. Superior Court, 98 Cal.App.2d 770, 220 P.2d 945. Where bias and prejudice at the trial on the part of the trial judge is established, then there has been a denial of due process. See, Kreling v. Superior Court, 25 Cal.2d 305, 153 P.2d 734; In re Jacobson's Guardianship, 30 Cal.2d 312, 182 P.2d 537; People v. Spear, 32 Cal.App.2d 165, 171–172, 89 P.2d 445; In re Steiner, 134 Cal.App.2d 391, 395–396, 285 P.2d 972; see, also, Code Civ. Proc., § 170 et seq.

The degree of bias and prejudice which disqualifies a trial judge is more than a nebulous belief that the judge had some preconceived ideas about a piece of litigation; it is personal bias and prejudice or a bent or leaning either for or against the litigant, which, regardless of the merits of the cause, makes it impossible for the judge to view the case dispassionately. It is a state of mind calculated to impair impartiality and to sway judgment. In re Estate of Friedman, 171 Cal. 431, 153 P. 918; McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 P. 86; Evans v. Superior Court, 107 Cal.App. 372, 290 P. 662; McKay v. Superior Court, supra. Moreover,

the bias or prejudice must be against the complaining party. People v. Sweet, 19 Cal.App.2d 392, 396, 65 P.2d 899; Woolley v. Superior Court, 19 Cal.App.2d 611, 626–627, 66 P.2d 680; People ex rel. Department of Public Works v. McCullough, 100 Cal.App.2d 101, 110–111, 223 P.2d 37.

It is well settled that expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice. In re Estate of Friedman, supra, 171 Cal. at page 440, 153 P. at page 922; McEwen v. Occidental Life Ins. Co., supra, 172 Cal. at page 11, 155 P. at page 88; Fishbaugh v. Fishbaugh, 15 Cal.2d 445, 456, 101 P.2d 1084; Kreling v. Superior Court, supra, 25 Cal.2d at pages 310–311, 153 P.2d at pages 737–738. Nor does marked disapproval by the judge of unlawful misconduct, disclosed by evidence., amount to a manifest prejudice by the trial judge. In re Steiner, supra, 134 Cal.App.2d at page 391, 285 P.2d at page 972.

As qualified by these principles the criterion for determining bias and prejudice is what the trial judge said or did. McKay v. Superior Court, 98 Cal.App.2d 770, 220 P.2d 945. The allegations showing prejudice must give fair support to the charge of a bent of mind that has prevented or impeded impartiality of judgment and assert facts with particularity from which a reasonable mind might fairly infer bias or prejudice. Wilkes v. United States, 9 Cir., 80 F.2d 285, 288–289.

It is clear that the facts contained in the present affidavit are sufficient to show such bias and prejudice. Although it is unnecessary to refer in detail to the errors that occurred during the trial of petitioners as pointed out in my dissenting opinion (People v. Osslo, 50 Cal.2d 75, 106, 323 P.2d 397, 415), a brief summary of them is required to set the stage for what was to follow. It is sufficient to say that the main thrust of the trial court's errors was manifested in the prosecutor's efforts to inflame the passions of the jury by portraying petitioners as characters harmful to society because they were members and officials of a labor union. The prosecution lacked facts to prove its case of conspiracy, and so resorted to non-legal methods of proof. For the most part the prosecutor was successful, despite vigorous objections by defense counsel. Thus by substituting the labor union movement as defendant and placing it on trial, the prosecutor obtained a conspiracy conviction on the basis of guilt by association.

At the time the appeal of the case was considered on its merits all that could be inferred from the trial judge's rulings, which permitted these tactics, was that they were erroneous. As serious and as prejudicial as I felt these errors were, and still do, our conclusion did not go beyond the observation that the trial judge misapprehended the law. The majority admitted there was error, but held that it was not prejudicial. However, even the majority found unpalatable the trial judge's astonishing provision that he retain exclusive jurisdiction of petitioners during their probation, and this term was stricken from the judgment by the decision of this court (50 Cal. 2d 75, 323 P.2d 397). This provision was a portent of the trial judge's position which was to be made known subsequently. The factual circumstances remained unchanged until the instant proceedings were commenced.

At the hearing on petitioners' motions to reject probation, the trial judge made the following revealing remarks as quoted in the majority opinion: " 'Levying a fine in a case of this kind is useless' because the fine would be paid by assessment of union members. 'I think it is going to be conducive to peace in the labor movement if these officials have to control their actions to such an extent that they don't become involved with the Penal Code. * * They are responsible to the criminal courts and * * * if they know it and it is certain if they are convicted they won't be turned loose and have the matter made a misdemeanor, I think we will have peace in the labor movement.' "

In considering these comments it will be remembered that petitioners were supposed-

ly being tried for a conspiracy to commit a misdemeanor, and not for disrupting the peace in the labor movement. Moreover, as was stated in my dissent, there was not one shred of evidence indicating that petitioners, in their capacity as union officials, or otherwise, demonstrated disrespect for the law. People v. Osslo, supra, 50 Cal.2d at pages 120–124, 323 P.2d at pages 423–425.

Only one conclusion can be drawn from the trial judge's preoccupation with petitioners' union membership. His obvious antipathy to the labor movement and union members in particular, as reflected in his rulings at the trial level, and fully demonstrated by his remarks at the hearing of the motions to reject probation, prevented the exercise of his impartial judgment. He attempted to clasp petitioners within the ambit of his jurisdiction for 10 years to preclude their participation in any labor union activity whatsoever. His punishment was not aimed at the individual petitioners but at labor union members as a whole for the sole purpose of controlling their actions. Again I repeat, neither labor unions nor the labor movement was on trial. But the statements by the trial judge, referring to these elements, coupled with his efforts to punish them, point to a pre-existing bias and prejudice which disqualified the trial judge and rendered the trial before him violative of due process of law.

Habeas corpus is an available remedy where a defendant is denied due process of law at his trial, provided there is no other adequate remedy. In re Wallace, 24 Cal. 2d 933, 938, 152 P.2d 1; In re McCoy, 32 Cal.2d 73, 76, 194 P.2d 531. Where, however, the facts on which the petition for habeas corpus is based, arise or come to light subsequent to the appeal, the existence of a prior appeal will not deter us from granting relief clearly called for. Chessman v. Teets, 354 U.S. 156, 161–162, 164–165, 77 S.Ct. 1127, 1 L.Ed.2d 1253.

Such is the situation in the case at bar. The most convincing statements demonstrating prejudice and bias by the trial judge did not occur until the hearings on the motions to reject probation, a time after the appellate processes had been exhausted.

Nor does the fact that petitioners have not specifically requested this relief militate against granting appropriate relief. "The proponent before the Court is not the petitioner but the Constitution of the United States." Chessman v. Teets, supra, 354 U.S. at page 165, 77 S.Ct. at page 1132. Where the facts warrant relief, as abundantly appears herein, the court, as justice requires (Pen.Code, § 1484), and as vindication of the constitutional guarantee of due process of law, must grant relief. No clearer case for the application of this rule can be found.

This case presents a sorry picture of justice in this state. It is obvious to my mind that if these petitioners had not been engaged in union labor activity, they would not have been prosecuted. There is not one word of evidence in the record connecting them with any crime whatsoever. Their only crime is being a member of a labor union. Such membership was believed by some to be unpopular in San Diego County and even in California before the last election. The atmosphere during the trial was surcharged with prejudice against the defendants because they were engaged in labor union activity. The trial judge did not become prejudiced solely on the probation issue. The record shows that he cooperated with the prosecutor to prejudice the defendants in the eyes of the jury and that the guilty verdict was the result of such prejudice. This result is too obvious to escape the careful scrutiny of the members of this court. The only question is, will it be tolerated. This question must be answered by the individual members of the court.

I have always believed that considerations of justice should rise above prejudice and that persons charged with crime should be judged on the basis of proven guilt, regardless of race, color, creed or occupation. I am convinced beyond doubt that if such rule were applied here, these petitioners

would be completely exonerated and discharged from custody.

For the foregoing reasons petitioners should be discharged from custody.

51 Cal.2d 402

K. WOLEY, Plaintiff and Appellant,

v.

Stanley Philip TURKUS, Defendant and Respondent.

S. F. 20053.

Supreme Court of California,
In Bank.
Dec. 30, 1958.

Action on a judgment. The Superior Court, San Mateo County, Aylett R. Cotton, J., rendered judgment of dismissal and plaintiff appealed. The Supreme Court, Shenk, J., held that where on date to which time for trial and for hearing of plaintiff's motion for summary judgment had been extended by stipulation beyond five year period from commencement of action, defendant served affidavit in opposition to motion, court heard motion and ordered that it be submitted pending receipt of defendant's amended affidavit, and defendant was granted extension of time thereafter, motion was denied, matter was set for trial but was continued because there were no available departments on date for which trial was set, defendant's motion to dismiss, made before case was reset for trial, on ground that case was not tried on date which time was extended, should have been denied on ground that it was impractical or futile to commence trial then and on ground that defendant's conduct estopped him from contending to contrary.

Reversed.

McComb, J., dissented.

Opinion, 328 P.2d 520, vacated.

1. Dismissal and Nonsuit ⇐60(1)

The purpose of statute providing for dismissal of action not brought to trial within five years after commencement, except where parties have stipulated that time may be extended, is to prevent avoidable delay in bringing an action to trial. West's Ann.Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇐60(2)

Under statute providing for dismissal of actions not brought to trial within five years after commencement, except on stipulation of parties, five year delay is deemed unreasonable as a matter of law and a five year period is deemed sufficient to complete preliminary matters in bringing a cause to trial. West's Ann.Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇐60(3)

Exception to statute providing for dismissal of actions not brought to trial within five years after their commencement exists where a party is unable, from causes beyond his control, to bring case to trial either because of total lack of jurisdiction, in strict sense, on part of trial court or because proceeding to trial would be both impracticable and futile. West's Ann.Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(3)

Whether it is impossible, impracticable, or futile to proceed to trial within judicial exception to statute providing for dismissal of cases not brought to trial within five years after their commencement in absence of a stipulation extending time, is to be determined in light of circumstances in each case, and such circumstances include not only terms of stipulation but acts and conduct of parties and proceedings themselves. West's Ann.Code Civ.Proc. § 583.

5. Stipulations ⇐14(11)

Ordinary rules for interpretation of contracts apply to stipulations, extending time to bring a case to trial, entered pursuant to statute providing for dismissal of actions not brought to trial within five years after their commencement in absence of such a stipulation extending the time. West's Ann.Code Civ.Proc. § 583.

6. Dismissal and Nonsuit ⇐71

For purposes of statute providing for dismissal of actions not brought to trial within five years after their commencement, in absence of a stipulation extending the time, an insufficient stipulation may be material evidence upon an issue of whether it was impossible, impracticable or a futile gesture to bring the action to trial. West's Ann.Code Civ.Proc. § 583.

7. Dismissal and Nonsuit ⇐60(6)

Where on date to which time for trial and for hearing of plaintiff's motion for summary judgment had been extended by stipulation beyond five year period from commencement of action, defendant served affidavit in opposition to motion, court heard motion and ordered that it be submitted pending receipt of defendant's amended affidavit, and defendant was granted extension of time thereafter, motion was denied, matter was set for trial but was continued because there were no available departments on date for which trial was set, defendant's motion to dismiss, made before case was reset for trial, on ground that case was not tried on date which time was extended, should have been denied on ground that it was impractical or futile to commence trial then and on ground that defendant's conduct estopped him from contending to contrary. West's Ann.Code Civ.Proc. § 583.

Abraham Setzer, San Francisco, for appellant.

Charles O. Morgan, Jr., and George R. Moscone, San Francisco, for respondent.

SHENK, Justice.

A judgment of dismissal of this action was rendered pursuant to section 583 of the Code of Civil Procedure. The dismissal was ordered on the ground that there had been an inexcusable delay of more than five years in bringing the action to trial. The plaintiff has appealed, contending that under the terms of a written stipulation and the circumstances otherwise appearing the dismissal was not mandatory and that the defendant is estopped to contend otherwise. The defendant contends that the stipulation extended the time only to January 13, 1956; that the plaintiff did not bring the action to trial on or before that date, and that there was no act or omission on the part of the defendant which would prevent him from invoking the mandatory provisions of section 583, the pertinent portions of which read: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended * * *."

The record shows the following: On December 28, 1950, a complaint was filed in the Superior Court in San Mateo County for a money judgment, based on a 1948 Maryland judgment on a promissory note in the principal sum of $1,302 plus interest. The answer was filed February 6, 1951. On December 9, 1955, the plaintiff filed a memorandum to set and a notice of motion to advance the cause for trial. The supporting affidavit pointed out that the cause of action would be barred by section 583 unless the trial was commenced before December 28, 1955, which would be the expiration of the five year period. At the hearing on the motion to advance the cause for trial the defendant requested a continuance on the ground that nothing had been done in the case for almost five years and that the 12 days' notice was inadequate for trial preparation. The request was made with the representation by the defendant in open court that the plaintiff was not to be prejudiced by such a continuance. The court had set December 27, 1955, as the date for the trial and for the hearing on the motion for summary judgment in response to the plaintiff's request to advance the cause for trial before December 28. However, pursuant to the request of the defendant and also pursuant to a written

stipulation entered into by the parties the court granted a continuance to January 13, 1956. The stipulation reads as follows:

"Stipulation for continuance of plaintiff's motion for summary judgment, and of trial of action, at defendant's request, beyond five year period prescribed by section 583 of the Code of Civil Procedure.

"The defendant above named having requested the same, it is hereby stipulated and agreed * * * that plaintiff's motion for a summary judgment, and the trial of the above entitled action * * * be continued to the 13th day of January, 1956 * * * the parties hereto expressly waiving further notice of the time and place of the respective hearing of said motion and of said trial and consenting thereto after the elapse of the five year period prescribed by section 583 of the Code of Civil Procedure."

On January 13 both parties were present in court. The defendant thereupon served and filed an affidavit in opposition to the motion for summary judgment. The court heard the motion and ordered that it be submitted pending the receipt of the defendant's amended affidavit. The trial was ordered continued to February 10, without objection by the defendant. On January 23 the defendant served and filed his amended affidavit and additional points and authorities on the motion for summary judgment. On March 6 the plaintiff served her affidavit in replication. On March 26 the court determined that there were triable issues of fact presented and that it could not determine on the motion for summary judgment the truth or falsity of the statements in the defendant's answer and affidavits. The motion for summary judgment was thereupon denied. Notice of the order denying this motion was served on the plaintiff on April 3. In the meantime the action had been removed to the master calendar department to be reset for trial. When the master calendar was called on April 11 the trial date was set for May 25. There were no available departments on May 25 and the matter was continued to June 28.

On May 28 the plaintiff noticed a motion for an order for the issuance of a commission to take an out-of-state deposition. On June 6 the defendant noticed the present motion to dismiss. It was heard before a judge other than the one who had conducted the former proceedings. In support of the motion the defendant alleged that a written stipulation had been entered into extending the time for trial to January 13, 1956; that the plaintiff did not commence the trial on that date nor at any time thereafter, and that the plaintiff's delay in bringing the cause to trial on January 13 was inexcusable and was not caused by any acts or omissions on the part of the defendant or his attorney. The plaintiff's answering affidavit averred that the defendant and his attorney knew and agreed that the court would first proceed to hear the motion for summary judgment on January 13 before proceeding with the trial and expressly agreed to such order of hearing; that in accordance with this agreement, and independently thereof, the court on that date ordered the motion to proceed; that when the court indicated it was about to grant the motion the defendant asked for an opportunity to present additional defenses by an amended affidavit and additional points and authorities, and that the court granted the defendant's request, giving the plaintiff an opportunity to respond thereto. Both of these motions were noticed for hearing on June 12 and were submitted. The defendant's motion was granted and judgment of dismissal was entered on June 28, 1956. The court concluded that the stipulation of the parties had extended the time to bring the action to trial to the 13th day of January, 1956, and not thereafter, and that it was not brought to trial on January 13, 1956.

[1, 2] The purpose of section 583 is to prevent avoidable delay in bringing an action to trial. Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; Christin v. Superior Court of Los Angeles County, 9 Cal.2d 526, 71 P.2d 205, 112

A.L.R. 1153. A delay of five years is declared by this statute to be unreasonable as a matter of law (Romero v. Snyder, 167 Cal. 216, 220, 138 P. 1002; Hibernia Savings & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 729, 107 P.2d 494) and to be sufficient time to complete preliminary matters in bringing the cause to trial.

[3, 4] However, the statute is not designed to arbitrarily close the proceedings at all events in five years. It expressly permits the parties to extend the period without limitation by written stipulation. Christin v. Superior Court, supra, 9 Cal.2d 526, 532, 71 P.2d 205; Continental Pacific Lines v. Superior Court, 142 Cal.App.2d 744, 749, 299 P.2d 417. Exceptions have been recognized by the courts. One arises where a party is unable from causes beyond his control to bring the case to trial either because of a total lack of jurisdiction in the strict sense on the part of the trial court or because proceeding to trial would be both impracticable and futile. Whether it is impossible, impracticable or futile to proceed to trial must be determined in the light of the circumstances in each case. Rose v. Knapp, 38 Cal.2d 114, 117, 237 P.2d 981; Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d 61, 68, 168 P.2d 665; cf. Wyoming Pacific Oil Co. v. Preston, 50 Cal.2d 736, 329 P.2d 489. The circumstances include not only the terms of the written stipulation but the acts and conduct of the parties and the proceedings themselves.

[5] The ordinary rules for the interpretation of contracts apply to stipulations extending time entered into pursuant to section 583. Smith v. Bear Valley Mining & Lumber Co., 26 Cal.2d 590, 601, 160 P.2d 1; Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 641, 116 P.2d 458; Elmhurst Packers v. Superior Court, 46 Cal. App.2d 648, 650, 116 P.2d 487. The stipulation here involved continued the hearing on the motion for summary judgment and trial to January 13. It specifically called the court's attention to the impending bar of section 583. Thus we do not have the situation presented in Boyd v. Southern Pacific R. Co., 185 Cal. 344, 346, 197 P. 58 (where the plaintiff orally acquiesced in continuances beyond the statutory period), in Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 336–337, 219 P. 1006 (where a continuance was granted without objection from the plaintiff), in Bank of America Nat. Trust & Savings Ass'n, v. Moore & Harrah, 54 Cal.App.2d 37, 42, 128 P.2d 623 (where the continuance was obtained without the plaintiff's objection), or in Ravn v. Planz, 37 Cal.App. 735, 174 P. 690 (where the continuance was obtained over the plaintiff's objection). In each of those cases it was pointed out that the court's attention was not called to the necessity for a trial date within the time required by section 583.

Here the cause was set for trial within the five year period, and by written stipulation of the parties the trial was postponed and the provisions of section 583 were specifically waived to January 13, 1956. The defendant had represented, in requesting the original continuance, that the plaintiff would not be prejudiced thereby. In the memorandum of points and authorities served and filed on January 13 with the affidavit in opposition to the motion for summary judgment the defendant urged that he "should be entitled to a day in court." He asked for further time to present additional defenses after the court indicated its intention to rule in the plaintiff's favor, and he was given an opportunity to do so. It was not necessary to again call the court's attention to the stipulation on file in these proceedings. It sufficiently appears that both parties were aware of the necessity for expediting the proceedings in order to avoid the mandatory provisions of section 583 and that their activities were carried on with this necessity in mind. The request of the defendant for additional time, as carried out in the minute order of January 13, which ordered the motion submitted after the receipt of the defendant's amended affidavit, is comparable to the situation in Govea v. Superior Court, 26 Cal.App.2d 27, 31, 78 P.2d 433, 434. It was there held

that "if * * * a stipulation entered in the minutes of the court does not literally comply with the language of section 583, supra, it does estop the petitioner from thereafter making a motion to dismiss the cause for want of prosecution under said section; that a party to an action cannot be allowed in such manner to play fast and loose with the court, either proposition of which is a bar to the granting of the petitioner's motion to dismiss."

[6, 7] An insufficient stipulation may be material evidence upon the issue whether it was impossible, impracticable or a futile gesture to bring the action to trial. Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d 61, 67, 168 P.2d 665. Whether the parties agreed that the motion for judgment should first be heard and determined or whether the court determined to hear the motion first, is not important. It sufficiently appears that the plaintiff was prepared to go ahead with either proceeding. The defendant was present under subpoena and there was documentary evidence before the court which would support the allegations of the complaint. It was practicable for the court on January 13 to first hear and determine the motion for summary judgment before proceeding with the trial. The request for a continuance in order to furnish additional facts by affidavit and points and authorities on the motion for summary judgment carried with it the implied request that the entire proceedings be postponed until the additional affidavits had been submitted and the motion for summary judgment determined. This order of proceeding was acquiesced in by both parties. Upon the submission of further affidavits and the denial by the court of the motion for summary judgment, the action was set for trial by the court for May 25. Through no lack of diligence on the part of the plaintiff the trial was not commenced on that date but was postponed by the court. It was not until after that date that the defendant sought to have the action dismissed on the ground that the written stipulation had extended the time for trial only to January 13. To grant such a motion under these circumstances would clearly not be within the letter and spirit of section 583. The motion should have been denied on the ground that it was impracticable or futile for the plaintiff to have commenced the trial on January 13, that the defendant's oral request for an extension of time, made in open court and granted, as shown by the minute order of January 13, and his conduct after that date, operated as an estoppel against his contention to the contrary.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

McCOMB, Justice.

I dissent. I would affirm the judgment for the reasons stated by Mr. Justice Fred B. Wood in the opinion prepared by him for the District Court of Appeal in Woley v. Turkus, Cal.App., 328 P.2d 520.

166 Cal.App.2d 714

Florence RUFO, Plaintiff and Appellant,

v.

N. B. C. NATIONAL BROADCASTING COMPANY, a corporation, Defendant and Respondent.

Civ. 23057.

District Court of Appeal, Second District, Division 1, California.

Jan. 5, 1959.

Action for personal injuries sustained by plaintiff when she fell after she was pushed or shoved into a tree well on a public sidewalk in front of defendant's premises. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered an order granting defendant's motion for nonsuit, and plaintiff appealed. The Dis-

trict Court of Appeal, Fourt, J., held that in absence of any evidence of prior negligent conduct of persons upon the sidewalk, and in absence of any evidence of boisterous or unruly conduct upon the part of persons on the sidewalk, plaintiff was not entitled to recovery.

Affirmed.

1. Judgment ⇐199(3.15)
Negligence ⇐121(1), 136(14, 25)

In an action for recovery of damages for personal injuries allegedly sustained through the negligence of defendant, burden of proof was upon plaintiff to establish the elements of her case, and where there was no proof of negligence upon the part of the defendant, nor any proof of proximate cause, under such circumstances, a motion for a nonsuit, directed verdict, or judgment notwithstanding the verdict was in order.

2. Municipal Corporations ⇐757(2)

Generally, in the absence of statute, there is no duty resting upon the owner or occupant of premises abutting on a public street to keep the sidewalk in repair.

3. Municipal Corporations ⇐808(1)

Abutting property owners are not responsible for whatever might happen to pedestrians who collide with each other upon the sidewalk in front of owners' property.

4. Municipal Corporations ⇐808(1)

An abutting property owner, such as those, for example, presenting exhibitions or performances in stadiums, sporting arenas, theaters, or stores, do not have a duty to supervise the conduct of people on a public sidewalk.

5. Municipal Corporations ⇐808(1)

Owner of broadcasting studio had no right, power or authority over persons upon public sidewalk abutting its premises.

6. Municipal Corporations ⇐808(9)

In action for personal injuries sustained by plaintiff on a public sidewalk, in front of defendant's broadcasting studio, when she fell after she was pushed or shoved into a tree well in the sidewalk, in absence of any evidence of prior negligent conduct of persons upon the sidewalk, and in absence of any evidence of boisterous or unruly conduct upon the part of persons on the sidewalk, plaintiff was not entitled to recovery.

Phill Silver, Hollywood, for appellant.

Moss, Lyon & Dunn, Fulton W. Haight, and Henry F. Walker, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from an order granting a motion for a non-suit.

The plaintiff alleged in her complaint that the defendant had its principal place of business in Hollywood, California, and maintained a broadcasting studio at the corner of Sunset Boulevard and Vine Street; that upon said premises it maintained certain doorways to the studio which are the means of ingress and egress of the studio; that at the front of the studio there is a cement walkway with trees planted in basins. She further alleged that on August 10, 1953, at about 4:20 o'clock p. m., she *was present upon the premises of the defendant* as a guest of the defendant to see a performance and that while she was walking to the end of a line composed of other guests she was pushed and shoved into the basin of a tree well in the cement walkway through the carelessness of the defendant, and that she thereupon fell and received injuries. She also alleged that the negligence of the defendant consisted of the following: (1) the defendant maintained the premises so that there was a sudden drop-off around the tree basin; (2) the defendant failed to warn her of the existence of the drop-off from the sidewalk, and it failed to maintain any supervision over the lineup of people who were waiting to enter the studio, and as a result of which she was then shoved backward with force and violence and fell to the cement near one of the trees where there

was a sudden drop-off from the cement to the dirt around the tree.

Appellant's opening brief states, "Plaintiff's complaint was an action for personal injuries sustained on a *public sidewalk* in front of the defendant's premises."

The answer filed by the defendant denied that the cement sidewalk with trees planted in basins therein was on any premises owned, operated or maintained by it, and denied that there was any negligence upon the part of the defendant, and denied that the plaintiff was injured.

A summary of the testimony is as follows: The plaintiff was with two other persons each of whom had tickets for, and desired to enter a show at the defendant's studio. When they arrived in the vicinity of the studio they saw many people who were to attend the show and observed that such people had already formed into a line. One of the ladies who was with the plaintiff stated that she and the plaintiff started to get into the line, and she also stated that at the start of the line there were two persons abreast, but toward the end of the line it widened to three and four persons abreast across the sidewalk, and that there was space for only one person to pass between the people in the line and the tree where the accident occurred. The witness described the base of the tree and its relation to the sidewalk, and said that the dirt around the tree was about an inch below the level of the sidewalk. The plaintiff and her companions were in no particular hurry because when they arrived at or near the studio it was about twenty minutes before the studio opened for the show. They saw two lines formed, one for those persons with tickets, which extended east on Sunset Boulevard toward Argyle Street, and one for those without tickets which extended west toward Vine Street. The three women became separated. One of the ladies testified that she was walking in front of the plaintiff, and heard someone say, "A woman has fell;" that she then turned around and by that time the plaintiff was on the ground. She further testified that an usher from the defendant's studio, who had been on or near the steps entering the studio prior to that time, went to the plaintiff and the plaintiff was then taken to a restroom in the building. The witness also stated that there had been no usher on the sidewalk supervising the lineup of persons before the plaintiff fell down. The witness indicated that there was a crowd immediately adjacent to the tree, and that it was necessary to walk single file to get through. This witness also stated that the sidewalk where the accident occurred was about nine feet wide.

The plaintiff testified that as she and her companions arrived there was quite a commotion among the people trying to get into the line, and that by the time she got to where the tree was located there was no room left for anybody to walk by the line of people without stepping into the base or basin around the tree, and that a person had to make her way through the crowd. She stated that she was pushed and shoved, and that her foot went into the dirt around the tree and she fell to the cement sidewalk. She did not recall seeing an usher other than the one at the head of the line.

Under section 2055, Code of Civil Procedure, a supervising usher of the defendant company was called and he testified that he went to the scene of the accident. He said that it was procedure to have the people who expected to attend the show form in lines on the sidewalk and wait until the studio doors opened. He had instructed the pages working under him to keep the people in the lineup two abreast, to stand close to the inside edge of the sidewalk area rather than close to the curb near the street so as to leave sufficient space for pedestrians to pass to and fro; the pages also were to keep the line straight and orderly, and to see to it that there was no pushing and to see if people had tickets, and further to stop any cutting into the line by unauthorized persons.

It is to be noted that the plaintiff knew of and saw the crowd on the sidewalk, and saw the tree and the basin surrounding it. There was no evidence that the defendant planted any of the trees or had any control over them, or was in any manner responsible for them or for the basin around them. There was no evidence to show that the plaintiff ever knew or was aware that the defendant's ushers ever had come onto the public sidewalk to give any information or make any requests, and there was no evidence that the plaintiff had placed any reliance upon any usher. There was no evidence that the people in the lineup or those on the sidewalk were boisterous, noisy or unruly. Neither of the plaintiff's companions saw the accident.

In the plaintiff's deposition she stated that people were going in both directions on the sidewalk at the time of the accident, whereas, at the trial she testified that they were all traveling in the same direction excepting those standing irregularly in the lineup facing her. She further testified at the trial that she remembered that it was a man who had pushed her, "* * * because as I was trying to get in that line making my way through there. I remember him on my left side here." There is no claim that such man was in anywise connected with the defendant.

After introducing the evidence above set forth, the plaintiff rested her case and the motion for a non-suit was granted.

Appellant now asserts that it was error to grant such a motion, claiming that the defendant was under a duty to exercise reasonable care to protect the plaintiff from injury caused from the wrongful acts of other invitees, and further, that independent of such duty there was a duty to refrain from doing any affirmative act that would render the sidewalk dangerous for public use.

Counsel for the appellant has referred to many cases and many situations, however, a review of such cases convinces us that none of them is in point in the present case. This is not a case where the plaintiff was an invitee of the defendant on its own premises, nor was she hurt by any condition on the premises of the defendant, nor was she hurt by anyone from the premises of the defendant, nor is it a case where a crowd became unruly and boisterous to the defendant's knowledge and defendant failed to do anything about such conduct, nor is it a case where the defendant roped off the sidewalk or placed any obstructions thereon. The plaintiff makes no claim that the condition was a nuisance. Most, if not all, of appellant's citations relate to cases where the injury occurred upon the premises of the inviter, and not in the street or sidewalk area adjoining the premises. For example, Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 148 P.2d 405, was with reference to an episode which occurred upon the Stanford University campus; Sample v. Eaton, 145 Cal.App.2d 312, 302 P.2d 431, involved a patron attending a wrestling match where another spectator threw a bottle within the premises; Winn v. Holmes, 143 Cal.App.2d 501, 299 P.2d 994, involved a patron inside of a restaurant who was assaulted by other patrons; Charonnat v. San Francisco Unified School Dist., 56 Cal.App.2d 840, 133 P.2d 643, was a school ground case where a boy was hurt by another student upon the playgrounds; Conner v. East Bay Municipal Utility Dist., 8 Cal.App.2d 613, 47 P.2d 774, 48 P.2d 982, was a case where the defendant was doing street work and negligently performed such work so as to hurt the plaintiff; Terrell v. Key System, 69 Cal.App.2d 682, 159 P.2d 704, 705, was a case of one passenger being hurt by a "milling, brawling crowd" and the conductor who saw the situation did nothing to prevent the unruly group from hurting the plaintiff; Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729, involved a dance hostess who was hurt upon the dance floor of the defendant by an obnoxious participant upon the dance floor; Thomas v. Studio Amusements, Inc., 50 Cal.App. 2d 538, 123 P.2d 552, involved a skating rink patron who was hit while upon the floor by a person recklessly cutting in on the skating area; Tschumy v. Brook's Mar-

ket, 60 Cal.App.2d 158, 140 P.2d 431, involved a market operator who owned a parking lot adjoining the building where the market was operated, and the person injured was on the lot which was a part of the same premises on which the market was operated; Gastine v. Ewing, 65 Cal.App.2d 131, 150 P.2d 266, where a dancer was being interviewed and asked to dance upon the premises and then injured; Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 170 P.2d 5, where the property next door was used in conjunction with the building through a special arrangement.

We believe that the trial court was correct in granting the motion for the non-suit.

[1] The burden was upon the plaintiff to establish the elements of her case. There was no proof of negligence upon the part of the defendant, nor was there any proof of the proximate cause. Under such circumstances a motion for a non-suit, directed verdict or judgment notwithstanding the verdict is in order. Dalrymple v. Hanson, 1 Cal. 125, 127; Ringgold v. Haven, 1 Cal. 108, 117; Holmes v. Moesser, 120 Cal.App.2d 612, 262 P.2d 27; Bolar v. Maxwell Hardware Co., 205 Cal. 396, 402, 271 P. 97, 60 A.L.R. 429. And such is the rule even though the evidence is conflicting. Zito v. Weitz, 62 Cal.App.2d 161, 164, 144 P.2d 409; Nicholas v. Jacobson, 113 Cal. App. 382, 389, 298 P. 505.

It was appropriately stated in Farmer v. Fairbanks, 71 Cal.App.2d 70, at page 73, 162 P.2d 26, at page 28, involving a directed verdict, as follows:

> "The trial court has the power, in a proper case, to direct a jury to render a verdict in favor of the defendant when 'there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one.' Newson v. Hawley, 1928, 205 Cal. 188, 190, 270 P. 364, 365; Keller v. Markley, 1942, 50 Cal.App. 2d 155, 156, 122 P.2d 614."

And continuing at page 80 of 71 Cal.App. 2d, at page 32 of 162 P.2d, the court said:

> "* * * While all reasonable inferences are to be drawn from the evidence and all conflicts to be resolved in plaintiffs' favor, nevertheless the inferences cannot be based upon speculation or conjectures, but must be based upon 'a fact legally proved.' Code Civ.Proc. secs. 1958 and 1960. To draw from plaintiffs' evidence the inferences which they would have us draw would be to decide a question upon mere speculation and not upon facts 'legally proved.' The mere fact that an accident happened in this case is not sufficient, of course, to establish defendants' negligence. The burden rested upon plaintiffs to establish that some act or omission on the part of defendants was the proximate cause of the accident. This burden, as appears from the foregoing résumé of the evidence, the plaintiffs have failed to sustain and their evidence lacks elements of proof essential to support a determination of negligence on defendants' part. This being true, there was no evidence requiring the submission of the case to the jury."

[2] The tree, the basin around the tree and the sidewalk were all part of the public walkway, and were in no sense the premises of the defendant. There was no evidence that the defendant had anything whatever to do with any of the public walkway or sidewalk. It was stated in Schaefer v. Lenahan, 63 Cal.App.2d 324, at page 326, 146 P.2d 929:

> "The general rule is that, in the absence of statute, there is no common law duty resting upon the owner or occupant of premises abutting on a public street to keep the sidewalk in repair. Consequently, in the absence of statute, it is well settled that such an abutting owner or occupant is not liable to travelers injured as a result of

defects in the sidewalk, which defects were not created by the owner or occupant. Eustace v. Jahns, 38 Cal. 3; Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; Bolles v. Hilton & Paley, Inc., 119 Cal.App. 126, 6 P.2d 335; Black v. Southern Pac. Co., 124 Cal.App. 321, 12 P.2d 981."

[3] Certainly it is not the law in this state that abutting property owners are responsible for whatever might happen to two pedestrians who collide with each other upon the sidewalk in front of their property.

In a recent case, Winston v. Hansell, 160 Cal.App.2d 570, 325 P.2d 569, at page 573, the court, in affirming a judgment based upon the sustaining of a demurrer to the complaint without leave to amend, said:

"In the instant case the appellant seeks to bring the facts within the exception to the general rule by the allegation that the defendants 'did make special use of said sidewalk in that said sidewalk was used as a driveway for automobiles.' * * * All that is alleged is that the sidewalk was used as a driveway by the abutting owners, and that such constituted a 'special use' of the sidewalk by the property owners. Certainly, in this day and age, the use of a sidewalk as a driveway to the abutting property is not a peculiar or unusual use of such sidewalk. It is one of the ordinary and accustomed uses for which sidewalks are designed. Private garages cannot be built to open directly onto the street, but must be set back at least to the property line in order to allow for sidewalks upon which pedestrains may travel. The use of part of the sidewalk as a driveway is imperative in most, if not all, locations. Such use is no more peculiar or unusual than using the sidewalk for pedestrains who desire to visit the owners of the abutting property. The allegations of the complaint clearly bring the case within the scope of the rule (of non-liability) announced in the Martinovich, Sexton [Sexton v. Brooks, 39 Cal.2d 153, 245 P.2d 496] and Schaefer cases.

* * * * * *

"The judgment is affirmed."

[4] Appellant suggests that the defendant should have supervised the people in the line on the sidewalk but failed to do so. To impose any such duty upon all of the abutting property owners, such as for example those presenting exhibitions or performances in stadiums, sporting arenas, theatres, schools, stores, etc., would be unrealistic and contrary to law. The defendant had no power over the persons upon the sidewalk and it could not expel them therefrom, and the ordinary American would give quick advice to any abutting owner who attempted to direct his activities while upon the sidewalk, assuming, of course, that during such time he was using the sidewalk he was behaving himself.

As indicated in F. W. Woolworth & Co. v. Conboy, 8 Cir., 170 F. 934, at page 936 (cited in Blodgett v. B. H. Dyas Co., 4 Cal. 2d 511, 513, 50 P.2d 801), crowds are almost a matter of course in metropolitan areas, and it was there stated:

"The crowd on the present occasion seems to have been somewhat more violent than usual. Still such crowds are often found in large stores at times of special sales, and during holiday seasons. They are an unavoidable feature of mercantile life in large cities. The defendant on the occasion in question had no reason to believe that such a sale as it was conducting would lead to any uncontrolled or violent conduct on the part of customers visiting the store, and was not therefore required to maintain its store in an unusual condition of safety to meet such an emergency. It had no reasonable cause to anticipate such violence, but, on the contrary, had a right to believe that patrons would demean themselves with a proper regard to others using the store. It was not, therefore, guilty of any negligence by reason of anything

done by the crowd. * * * She [plaintiff] has met with an accident which is quite frequent, and there is nothing in this record justifying the shifting of her misfortune upon the defendant." See also, Pridgen v. S. H. Kress & Co., 213 N.C. 541, 196 S.E. 821.

In the case of Smith v. Epstein Realty Co., 133 Neb. 842, 277 N.W. 427, the plaintiff purchased some groceries in the defendant's store, then left the groceries in the store while she went down the street on another errand, intending to return and pick up the groceries. The court said (277 N.W. at page 428): "* * * plaintiff had left the store and gone a block away to shop at another store. Upon her return, and while still quite a distance away from the door leading into the store, she stepped back into a recess from the sidewalk and opened a door, and fell down a stairway leading to a billiard parlor in the basement. She had not re-entered the premises of the [defendant] and was about 40 feet therefrom when the accident occurred. It is attempted to fasten liability upon this defendant for the accident because the store had a display in the window which caused her to step back into the recess. Since when has it become negligence for a storekeeper to fill his windows with fresh stock so attractively displayed as to cause women to pause and examine it? We fail to find the allegations of negligence against the owner of the * * * store supported by sufficient evidence to require the submission of that question to the jury. (Citing cases.)" See, also, Williams v. New York Rapid Transit Corp., 272 N.Y. 366, 6 N.E.2d 58; Serlin v. City of New York, 291 N.Y. 595, 50 N.E.2d 1009; Snyder v. Salwen, 317 Pa. 531, 177 A. 789; Haley v. May Department Stores Company, Mo. App., 287 S.W.2d 366; Rincon v. Berg Co., Tex.Civ.App., 60 S.W.2d 811; Fenasci v. S. H. Kress & Co., 17 La.App. 170, 134 So. 779.

In Miller v. Welworth Theatres of Wisconsin, 272 Wis. 355, 75 N.W.2d 286, the complaint set forth that patrons purchasing tickets were required, because of the contiguousness of the theatre building, ticket window and public sidewalk, to stand on the sidewalk, and after buying a ticket to walk about ten feet upon the sidewalk to the theatre entrance. It was alleged that the sidewalk was cracked and the plaintiff caught her heel in the crack while buying a ticket and was hurt. She asserted that under the circumstances the defendant had appropriated and used the sidewalk as a part of its place of business and failed to maintain it safely for the patrons. The court said (75 N.W.2d at pages 288–289):

"The allegations in the respondent's complaint do no more than claim that, because a patron of the theatre must stand on the public sidewalk adjacent to said building in order to purchase an admission ticket and because it is then necessary for said purchaser to walk approximately ten feet to the north on said public sidewalk to reach the entrance of said theatre, the result is that the sidewalk becomes a part of the theatre's place of business, and the owner is required 'to construct and maintain said area in a condition safe for use by the plaintiff.' The conclusion rests on a non-existing duty. The complaint is demurrable because it does not state facts sufficient to constitute a cause of action. The effort to make it appear that the described area is a place of employment may be prompted by a wish, but it cannot rise above a conclusion on the pleader's part. * * *

"* * * The municipality is responsible for the maintenance and repair of the sidewalk. We hold that the fact that in entering a store or place of business, in stopping to admire an attractive display in a show window, a patron approaches or stands on a public sidewalk does not make that pathway a part of the merchant's place of business or place of employment.

"* * * The facts alleged being inherently insufficient to create or constitute a right in favor of the respond-

ent and against the appellant based on a duty owed by the appellant, the order overruling the demurrer must be reversed." See also, Porter v. California Jockey Club, Inc., 134 Cal.App.2d 158, 285 P.2d 60; Haberlin v. Peninsula Celebration Ass'n, 156 Cal.App.2d 404, 319 P.2d 418.

[5, 6] As we have pointed out, in the present case the event did not take place upon any premises belonging to, or under the control of the defendant. The defendant had no right, power or authority over persons upon the sidewalk, and there was no evidence of any prior negligent conduct of persons upon the sidewalk, and there was no evidence of any boisterous or unruly conduct upon the part of anyone.

The order is affirmed.

WHITE, P. J., and LILLIE, J., concur.

167 Cal.App.2d 108

Clyde N. PALMER, Jr., Plaintiff and Appellant,

v.

Errol K. FLEMING and Alexander Patrick Fleming, Defendants and Respondents.

Civ. 5771.

District Court of Appeal, Fourth District, California.

Jan. 13, 1959.

Action by purchaser against vendors to recover purchaser's payment under purchase option agreement providing that vendors should retain purchaser's payment in event of purchaser's failure to exercise option. The Superior Court, Riverside County, S. Thomas Bucciarelli, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Shepard, J., held that evidence warranted implied finding that purchaser never intended his first writing to be an unqualified acceptance of option in that the escrow instructions proffered by purchaser did not conform to option agreement.

Affirmed.

1. Appeal and Error ⇐931(1)

The District Court of Appeal views the evidence in the light most favorable to the judgment.

2. Vendor and Purchaser ⇐341(3)

In purchaser's action to recover his payment under purchase option agreement providing that vendors should retain purchaser's payment in event of purchaser's failure to exercise option, evidence warranted implied finding that purchaser never intended his first writing to be an unqualified acceptance of the option in that the escrow instructions proffered by purchaser did not conform to option agreement.

Gray, Glass & Allen, Gardena, for appellant.

Neblett, Walker & Sullivan, Riverside, for respondents.

SHEPARD, Justice.

This is an action to recover $5,000 paid by plaintiff to defendants for an option to purchase realty.

Plaintiff alleges that on May 23, 1955, the parties entered into a written agreement and option whereby for the sum of $5,000 defendants agreed to hold until August 23, 1955, at 12 noon (time being of the essence of the option), subject exclusively to the order of this plaintiff certain described realty for a total purchase price of $102,000 in cash, or secured in accordance with written escrow terms attached to and made a part of the agreement. It was further agreed that if plaintiff elected to exercise the option the $5,000 paid should be credited on the purchase price, otherwise it was to be retained by these defendants in consideration of the granting of the option and the holding of the property for plain-

tiff's optional purchase. If defendants were unable to deliver title within 30 days after notice to them of the exercise of the option the consideration was to be returned. All notices were required to be delivered to Errol K. Fleming (one of the defendants herein) at 6190 Hawarden Drive, Riverside, California.

The agreement provides that the date of the opening of the escrow will be the date of the exercise of the option; that the buyer will deposit in escrow $1,000 at its opening, an additional $23,000 within 30 days thereafter, and a trust deed and note for $73,000. The agreement made further provision on the following matters: prorate of taxes as of close of escrow; delivery of title subject to covenants, conditions, restrictions and easements of record; a pipeline easement with appurtenant rights, canal stock and percentage interest in a pumping plant; usual buyer and seller escrow charges; possession to buyer as of close of escrow; usual trust deed form with a prohibition therein against removal of trees; provision for locating a well site and releasing from the trust deed lien sufficient ground to accommodate the well and new pumping plant; a provision for deeding full unencumbered title to buyer of certain lots upon payment of $7,500 (Lots 12, 15 and 16 of Monte Vista Tract, comprising about 2½ acres); provision that there be no subordination of trust deed encumbrance; provision for annual payments of $30,000 with final balance the third year, with interest at 6%; provision that if buyer fully complied with escrow by June 23, 1955, buyer entitled to entire crop with certain other crop advantages if escrow closed before June 13, 1955, otherwise crop to belong to sellers; provision for adjustment by use of second trust deed if first trust deed then on premises could not be released by close of escrow.

Plaintiff's complaint alleges that he complied with all of the conditions of the option agreement, that the defendants breached their agreement, and he is entitled to the return of the $5,000 originally deposited. Defendants' answer denies that the plaintiff ever exercised the option, and denies breach by defendants. After a full trial, the trial court found against the contentions of plaintiff and in favor of the defendants, entered judgment accordingly, and plaintiff appeals therefrom.

[1] This court on appeal is required to view the evidence in the light most favorable to the judgment. Bailey v. County of Los Angeles, 46 Cal.2d 132, 137(4), 293 P.2d 449.

[2] With that rule in mind, the evidence shows that no escrow instructions directly and unqualifiedly conforming to those contained in the original agreement were ever signed by plaintiff; that contrary to the original agreement the escrow instructions which were in fact signed by plaintiff enlarged the acreage to be released without encumbrance by about six acres; that said proffered escrow instructions provided, contrary to the original agreement, that one acre of the land would be released for each $3,000 (plus interest) paid on the balance of the purchase price, and also provided for the direct payment of the real estate broker's fee.

The amended escrow instructions so proffered contained a proviso that, if they conflicted in any way with the original agreement, the original agreement would control. Plaintiff contends that this provision, that is, that the original agreement would control the conditions of the amended proposal, made the escrow document by plaintiff a sufficient acceptance of the escrow. However, the trial court was confronted with evidence that no deed of trust as provided by the original agreement was submitted therewith, or was ever signed at any time by the plaintiff; that the only proffered escrow instructions of which notice was ever given to defendants did not conform to the original agreement; that $6,000 of the money posted in the escrow was conditioned on the execution of a crop and chattel mortgage by plaintiff to a third party covering the current crop then on the trees; that under certain conditions of the original agreement defend-

ants were authorized to forthwith retake possession of the premises; that the original agreement prevented subordination of the seller's lien to that of the crop mortgage; that defendants were never notified of the existence and readiness for signature by them of any escrow instructions conforming to the original agreement anywhere.

> "'An option is a privilege given by the owner of property to another, to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy.'" Transamerica Corporation v. Parrington, 115 Cal. App.2d 346, 352(6), 252 P.2d 385, 389.

> "It is elementary that an acceptance is required to be identical with the offer, and must be unconditional and not add any new terms thereto. If the terms of the offer are changed or added to by the acceptance, there is no meeting of the minds and no contract." Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 276(13), 65 P.2d 42, 60.

From the terms of the plaintiff's counter offer and the character of the negotiations thereafter, we think the trial court was justified in its implied finding that the plaintiff never intended his first writing to be an unqualified acceptance of the option.

The record further shows that after some negotiations and concessions by defendants to part of plaintiff's requested changes, plaintiff himself finally broke off all negotiations and terminated the escrow by his own voluntary act of withdrawing, on September 12, 1955, from further operation of the escrow all money and documents. The evidence shows there was no rejection or refusal by defendants prior to September 20, 1955, which was several days after plaintiff's termination of the escrow.

It is evident that the trial court concluded that the amended proposal under all the circumstances then present involved only a qualified acceptance of the option, and that the option agreement was never sufficiently completed to ripen into an agreement of sale.

Under the record produced in this case we cannot find that the trial court's conclusion was unsupported by the evidence.

The judgment is affirmed.

MUSSELL, Acting P. J., and COUGHLIN, J. pro tem., concur.

166 Cal.App.2d 766

H. J. WILSON, Plaintiff and Appellant,

v.

William G. SHARP; Charles C. Mack and Thomas J. O'Keefe, as Members of the Los Angeles County Civil Service Commission; Clifford N. Amsden, as Secretary and Chief Examiner of the Los Angeles County Civil Service Commission; Joseph M. Lowery, as Auditor of the County of Los Angeles; The County of Los Angeles, a Body Politic and Corporate; Harold W. Kennedy, John One, John Two, John Three, John Four, John Five, John Six, and John Seven, Defendants,

William G. Sharp; Clifford N. Amsden, as Secretary and Chief Examiner of the Los Angeles County Civil Service Commission; Joseph M. Lowery, as Auditor of the County of Los Angeles; and The County of Los Angeles, Respondents.

Civ. 23182.

District Court of Appeal, Second District, Division 3, California.

Jan. 6, 1959.

Hearing Denied March 4, 1959.

Action by a taxpayer for declaratory relief and to recover public moneys allegedly paid out without authority of law. From an adverse judgment of the Superior Court of Los Angeles County, Arthur Crum, J., the plaintiff appealed. The District Court of Appeal, Vallée, J., held that the plaintiff was not entitled to recover on the ground

that defendant serving as an executive assistant county clerk was a de facto employee in the classified service during the period in which he served in such position and that recovery could not be had against the civil service commission and the county auditor for making the payments on the ground that the payroll procedure was illegal.

Judgment affirmed.

1. Counties ⇐196(4)

Where employee was a de jure officer of county and position of executive assistant county clerk was in the classified service and the commission promulgated an eligible list for that position and examination was restricted to employees in the department of county clerk in accordance with the commission's rules and defendant was the only person to file an application for the position and in reliance on certification by the commission the defendant was appointed to the position of executive assistant county clerk and served therein and was paid the salary from the public moneys of the county, taxpayer was not entitled to recover the moneys paid to the defendant on the ground that they were allegedly paid out by the county without authority of law.

2. Counties ⇐196(4)

Taxpayer was not entitled to recover moneys paid out by county to executive assistant to the county clerk on the ground that such payments were without authority of law in that the commission had not certified to the auditor on any county payroll that the defendant was appointed or employed and was performing services during the period of the payroll where the procedure followed conformed to the requirements of the charter and the rules of the commission. County Charter of Los Angeles, §§ 11, 30 et seq., 38, St.1913, p. 1484; West's Ann.Code Civ.Proc. § 1963, subd. 15.

3. Officers ⇐119

In action against public officer wherein it is sought to hold him personally liable for moneys paid out allegedly without authority of law the complaint must set forth the special circumstances relied on to establish liability.

John J. Guerin, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff as a taxpayer from a judgment for defendants in an action for declaratory relief and to recover public moneys allegedly paid out without authority of law. Recovery is sought from defendant William G. Sharp of salary paid to him. Liability is sought to be imposed on defendants Clifford N. Amsden, Secretary and Chief Examiner of the Civil Service Commission of the County of Los Angeles, and Joseph M. Lowery, Auditor of the County of Los Angeles, for causing to be paid and paying the salary to Sharp.

The second amended complaint in substance alleges:[1]

1. Plaintiff is a resident and taxpayer of the County of Los Angeles. On June 5, 1946 the Civil Service Commission ordered a promotional examination for the position of executive assistant in the department of the county clerk. On July 1, 1946 Sharp was given a temporary appointment as executive assistant to the county clerk. On July 5, 1946 a bulletin with respect to the examination was published by the commission. The bulletin limited applicants to employees in the department of the county clerk. Defendants, as a part of a common scheme or plan to secure the appointment of Sharp to the position of executive assistant county clerk, a position in the classified service of the county, and to pay or cause to be paid to Sharp the salary for the position, fixed and determined the requirements for participation in the promotional examination for the position. Sharp filed an application for the examination. No writ-

1. The original complaint was filed December 3, 1951.

ten or oral examination was given. On July 30, 1946 the commission promulgated an eligible list for the position which showed that Sharp was the only applicant, that no examination was held, that applicants were restricted to employees in the department of the county clerk, that Sharp was declared eligible for certification for appointment to the position despite the fact the commission determined his grade by investigation and not by competitive examination.

2. On August 2, 1946 the commission certified the name of Sharp to the county clerk as eligible for appointment to the position of executive assistant in the department of the county clerk. On August 5, 1946 Sharp was appointed to the position. He served in it until June 29, 1949 except for a period from October 6, 1948 to March 21, 1949, during which time he served as county clerk under a temporary appointment.

Recovery was sought for the county of moneys paid to Sharp as salary.

[1] The court, after a protracted trial, found: 1. At all times mentioned in the second amended complaint Sharp was a *de jure* officer or employee of the county. 2. At all times between July 1, 1946 and June 27, 1949 the position of executive assistant county clerk was a position in the classified service of the county. 3. The commission promulgated an eligible list for that position on July 30, 1946. 4. The applicants for the examination were restricted to employees in the department of the county clerk in accordance with rules of the commission. 5. Sharp was the only person to file an application for the position. 6. The grade of Sharp was determined by an unassembled examination based on his professional training and experience and his aptitude and personal suitability in accordance with the rules of the commission. 7. In reliance on the certification by the commission, the county clerk appointed Sharp to the position of executive assistant county clerk on August 5, 1946. 8. Sharp served in that position through and including October 5, 1948, and while so serving was paid salary from public moneys of the county. 9. On March 21, 1949 Sharp returned to the position after a leave of absence during which he held a temporary appointment as county clerk, and served as executive assistant through and including June 26, 1949 and while so serving was paid a salary. 10. It is not true that no person other than Sharp was able to file for the promotional examination for the position; at least ten persons, including plaintiff, were eligible to apply for the position. 11. Defendants are not indebted to the County of Los Angeles in any sum.

Plaintiff contends Sharp was a *de facto* employee in the classified service of the county during the period in which he served as executive assistant to the county clerk and therefore not entitled to the compensation paid him while serving.

Plaintiff's contention is answered by Wilson v. Los Angeles County Civil Service Com., 103 Cal.App.2d 426, 229 P.2d 406. That was a proceeding in mandamus to compel the Civil Service Commission of the County of Los Angeles to annul its order denying the appeal of the petitioner, Wilson, plaintiff here, from an examination for chief deputy county clerk and from the determination of the efficiency of Sharp; to annul the eligible lists created by the commission for the positions of executive assistant to the county clerk and chief deputy county clerk and for a determination that the appointments of Sharp to such positions on August 5, 1946 and June 28, 1949, respectively, were unlawful and void. The petition alleged substantially the same facts as are alleged in the present case. The trial court denied the writ.

Holding on review that the petition did not state facts sufficient to constitute a cause of action for relief by writ of mandamus, the court stated (103 Cal.App.2d 432, 229 P.2d 410):

> "Under Article IX of the County Charter establishing civil service, it is incumbent upon the respondent commission to adopt and enforce such rules and regulations as may be prop-

er and necessary for the enforcement of the provisions of such article. As stated in Almassy v. Los Angeles County Civil Service Com., 34 Cal. 2d 387, 396, 210 P.2d 503: 'It is manifest from the provisions of the charter and rules above quoted that subject to the limitation that "all examinations shall be impartial and shall deal with the duties and requirements of the position to be filled", Art. IX, sec. 36; rule VII, § 3, the civil service commission has been given broad discretionary powers in determining the subjects of examination and the qualifications which are to be measured. [Citations.] Judicial interference under such circumstances is unjustified except on a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion. [Citations.]'

"Turning again to the allegations of the instant petition, appellant first charges that as to the examination for chief deputy county clerk, the secretary and chief examiner for the commission, 'wilfully, but without lawful authority' changed the five year requirement of 'administering or managing the personnel and activities of a major division of the Department of County Clerk', as set forth in the original bulletin, to 'administering or managing or assisting in the administration or management of the personnel and activities of the Department of County Clerk, or administering or managing a major division thereof.'

"Pursuant to an order of this court granting appellant's application for leave to produce additional evidence, a certified copy of rule V of the respondent commission is now before us. This provides that 'subject to the direction and approval of the Commission', the secretary and chief examiner 'shall have charge of all matters pertaining to the preparation and conduct of examinations', down to the smallest detail, including the preparation and posting of official bulletins.

"Appellant next complains that the examination for chief deputy county clerk was void because limited to employees in the department of county clerk; that such examination should have been an interdepartmental promotional examination. This was a promotional examination and was given in accordance with a rule of the commission providing for two types of promotional examinations: (a) Departmental and (b) Inter-departmental.

"As heretofore stated, appellant's main complaint is that the respondent commission had no right to permit Mr. Sharp to take the examination for chief deputy county clerk based upon a void appointment to the position of executive assistant county clerk. The latter appointment was made from an eligible list, a copy of which is here in evidence. True, it contains only one name. But it shows that its basis was an 'Unassembled examination' and that the candidates were 'Rated on their professional training and experience and their aptitude and personal suitability as evidenced by investigation.' It is a matter of common knowledge that written examinations are often waived in the selection of appointees for positions in the civil service, particularly in those fields requiring special or professional training.

"The respondent commission is vested under the county charter with a high discretion, and the instant petition is insufficient to show an abuse thereof." [2]

2. Various facets of this action have also been considered in Wilson v. Los Angeles County Civil Service Com., 95 Cal.App. 2d 51, 212 P.2d 260; Wilson v. Los Angeles County Civil Service Com., 97 Cal. App.2d 777, 218 P.2d 547; Wilson v. Los Angeles County Civil Service Com., 106 Cal.App.2d 572, 235 P.2d 620; Wilson v. Los Angeles County Civil Service Com., 126 Cal.App.2d 679, 273 P.2d 34, and Wilson v. Sharp, 42 Cal.2d 675, 268 P.2d 1062.

[2] The second amended complaint also alleges that since August 5, 1946 the commission has not at any time certified to the auditor, Lowery, on any payroll of the county that Sharp was appointed or employed and was performing service during the period of the payrolls in accordance with article IX of the charter of the county and the rules of the commission, as the commission was required to do as a condition precedent to the auditor approving any salary by reason of the provisions of section 38 of Article IX of the charter; unless restrained, Lowery will continue to approve for payment the monthly salary warrants of Sharp without the certification required by section 38 of article IX of the charter.

With respect to these allegations the court found: 1. At all times since August 5, 1946 the account for salary and compensation of Sharp has borne the certificate of the commission that Sharp was appointed and employed and was performing services for the county in accordance with article IX of the charter and the rules of the commission established thereunder. 2. The certification was made in the form approved by the auditor and the commission pursuant to discretion vested in them by the provisions of section 85 of ordinance 4099 of the county, added by ordinance 4354 on June 2, 1944. 3. The facts alleged in this connection have been well known to plaintiff since August 5, 1946 but he has, nevertheless, delayed bringing this action for an unreasonable and unnecessary period of time, and the unreasonable delay was prejudicial to the defendants. 4. During this period of delay, Lowery has approved the payment of many hundreds of thousands of payroll warrants to employees in the classified service of the county in amounts totaling many millions of dollars pursuant to administrative procedures which were adopted by the county and which are substantially identical to those pursuant to which payments to Sharp were made. 5. It would be highly prejudicial to Lowery and to the thousands of employees in the classified service of the county to permit plaintiff to attack this procedure at this late date. 6. Since August 5, 1946 plaintiff Wilson has been an employee in the classified service of the county and at all times has received and continues to receive salary warrants for compensation issued and approved by Lowery pursuant to administrative procedures adopted by the county about July 1, 1945. 7. Plaintiff has not at any time refused to accept salary warrants so paid to him as such classified employee and has not questioned the legality of the administrative procedures until the filing of this action on December 3, 1951.

Plaintiff contends the payroll procedure was illegal and that as a result of such illegality the moneys paid to Sharp as salary were unlawfully paid.

Section 38 of article IX of the charter of the County of Los Angeles reads:

> "The auditor shall not approve any salary or compensation for services to any person holding or performing the duties of a position in the classified service, unless the payroll or *account* for such salary or compensation shall bear the certificate of the commission that the persons named therein have been appointed or employed and are performing service in accordance with the provisions of this article and of the rules established thereunder."

(Stats.1913, c. 5, pp. 1484–1496. Emphasis ours.) The rules of the commission contain an identical provision.

Section 11 of article III of the charter provides the following among the duties of the board of supervisors:

> "To provide, publish and enforce, a complete code of rules, not inconsistent with general laws or this Charter, prescribing in detail the duties, and the systems of office and institutional management, accounts and reports for each of the offices, institutions and departments of the county."

Pursuant to this command the board of supervisors on June 2, 1944 adopted ordinance 4354 which provides:

"Payrolls: How Prepared. The Auditor shall prepare all payrolls in the manner and upon the forms prescribed by him. Each department head shall be responsible for maintaining his departments' personnel and time records and shall certify such information as is necessary in the preparation of the payroll to the County Auditor and the Civil Service Commission at the time and upon the forms prescribed by the County Auditor and approved by the Civil Service Commission."

The procedure for the preparation of payrolls or accounts for salary or compensation of persons holding or performing the duties of a position in the classified service was as follows: When a person was appointed to a civil service position an incoming report was prepared in triplicate by the department in which the person was employed. Two copies of this report were submitted to the Civil Service Commission where the report was checked to determine whether the employee had been appointed in accordance with civil service requirements. The commission then certified one copy and forwarded it to the auditor. From this report a tab card was cut, permitting the mechanical preparation of the payroll or account and of the salary warrant. If there was any change in the civil service status of the employee a change-of-status report was prepared. The change-of-status report was, in turn, certified by the commission, forwarded to the auditor, and a new card prepared for the employee. The certification of the commission consisted of a rubber stamp on the incoming report and on the change-of-status report reading "Approved: Civil Service Commission (date)." The stamp was initialed by an authorized representative of the commission. If an employee's employment was terminated, an outgoing report was prepared, certified by the commission, and sent to the auditor.

The change-of-status report from which the payroll account of Sharp was made up bore the certificate of the commission at all times. It showed his number as an employee, that his position was executive assistant in the department of the county clerk, that his position was permanent, that he had been certified, the beginning date of his employment, his schedule number, his salary rate, his retirement rate, and the retirement amount. It was approved by the commission and dated by a rubber stamp, and initialed by an authorized representative of the commission. There was evidence that all change-of-status reports with the exception of absence reports are certified to the auditor by the commission, certifying that a person has been duly appointed to a particular position, that he is performing the services indicated on the report, that it is unnecessary for the commission to report to the auditor the employee is still performing the services for each salary warrant, and that the commission has so indicated until a new change-of-status report is certified to the auditor by the commission.[3]

3. Mr. Nichols, Chief of the Special Claims Division of the Department of Audit and Controller in the department of Auditor Lowery, testified: "An employee is hired by a department. There is a report called an incoming report that is prepared by the department, or the County Clerk in this particular case. It is submitted to the Civil Service. They check the report, itself, to determine that the employee has been certified to the position as shown on the report. They certify to the Auditor. The Auditor checks it as to salary for the position that has been approved by Civil Service. We then proceed to punch a tabulating card with all of the pertinent information, and that card is then filed in a regular tab card file and is kept there until such time as it is necessary to write a payroll, and that card is used continually, month after month, until such time as there is a change that may come through for the employee. Then that change is reflected, and that is done with all employees within the County Clerk's office, or the entire county service for that matter. That card remains in the file even after the change is made until that employee may be relieved of the county service and then it is removed. Generally speaking, that is a brief summary of how we maintain the records for all employees. * * * As

The change-of-status reports, certified as they were by the commission, constituted certificates of the commission on the account for the employee's salary or compensation that the person named therein had been employed or appointed and was per-

I understand it, Mr. Nichols, when making up a payroll, you refer to the tab card to see if the employee is still employed, is that correct? A. That is correct. * * *

"Q. Now, does the change of status report show that William G. Sharp has been appointed or is employed and is performing services in accordance with the provisions of Article IX of the County Charter? A. That is the object of the approval of Civil Service, that they are making that certification that the services are performed and Mr. Sharp is employed in accordance with that provision. * * * In this particular case, in the case of Mr. Sharp the only report that we have is a change of status report. The last one is dated effective 6–27–49 to the position of Chief Deputy County Clerk. * * * All of the reports, with the exception of an absence report, is certified to the Auditor by the Civil Service, that the person is properly performing, employed, and is performing, the services as indicated on the report. From that point on we feel it unnecessary for the Civil Service Department to report to us that the employee is still performing the services. They have so indicated on the reports from which our records are prepared.

"Q. In other words, once you receive a report, you assume that the employee continues on in that position until you are notified by the Civil Service Commission of a change, is that correct? A. We have no reason to believe otherwise, that he is not. We have some 37,000 county employees, and we have to adopt some— * * *

"Q. By Mr. Davis: Mr. Nichols, in the ordinary course of events since 1949, have these change of status reports been prepared on some specific type of form? A. The form, itself, which you have there, I think, is perhaps the latest design that we are using. The Department prepares the form. It is one that is filled out by the Department. The design of the form originates in Civil Service, in conjunction with our own Department.

"Q. You mean the original design of that form was prepared— A. Drawn.

"Q. Drawn by Civil Service Department and the County Auditor's Department in conjunction with each other, is that right? A. Yes, that is right.

"Q. And then these forms, I assume, are they distributed to every County Department throughout the County? A. That is right.

"Q. Now, if there is a change of status in a particular employee, who fills out the form? A. The affected department.

"Q. I see. Then what happens to the form? A. The form then is routed to the Civil Service Commission for checking as to accuracy, and then—one copy of it reaches the Auditor. If you will notice, the form is so designated, Departments: Auditor, Civil Service. The original remains with the Civil Service and the Auditor gets the second copy, and the third copy is retained by the Department.

"Q. Then those forms are always prepared in triplicate? A. That is right.

"Q. And they are routed from the department to the Civil Service Commission, is that right? A. That is right.

"Q. And then you, in turn, the County Auditor gets the second copy? A. That is right.

"Q. And then after it reaches your department, what happens to it? A. It is checked by our own employees to determine that certain information is correct. It is then sent to our tabulating unit of our payroll section where the pertinent information is either punched originally into a card and then filed or if it is a change of status such as this, the only information that is changed is necessary to be punched into the card, into a new card, and it is then filed for future processing in payrolls.

"Q. Mr. Nichols, I will show you a form here that says 'Incoming Report.' What is that form used for? A. That is for new employees coming into the service or into any department.

"Q. And again, is that in triplicate? A. That is in triplicate, first, second third copies, and they go to the departments as indicated.

"Q. This one has stamped on the bottom, 'Approved, Civil Service Commission' with a date and initial. Is that on the blank form or is that just on this example? A. No, that is just on this example.

"Q. To show the manner in which it is certified? A. That is right. * * *

"Q. By Mr. Davis: I will next show you a form marked 'Outgoing Report.'

forming service. All the auditor needed to do was to check the change-of-status report against the salary ordinance and ascertain that the position was in the ordinance and that the rate of pay was as it was there fixed. Under ordinance 4354 the department head certifies personnel and time records to the auditor and to the commission. The commission and the auditor did everything required of them by the charter, ordinance 4354, and the rules of the commission. Under the procedure followed the records in the auditor's office cannot differ from those in the commission's office. We think it manifest that the procedure followed conformed to the requirements of the charter and the rules of the commission. Cf. In re Smith, 33 Cal.2d 797, 800–801, 205 P.2d 662; Galli v. Brown, 110 Cal.App.2d 764, 781, 243 P.2d 920. It is presumed that official duty has been regularly performed. Code Civ.Proc. § 1963, subd. 15. Plaintiff's claim that public moneys were illegally paid to Sharp by reason of the payroll procedure is wholly without merit.

[3] On June 27, 1949 Sharp was appointed chief deputy county clerk in the department of the county clerk. There is much discussion in the briefs of plaintiff-appellant with respect to that appointment. That question is not before us. The complaint is silent with respect to that appointment. No facts are alleged and no findings were made with respect to it. The only allegation in the complaint with respect to any period after June 26, 1949 is that defendants are indebted to the County of Los Angeles for public moneys of the county paid to Sharp after June 28, 1949, and the court found that no one of defendants is indebted to plaintiff for public moneys of the county paid to Sharp. In an action against public officers in which it is sought to hold them personally liable, the com-

Can you tell us what that is used for? A. That report is used when employees are leaving the County Service and it, too, is in triplicate and requires a certification of the Civil Service, and on that we show the outgoing earnings of the employee.

"Q. Now, what happens when that report comes to your department? A. That is a notice to us, then, to withdraw from our tab card files the card of the employee and then he is no longer paid, subsequent to that. * * *

"Q. Mr. Nichols, county employees in the classified service are paid either semi-monthly or monthly; is that correct? A. That is true.

"Q. And in ascertaining the amount for each salary warrant for each employee that shall be drawn and approved by the auditor, it is assumed that unless there are absence reports on file for the particular employee that he shall be paid for a full month's salary for that particular month; is that correct? A. That's right.

"Q. These absence reports are made to the auditor by the head of each department; isn't that correct? A. Yes, and a copy of which goes to the Civil Service. * * * The tab card would reflect the current information that is needed to produce a paycheck to any employee. First off, it would have an employee number; it would have the classification number, the employee number, whether or not he is in a retirement system, and there are four of them within the county service; the department number, the date of last change of status report that may have flowed into the office. It has a pay location number. It has a tax class number. It has a code as to whether or not he is a member of AID, which is a charitable organization within the city to eliminate the necessity for annual solitication for welfare needs. It has the rate of pay. It has the retirement percentage. I believe that is all. * * *

"Q. Mr. Nichols, those change of status reports which bear the certificate of the Civil Service Commission are retained as permanent records of your department? A. Yes. * * *

"Q. Mr. Nichols, will you show me on the original change of status report which we have a copy in evidence, Exhibit 30, where the seal of the Civil Service Commission appears? A. The reports do not bear a seal as such. They bear a rubber stamp, 'Approved, Civil Service Commission,' and the date.

"Q. Have you a rubber stamp approval? A. That is right.

"Q. I see. In fact, it is not even signed by an individual, is it? A. It is initialed by an individual. That is this here.

"Q. And it is the rubber stamp of the Commission? A. That is right."

plaint must set forth the special circumstances which are relied on to establish the liability. Gray v. Southern Pacific Co., 21 Cal.App.2d 240, 245, 68 P.2d 1011. In any event, the question of the validity of Sharp's appointment as chief deputy county clerk was settled by Wilson v. Los Angeles County Civil Service Com., supra, 103 Cal. App.2d 426, 229 P.2d 406.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 190

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public corporation, Petitioner,

v.

Fred A. HEILBRON, as Secretary of the Board of Directors of The Metropolitan Water District of Southern California, Respondent.

No. 23581.

District Court of Appeal, Second District, Division 3, California.

Jan. 19, 1959.

Original proceeding in mandate was brought by metropolitan water district against the secretary of the board of directors of the district to compel the secretary to publish a notice inviting proposals for an issue of waterworks bonds authorized by an ordinance and a resolution adopted by board of directors. The District Court of Appeal, Patrosso, J. pro tempore, held that in determining whether bonds of metropolitan water district, which has been organized under the Metropolitan Water District Act, will create an "indebtedness" in excess of statutory debt limitation set forth in provision of the act that "indebtedness" outstanding at any time shall not exceed 50% of aggregate amount of special taxes thereafter to be levied by district pursuant to authority of the act, interest to accrue on the bonds in the future should not be considered as "indebtedness."

Peremptory writ issue as prayed for.

1. Mandamus ⇐103

Mandamus was an appropriate remedy for metropolitan water district to compel secretary of board of directors of district to publish notice inviting proposals for bonds, if proposed bond issue met requirement of law, since action demanded of secretary was "ministerial." Metropolitan Water District Act, §§ 1 et seq., 7.2, 7.3, 9, West's Ann.Water Code App. §§ 35–1 et seq., 35–7.2, 35–7.3, 35–9.

See publication Words and Phrases, for other judicial constructions and definitions of "Ministerial".

2. Waters and Water Courses ⇐183½

In determining whether bonds of metropolitan water district, which has been organized under the Metropolitan Water District Act, will create an "indebtedness" in excess of statutory debt limitation set forth in provision of the act that "indebtedness" outstanding at any time shall not exceed 50% of aggregate amount of special taxes thereafter to be levied by district pursuant to authority of the act, interest to accrue on the bonds in the future should not be considered as "indebtedness". Metropolitan Water District Act, §§ 1 et seq., 7.2, 7.3, 9, West's Ann.Water Code App. §§ 35–1 et seq., 35–7.2, 35–7.3, 35–9.

See publication Words and Phrases, for other judicial constructions and definitions of "Indebtedness".

Charles C. Cooper, Jr., Donald M. Keith, William A. Parsons, O'Melveny & Myers, and James L. Beebe and James W. Beebe, Los Angeles, for petitioner.

Robert H. Dunlap, Pasadena, for respondent.

PATROSSO, Justice pro tem.

This is an original proceeding in mandate instituted by the Metropolitan Water District of Southern California, hereinafter referred to as the "district," against the respondent, the secretary of its board of directors, to compel the latter to publish a notice inviting proposals for an issue of $26,400,000 waterworks bonds, series 4, authorized by an ordinance and a resolution adopted by the district's board of directors. The respondent has made return by general demurrer.

The district is a public corporation organized under the statute known as the "Metropolitan water district act" (Stats.1927, ch. 429, p. 694) and amendments thereto, West's Ann.Water Code App. § 35–1 et seq., hereinafter referred to as the "Act." On June 5, 1956, a special election was held in the district pursuant to the provisions of section 7.3 of the Act for the purpose of submitting to the qualified voters of the district a proposal, substantially in the language set forth in said section 7.3, authorizing the district to incur indebtedness from time to time for the purpose of constructing or installing additional works or facilities for development, transportation and distribution of water. At said election more than a majority of the qualified voters of the district voting on such proposal at said election voted in favor thereof.

Pursuant to such authorization and in accordance with sections 7.2 (Stats.1955, ch. 1400, p. 2513) and 7.3 (Stats.1957, ch. 1, p. 277) the district prior to October 28, 1958, issued three series of bonds aggregating in principal amount $51,000,000 of which an amount of $48,250,000 will remain outstanding and unpaid on April 1, 1959.

On October 28, 1958, pursuant to said authorization and in accordance with sections 7.2 and 7.3 of the Act the district's board of directors duly adopted ordinance Number 93 authorizing the issuance of $26,400,000 waterworks bonds, series 4, said bonds to be dated April 1, 1959, and payable in 12 equal annual installments commencing April 1, 1960, with interest at a rate to be fixed upon the sale thereof but not to exceed 4½ per cent per annum. By said resolution its secretary, respondent herein, was directed to publish notice inviting sealed proposals for said series 4 bonds. The respondent has refused to publish such notice upon the asserted ground that the ordinance and resolution purporting to authorize the issuance and sale of said bonds are invalid.

[1] Mandamus is an appropriate remedy to compel respondent to publish the notice inviting proposals for the bonds in question if the proposed issue meets the requirement of law because the action demanded is ministerial. City of Los Angeles v. Offner, 1942, 19 Cal.2d 483, 122 P.2d 14, 145 A.L.R. 1358; City of Oxnard v. Dale, 1955, 45 Cal.2d 729, 731, 290 P.2d 859.

The basic question presented is whether or not the series 4 bonds hereinabove referred to will, when added to the other three series of bonds heretofore issued, create an indebtedness in excess of the statutory debt limitation set forth in section 7.2(a) of the Act as amended, to the effect that "such indebtedness so incurred outstanding at any time shall not exceed fifty (50) per cent of the aggregate amount of special taxes thereafter to be levied by the district pursuant to the authority of Section 9."

If the principal or face amount of the bonds constitutes the "indebtedness," as this word is used in the statute, the district is entitled to the relief sought, as the aggregate of all bonds including series 4 will be $74,650,000 and the special taxes to be levied by the district pursuant to section 9 of the Act from and after April 1, 1959, will be $153,623,000. If, however, the interest to accrue on such bonds must be included in "such indebtedness" as well as the principal, the debt limitation will be exceeded as to all fiscal years from 1963–1964 to and including 1970–1971.

The question as to whether the word "indebtedness" as used in constitutional and statutory debt limitation provisions includes or excludes interest to accrue on bonds has never been passed upon by the courts of this state. However, the overwhelming au-

thority elsewhere is to the effect that the word does not include interest to accrue on the bonds. The rationale of the authorities so declaring is well summarized in an annotation in 100 A.L.R. 610, as follows: "The interpretation given to the words 'debt,' or 'indebtedness,' as used in constitutional or statutory provisions governing the limitation of the amount to which a city may become indebted, may be said to be the deciding factor in determining whether interest on its indebtedness is to be considered as a part of the total indebtedness of a municipality.

"Nearly all jurisdictions incline toward the view expressed by the court in Epping v. Columbus (1903) 117 Ga. 263, 43 S.E. 803, that the word 'debt,' when appearing in a constitution, is to be taken in its ordinary, natural, common-sense, popular meaning, unless the context requires that it should be treated as used in a technical sense. 'If a person unversed in the technical niceties of the law is asked what is the amount of his debts, his answer to the question in every instance would be an amount which would represent the present liability that he was under at the moment the question was answered. A farmer who had been so unfortunate as to be compelled to place a long loan upon his farm, if asked what was the amount of the debt upon his farm, would unhesitatingly answer by giving an amount which would represent the principal of the debt and any interest that was past due and payable at the time the inquiry was made. One who, in making a return of his property for taxation, is required to state to the tax receiver the amount of solvent debts due him, would not, in the case of a perfectly solvent debt, consider that he was under a moral obligation to return for taxation the value of the debt at any higher amount than one which would represent the principal and any interest that was past due at the time the return was made. It is useless to multiply illustrations. The "debt" of an individual or a corporation or the public, in its usual and popular sense, means the amount for which the individual or corporation or the public would be presently liable if called upon to discharge the obligation. The law deals at all points with the man of ordinary prudence and average capacity as the standard, for the simple reason that communities and commonwealths are made up of persons of this class.'" [1]

We find nothing in the language of the debt limitation provisions of the statute here to suggest a different result. On the contrary, an examination of the pertinent provisions thereof but serves to confirm the conclusion that the word "indebtedness" as used therein refers to the amount of the debt created by the issuance of bonds and has no reference to the amount of interest which will thereafter accrue thereon.

Section 7.2(a) which contains the debt limitation provision reads in part as follows: "Sec. 7.2(a) Whenever the board of directors, by ordinance adopted by a vote of three-fourths of the total vote of the board, shall find * * * that public interest requires the incurring of *indebtedness* for the purpose of providing moneys for the construction or installation of such additional works or facilities, such board of

1. Accord: O'Rear v. Sartain, 193 Ala. 275, 69 So. 554; Epping v. City of Columbus, 117 Ga. 263, 43 S.E. 803; People ex rel. Lindheimer v. Hamilton, 373 Ill. 124, 25 N.E.2d 517; Goodwine v. Vermilion County, 271 Ill. 126, 110 N.E. 890; Stone v. City of Chicago, 207 Ill. 492, 69 N.E. 970; Brown v. Guthrie, 185 Ind. 669, 114 N.E. 443; Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629, 109 A.L.R. 355; City of Ashland v. Culbertson, 103 Ky. 161, 44 S.W. 441; Finlayson v. Vaughn, 54 Minn. 331, 56 N.W. 49; Carlson v. City of Helena, 39 Mont. 82, 102 P. 39; Schieber v. City of Mohall, 66 N.D. 593, 268 N.W. 445; Pennsylvania Power & Light Co. v. City of Bethlehem, 323 Pa. 313, 185 A. 710; Williams v. City of Rock Hill, 177 S.C. 82, 180 S.E. 799, 100 A.L.R. 604; Herman v. City of Oconto, 110 Wis. 660, 86 N.W. 681; 100 A.L.R. 610; 15 McQuillin Municipal Corporations 3d Ed. 359; Contra: Coulson v. Portland, 6 Fed.Cas.No.3,275, p. 629; Bateman v. Board of Com'rs of Improvement Clarendon District No. 1, 102 Ark. 306, 143 S.W. 1062.

directors may authorize the incurring of *such indebtedness* and may authorize the issuance and sale of notes or other evidence of *indebtedness* for such purpose either in one block or in installments; provided, however, that all *such indebtedness* so incurred shall be subject to the following limitations: (1) *such indebtedness* so incurred outstanding at any time shall not exceed fifty (50) percent of the aggregate amount of special taxes thereafter to be levied by the district pursuant to the authority of Section 9 hereof and annexation proceedings concluded thereunder, or one (1) percent of the assessed valuation of property within the district taxable for district purposes, whichever shall be the lesser; (2) the interest payable on *such indebtedness* shall not exceed six (6) percent per annum payable semiannually; (3) the term of *such indebtedness* shall not exceed twelve (12) years; and (4) the whole amount of *such indebtedness* or of the respective installment thereof, depending upon whether the notes or other evidence of *such indebtedness* shall be issued in one block or in installments, shall be made payable in substantially equal annual parts during the term of *such indebtedness* or installment thereof, as the case may be. * * * The proceeds of any borrowing hereunder (other than accrued interest) shall be applied solely to the purpose specified in the ordinance authorizing the incurring of *such indebtedness* or to the retirement of the principal of the obligation issued pursuant to such ordinance. Any accrued interest received shall be applied to payment of interest on *such indebtedness.*" (Italics ours.)

A reading of the foregoing provision discloses that it contains several distinct limitations, some applicable to the "indebtedness" and others relating to the interest payable thereon which clearly suggests that "indebtedness" has reference only to the principal of the debt created by the bonds issued pursuant to the authority therein conferred upon the district.

Further confirmation of the correctness of this conclusion is found in section 7.2(c) relating to the tax to be levied for the purpose of servicing the bonds which in part reads as follows: "(c) * * * the board of directors shall, at the time of fixing the tax levy and in the manner for such tax levy provided, levy and collect annually until *such indebtedness* shall be paid or until there shall be a sum in the treasury of the district set apart for that purpose, sufficient to meet all sums coming due for principal and interest thereon, a tax sufficient *to pay the interest on such indebtedness,* or such part thereof as shall not be met from other income and revenues of the district, as such interest becomes due, and also sufficient to pay such part of the *principal thereof* as shall become due before the time when money will be available from the next general tax levy, or *such portion thereof* as shall not be met from other income and revenues of the district. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for district purposes, shall not be limited by the provisions of Section 5, subdivision (8) hereof and shall be collected at the time and in the same manner as other district taxes are collected and shall be used for no purpose other *than the payment of such indebtedness and interest accruing thereon.*" (Italics ours.)

[2] Inasmuch as the district is required to levy a tax for the payment of the indebtedness and also for the interest thereon it is evident that the former does not include the latter. Apposite, here, is the following quotation from Wright v. Stapp-Zoe Consol. School Dist. No. 1, 1942, 190 Okl. 289, 123 P.2d 281, 283: "Plaintiffs' third contention raises the question of whether interest on the bonds to be issued may be considered in determining whether the issue exceeds the five per cent debt limit specified in section 26, article 10 of the state constitution, O.S.1941. Plaintiffs contend that interest must be computed and added to the principal of the proposed bonds in figuring

the amount of the debt. No case so holding is cited, and we know of none. The law is to the contrary. (Citations.)

"That such is the proper construction of section 26, article 10 is apparent from a reading of the section. After using the term 'indebtedness' it provides for the collection of a sufficient tax annually to 'pay the interest on such indebtedness as it falls due' and for a sinking fund for the payment of the principal thereof. This clearly indicates that by the term 'indebtedness' was meant only the amount of the indebtedness at the date it was contracted, and interest thereon to accrue in the future was not included."

We see nothing in Provident Mut. Building-Loan Ass'n v. Davis, 143 Cal. 253, 76 P. 1034, cited by respondent, which would support the conclusion that the word "indebtedness" includes interest to accrue thereon in the future. The sole question there was whether a counterclaim pleaded by the defendant which merely alleged that at the date of the filing of the plaintiff's action the latter was indebted to him in a certain sum stated a cause of action. The language quoted from the opinion by respondent was used by the court in support of its conclusion that the pleading was insufficient because it failed to allege as then required by Code of Civil Procedure, section 438, that the claimed indebtedness was due at the time of the filing of the plaintiff's complaint; the court observing that one may be indebted and yet not obligated to pay because the time for payment had not arrived. This, however, does not suggest that the word "indebtedness" refers to both the amount of the principal of a debt and the interest to accrue thereon in the future. Moreover, as said in Bair v. Layton City Corporation, 1957, 6 Utah 2d 138, 307 P.2d 895, 901: "[T]he terms 'debt' and 'indebtedness' as used in constitutional debt limitations of municipalities 'is [sic] given a meaning much less broad and comprehensive than it bears in general usage.'"

Having concluded that the word "indebtedness" does not include interest to accrue thereon in the future, the bonds proposed to be issued by the petitioner do not violate the debt limitation of the statute and it is the duty of the respondent to publish the notice inviting proposals therefor.

Let a peremptory writ issue as prayed for.

SHINN, P. J., and WOOD, J., concur.

167 Cal.App.2d 180

Jewell ELLIS and Homer Ellis, a minor, and Brenda Ellis, a minor, by their Guardian ad litem, Jewell Ellis, Plaintiffs and Respondents,

v.

CITY OF LOS ANGELES, a municipal corporation, Defendant and Appellant.

Civ. 22974.

District Court of Appeal, Second District, Division 3, California.

Jan. 19, 1959.

Rehearing Denied Feb. 17, 1959.

Hearing Denied March 18, 1959.

Action against the city for death of employee of a sewer contractor when a pile-driving rig operated by him toppled over on its side crushing the employee to death when an old sewer lying under the path of the proposed construction collapsed. From an order granting the plaintiffs a new trial in the Superior Court of Los Angeles County, Frederick F. Houser, J., the city appeals. The District Court of Appeal, Shinn, P. J., held that there was no basis in the evidence for charging the inspectors of the city with notice of the dangerous condition and hence the city was not liable for the death of the employee.

Order reversed.

1. Appeal and Error ⇐1015(1)

Unless as a matter of law a judgment in favor of movant would find no support in the evidence, granting of a motion for

new trial upon the ground of insufficiency of evidence will not be disturbed on appeal.

2. Municipal Corporations ⇐840

In action for death of employee of contractor engaged in construction of sewer for city, if both the contractor and city were guilty of negligence which contributed proximately to the accident, the negligence of the contractor would not relieve the city from liability. West's Ann.Gov. Code, § 53051.

3. Appeal and Error ⇐991
Municipal Corporations ⇐847

A "dangerous and defective condition" of public property within the statute imposing liability on a city therefor is one that creates an unreasonable hazard, or one from which injury to those coming in contact with it might reasonably be anticipated, and ordinarily the question whether the condition is dangerous is one of fact, not one of law for the reviewing court. West's Ann.Gov.Code, § 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous and Defective Condition".

4. Appeal and Error ⇐867(2)

An order granting plaintiffs a new trial implied that the trial court determined that all facts essential to the existence of defendants' liability were established by the weight of evidence, and the scope of review with respect to the findings on which the latter was based was the same as it would be if in a court trial findings had been made of all of the essential facts.

5. Appeal and Error ⇐1015(3)

It is the exclusive function of the trial court in ruling on a motion for new trial on the ground of insufficiency of evidence to determine whether the verdict is supported by the weight of the evidence.

6. Appeal and Error ⇐1015(1)

If any one of the trial court's implied findings of essential facts is without substantial support in the evidence, an order granting a new trial to plaintiffs for insufficiency of evidence was improper and must be reversed.

7. New Trial ⇐65

It is error to grant a new trial unless the evidence would warrant a judgment in favor of the moving party.

8. Municipal Corporations ⇐839

In action for death of employee of sewer construction contractor when drilling rig toppled over because of collapse of an abandoned sewer below the surface of the street, general knowledge of the city inspectors of the manner in which the excavation and removal of the old sewer was being done would not place on the city a duty to warn the employee that the method of operation was unsafe, unless the inspectors knew or by ordinary care should have known that the operation entailed an unreasonable risk. West's Ann.Gov.Code, § 53051.

9. Municipal Corporations ⇐723, 742(5)

Liability of a municipality is for negligence which is not presumed and under the statutory liability there can be no negligence in failing to repair or to give warning of a condition unless it is one which is known or by ordinary care would be known to impose an unreasonable risk of injury. West's Ann.Gov.Code, § 53051.

10. Municipal Corporations ⇐723

Municipal liability statute cannot be given an application that would render the municipality an insurer against accidents but knowledge of the dangerous nature of the condition must be shown in order to impose liability on city. West's Ann.Gov. Code, § 53051.

11. Municipal Corporations ⇐723

Under the municipal liability statute, it is the obviously dangerous character of the defect and not alone its size which the municipality must take notice of and repair. West's Ann.Gov.Code, § 53051.

12. Municipal Corporations ⇐723

A municipality is chargeable with knowledge of conditions which would be disclosed by reasonable inspection and conducted in the exercise of ordinary care. West's Ann.Gov.Code, § 53051.

13. Municipal Corporations ⇐839

In action for death of employee of a sewer contractor constructing a sewer for a city for failure to warn the employee of the existence of an old sewer extending underneath the paved surface of the street which caused the pile-driving rig operated by the employee to topple over on its side and crush him to death, where there was no evidence that the employee's work was being carried on under dangerous conditions other than the fact that the accident happened and no basis for charging city inspectors with notice of the danger, they were under no duty to warn employee and hence the city was not liable for the employee's death. West's Ann.Gov.Code, § 53051.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, Weldon L. Weber, Deputy City Attys., Los Angeles, for appellant.

Eric A. Rose and Everett E. Demler, Long Beach, for respondents.

SHINN, Presiding Justice.

Appeal by the City of Los Angeles from an order granting plaintiffs a new trial in an action under the Public Liability Act (Government Code, § 53051), for the wrongful death of Treva Ellis. The verdict of the jury was in favor of the defendant; upon a former trial the jury had disagreed.

In October 1953, the city entered into a contract with Ellis' employer, Peter Kiewit & Sons, Inc., and another firm for the construction of a new sewer. The contractors also undertook to remove an old abandoned 54-inch segmented tile and cement sewer lying directly in the path of the proposed sewer construction. The old sewer extended underneath the paved surface of Jefferson Boulevard between Rodeo Road and Higuera Street, a distance of approximately 1,100 feet. As Ellis was operating a pile-driving rig on Jefferson at a point midway between Rodeo and Higuera, the old sewer caved in and the rig toppled over on its right side, crushing him to death. At the location of the accident the sewer was 3½ feet below the surface of the street.

Plaintiffs are the widow and two minor children of Ellis. Their theory of recovery was that the existence of an abandoned sewer 3½ feet below the surface of the street constituted a dangerous and defective condition of public property, that the city had knowledge of the condition, and that it was liable to them in damages for failing to warn Ellis of the danger. Gov. Code, § 53051. Plaintiffs made a motion for new trial, which was granted upon the ground that the verdict was clearly against the weight of the evidence.

[1] We have examined the transcript in the light of the well-established principle that unless, as a matter of law, a judgment in favor of the moving party would find no support in the evidence, the granting of a motion for new trial upon the ground of insufficiency of the evidence will not be disturbed on appeal. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689; Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269.

Jefferson Boulevard between Rodeo and Higuera was a heavily travelled thoroughfare, having a normal black-top surface and no noticeable defects or depressions. The city withdrew from public use and assigned exclusively to the contractors a 12-foot strip running along the north side of Jefferson from Rodeo to Higuera. Before work commenced, employes of the city had marked on the pavement within the 12-foot strip the center line of the proposed sewer as a guide for the contractors' employes.

The excavation of the old sewer and installation of the new proceeded as follows. First, two parallel slit trenches, each 18 inches wide and 10 feet deep, were dug along the outer edges of the 12-foot strip; dirt was removed from the trenches. Next, Ellis drove his rig along the strip and drove 36-foot steel pilings into the trenches along the outer walls. He backed along the strip, setting five pilings on one side, then moved forward and backed up over the same area,

setting an equal number of pilings on the other side. An excavating rig operated by Ellis' co-worker, Kinsey, then removed the dirt and other materials between the two rows of pilings; steel was set and concrete poured for the new sewer; the excavation was then back-filled, the pilings extracted and the street re-surfaced.

Ellis' rig, together with its attachments, weighed approximately 71 tons and was 11 feet 6 inches wide. It operated on 15-foot tracks, each 33 inches wide. The rig had 8,400 pounds of counterweight. The pilings dropped of their own weight to the bottom of the trenches and were driven into the ground further by means of a steam hammer which struck between 85 and 130 blows per minute, exercising a force of 13,500 pounds. Vibrations caused by the hammer blows could be distinctly felt by persons standing several hundred feet away from the rig.

As we have said, the old sewer was found to be 3½ feet below the surface at the place where the accident occurred. According to the plans furnished to Ellis' employer by the city, the sewer was between 3 and 3½ feet deep along Jefferson Boulevard to a point 600 feet west of Rodeo. The plans were kept in the Kiewit office at the job site. Ward White, Kiewit's project superintendent, had checked them before work started and knew what they disclosed about the location of the old sewer. He gave this information to Brigance, the pile superintendent, but he did not disclose it to Ellis or to Wampler, Ellis' foreman and immediate superior. Wampler and Kinsey both testified that they had no knowledge of what the plans disclosed about the depth of the old sewer.

Workmen excavating at the corner of Higuera and Jefferson some time before Ellis' accident discovered that the old sewer was 11 feet below the surface. About a week before Ellis' death, Kinsey was excavating on Jefferson at a point approximately 75 feet west of Rodeo. His rig, which was somewhat lighter than Ellis', sank into a segment of the old sewer which had collapsed due to trenching operations undertaken to run off some excess water; the exposed sewer was found to be between 8½ and 9 feet below the surface at that location. Kinsey told Ellis what had occurred. In order to prevent a recurrence, Kinsey was told by his superiors to operate his rig across rather than lengthwise of the 12-foot strip.

John Bannister and Albert Anderson were city inspectors employed full-time at the job site. The former was senior engineer for the Board of Public Works, the agency charged with the maintenance of streets and sewers in Los Angeles, and the latter was his assistant. Both men were familiar with the equipment and methods used in sewer construction; according to Bannister, Ellis' employer used normal methods and equipment. The inspectors testified that their duties consisted in making sure that the work proceeded in accordance with the plans and specifications; they had no authority to direct the contractors as to the manner of doing the work and it was established that they gave no directions. The inspectors were familiar with the maps kept in Kiewit's office and knew that the sewer was 3½ feet below the surface of Jefferson Boulevard at the point where Ellis later had his fatal accident. They were also familiar with the circumstances of Kinsey's accident. Bannister attended weekly safety meetings held for Kiewit's foremen at which times measures for the protection of the general public were discussed. Although it took Ellis approximately two weeks to drive pilings from Rodeo to the location of the accident, a distance of 525 feet, and although they observed him daily, the inspectors did not inform him of the depth of the old sewer and did not suggest to his superiors the possibility that the sewer might collapse under the rig.

Ward White testified that although he had seen the maps and knew that the sewer was deeper at both ends on Jefferson than the maps indicated, he made no effort to test their accuracy. This was for the reason that the sewer was a gravity-flow sewer, and he assumed that its depth would

vary between 8½ feet at Rodeo and 11 feet at Higuera. White testified, as did Bannister and Anderson, that the possibility that the sewer might give way under Ellis' rig had never occurred to him.

Thomas C. Shields, an expert witness called by plaintiffs, gave his opinion that the weight of Ellis' rig, if distributed evenly over the ground, would be about 2,900 pounds per square foot on the surface; if only one-fourth of the area of the treads rested on the ground, the weight per square foot would be 11,600 pounds on the surface. In his opinion, a rig would not tip over unless only one-fourth to one-third of its treads rested on the ground. He also stated his opinion that the trenches cut by the contractors tended to deprive the sewer of lateral support. In White's opinion, the pressure per square foot exerted by the rig when only one-fourth of its tread area rested on the ground would be approximately 130 pounds at a point 4 feet below the surface of the street. If a rig is properly counterweighted and if an excessive weight is not placed on the boom, the tracks will remain flat on the ground and the weight of the rig will be evenly distributed over the area occupied by the machine.

[2] The city contends that the method employed by the contractor was the sole cause of the accident and that it cannot be held liable for the negligence of an independent contractor. Plaintiffs do not contend that the city would be liable for the contractor's negligence but correctly assert that if both were guilty of negligence which contributed proximately to the accident the negligence of the contractor would not relieve the city of liability. Irvin v. Padelford, 127 Cal.App.2d 135, 141, 273 P.2d 539; Bady v. Detwiler, 127 Cal.App.2d 321, 333, 273 P.2d 941, and cases cited. The question is whether the city was negligent.

If liability existed on the part of the city it was by virtue of its duty under the Public Liability Act. Under section 53051 of the Government Code, a city is liable for personal injuries resulting from the dangerous or defective condition of public property if the legislative body, board or person authorized to remedy it had knowledge or notice of the dangerous or defective condition and for a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

[3] A dangerous and defective condition of public property is one that creates an unreasonable hazard or one from which injury to those coming in contact with it might reasonably be anticipated. Gentekos v. City & County of S. F., 163 Cal.App.2d 691, 329 P.2d 943. Ordinarily, the question whether a condition was dangerous is one of fact, not one of law for a reviewing court. Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 218–219, 82 P.2d 216, and cases cited.

[4–7] The order granting plaintiffs a new trial implies that the trial court determined that all facts essential to the existence of liability on the part of the city were established by the weight of the evidence. The scope of our review of the order with respect to the findings on which it was based is the same as it would be if in a court trial findings had been made of all of the essential facts. It is the exclusive function of the trial court in ruling on a motion for a new trial on the ground of insufficiency of the evidence to determine whether the verdict is supported by the weight of the evidence. Considering the implied findings in this light, each of them having substantial support in the evidence and the reasonable inferences, is binding upon us on the present appeal. But if any one of the court's implied findings of essential facts is without substantial support in the evidence the order granting a new trial for insufficiency of the evidence was improper and must be reversed. It is, of course, error to grant a new trial unless the evidence would warrant a judgment in favor of the moving party. Roscoe Moss Co. v. Jenkins, 55 Cal.App.2d 369, 130 P.2d 477.

In ruling upon the motion the court found in effect that it was established by a preponderance of the evidence that the city

had knowledge that the sewer was only 3½ feet below the surface where Ellis was working, that Ellis did not have knowledge of that fact and that the inspectors knew or should have known that this fact created a dangerous condition, due to the manner in which the work was being done. There was nothing inherently dangerous in the installation and maintenance of the sewer line, although at places it was only 3½ feet below the surface of the street. Plaintiffs say that the mere occurrence of the accident was sufficient proof that Ellis was working under dangerous conditions, and this, of course, is true. But the crucial question which we shall discuss is whether there was any evidence that the agents of the city knew, or in the exercise of ordinary care, would have known that the conditions were dangerous.

It is not, nor could it be reasonably contended, that the city, with knowledge of the manner in which the work was being carried on, had a duty to relocate the sewer, place barricades in the area, or stop the work. Plaintiffs' sole contention is that Ellis was working under dangerous conditions due to the fact that the sewer was but 3½ feet below the surface, that fact was known to the inspectors, but unknown to Ellis, and that it was the duty of the inspectors as responsible agents of the city to inform Ellis of the location of the sewer at the place where he was working.

[8] Due to the theory upon which plaintiffs presented their case at the trial and seek to sustain the order, we shall assume for the purposes of our discussion that if the inspectors had knowledge of a dangerous condition which was unknown to Ellis the city had a duty through the inspectors to warn Ellis of the danger, even though it had furnished drawings to the contractor which showed the location of the sewer and even though the danger of the operation was due solely to the manner in which the work was being done. If knowledge of the precise manner in which the work was carried on was brought home to the city it could only have been through the city's inspectors who were watching the work. The inspectors had general knowledge of the manner in which the excavation and removal of the old sewer was being done. That fact would not have placed the city under a duty to warn Ellis that the method of operation was unsafe unless the inspectors knew or in the exercise of ordinary care would have known that the operation entailed an unreasonable risk.

[9, 10] The liability of the municipality is for negligence, which is not to be presumed. Under the statutory liability there can be no negligence in failing to repair or give warning of a condition unless it is one which is known, or in the exercise of ordinary care would be known to impose an unreasonable risk of injury. If this were not so a municipality would be subject to liability without fault by force of the statute alone, whereas an individual in similar circumstances would be held blameless. The liability statute cannot be given application that would render the municipality an insurer against accidents. Knowledge of the dangerous nature of the condition must be shown. Howard v. City of Fresno, 22 Cal.App.2d 41, 70 P.2d 502.

With respect to the question of knowledge of a dangerous condition in the present case there were many factors to be considered. There was the weight of the equipment, the strength of the old sewer line, the carrying capacity of 3½ feet of pavement above the sewer, the lateral support furnished by the earth surrounding the sewer and the vibration of the earth caused by the hammering and its weakening effect. Another important consideration was the manner in which the boom might be operated. As its weight would be thrown to one side or the other so would the weight of the equipment be increased on one or the other of the treads, thus materially increasing the per square foot pressure. It was shown by photographs in evidence that the support for the right tread gave way and it fell deep into the hole with the cab resting on the ground and the opposite tread high in the air. There was also the negative fact that Ellis had driven

piling for over 500 feet, operating in the same manner and without incident. While it was not incumbent upon the city to prove that the inspectors believed the operation to be a safe one, the safety of it up to the time of the accident, was some justification for their having no fear that it might be dangerous. Although plaintiffs say "the very fact that the rig broke into the abandoned sewer is in itself evidence of a dangerous condition", they merely assume that the inspectors should have recognized the danger, due to the fact that the old sewer was only 3½ feet below the surface. The inspectors were present only to see that the work was done according to contract. They had no authority to direct the operations and no duty to undertake the solution of the difficult engineering problem which would determine whether the location of the sewer created a dangerous condition. All the factors we have mentioned created an engineering problem for which there was no ready answer, even by competent observers.

Two expert engineering witnesses testified, one for the plaintiffs, the other for defendant. Neither witness testified to the weight per square foot of the equipment at a point 3½ feet below the surface if the treads rested wholly on the surface. Each testified as to the increased weight that would be cast upon one-third or one-fourth of the rig if the remainder of the treads should be tipped off the ground. This was a purely speculative supposition since there was no direct evidence of the position of the rig on the ground at the time its support collapsed. Nor was there evidence that during the operation two-thirds or three-quarters of the weight of the rig was lifted off the ground. Obviously, none of the engineers on the job suspected that an accident would occur. There had been no similar accident and, in fact, the operation under the physical conditions was an unusual one in which the engineers were not shown to have had any previous experience.

Although the implied findings of the court in granting the motion are entitled to every consideration they cannot be regarded as conclusive on the appeal. If they are without any substantial support in the evidence they must be denied effect.

In many cases the courts of review have been obliged to reverse judgments which imposed liability under the Public Liability Law for insufficiency of the evidence to establish knowledge on the part of the municipality or other public body of the existence of a dangerous or defective condition.

There have been many cases of defects in sidewalks and streets which, because of their "trivial" character, placed the municipality under no duty to make repairs or give warning. Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725; Barrett v. City of Claremont, 41 Cal.2d 70, 71–73, 256 P.2d 977, and cases cited; Ness v. City of San Diego, 144 Cal.App.2d 668, 301 P.2d 410; Beck v. City of Palo Alto, 150 Cal. App.2d 39, 309 P.2d 125.

[11] The rationale of such cases is that it appeared from the evidence, as a matter of law, that the defect was not one that rendered the condition dangerous to an extent that would subject the users to an unreasonable risk, and the failure of the municipality to discover and repair it was not a breach of duty. Although a defect has sometimes been called "trivial" because it was small, it was not the size of the defect but the likelihood of its causing accidents that determined whether it should have been discovered and repaired. It is the obviously dangerous character of the defect, and not alone its size, which the municipality is required to take notice of and repair. A small hole in a walkway may be more dangerous than a large one. Blumberg v. M. & T. Incorporated, 34 Cal. 2d 226, 209 P.2d 1.

The record is devoid of any evidence that Ellis' work was being carried on under dangerous conditions, other than the mere fact that an accident happened. So, too, accidents happened in a multitude of the "trivial" defect cases in which it was held on appeal that since knowledge of the dan-

ger was not brought home to the defendant no liability was established. Mr. Prosser says, Second Edition, Section 30, page 121: "The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.' The standard must be one of conduct, rather than of consequences. It is not enough that every one can see now that the risk was great, if it was not apparent when the conduct occurred. Citing Cardozo, C. J., in Greene v. Sibley, Lindsay & Curr Co., 257 N.Y. 190, 177 N.E. 416."

Plaintiffs have advanced no theory of the evidence under which the inspectors would be chargeable with knowledge of a dangerous condition and it is significant that two juries failed to find that they had or should have had such knowledge. Moreover, it was not shown that the inspectors knew that Ellis was less informed than they were of the working conditions. To be sure there had been an accident to the equipment of Kinsey due to trenching in order to dispose of an excess of underground water at one point, a condition which did not exist elsewhere, but Ellis was familiar with that occurrence and it was as well known to him as it was to the inspectors.

[12] A municipality is chargeable with knowledge of conditions which would be disclosed by a reasonable inspection, one conducted in the exercise of ordinary care. Only if held to the highest degree of care would the inspectors have been required to make a scientific analysis of the factors which bore upon the safety of the methods employed in the work.

[13] There was, in our opinion, no basis in the evidence for charging the inspectors with notice. They were therefore under no duty to warn Ellis, and absent such duty upon their part the city must stand absolved of liability for the accident.

The order is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

166 Cal.App.2d 796

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Louis J. SPIVAK, Defendant and Appellant.

Cr. 6234.

District Court of Appeal, Second District, Division 1, California.

Jan. 7, 1959.

Rehearing Denied Jan. 26, 1959.

Hearing Denied March 4, 1959.

Prosecution for armed robbery and kidnapping. The Superior Court, Los Angeles County, Leon T. David, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence, including testimony of a witness other than an accomplice that witness, a day or two before the robbery, accompanied defendant and another person to an area near home of persons who were robbed, along with testimony that defendant left town shortly after the robbery, even though he had paid a week's rent in advance, was sufficient corroboration of accomplice's testimony to sustain conviction.

Judgment of conviction and order denying new trial affirmed.

1. Criminal Law ⇐511(1)

Evidence required by section of the Penal Code, providing that a conviction cannot be had upon the testimony of an accomplice unless it is corroborated, may be sufficient, even though slight, and entitled to but little consideration when standing alone. West's Ann.Pen.Code, § 1111.

2. Criminal Law ⇐511(5)

In prosecution for robbery, evidence, including testimony of a witness other than an accomplice, that a day or two before the robbery he accompanied defendant and other person to an area near home of persons who were robbed, along with testimony that defendant left town shortly after the robbery, even though he had paid a week's rent

in advance, was sufficient corroboration of accomplice testimony to sustain conviction.

3. Criminal Law ⇐406(7)

Denials of a defendant in a criminal prosecution of material facts established by other evidence show a consciousness of guilt from which a jury can deduce that defendant had a connection with the crime charged.

4. Criminal Law ⇐361(1)

In robbery prosecution, where the state had already introduced evidence to the effect that before the robbery a witness, defendant and an accomplice had driven into an area overlooking scene of the robbery, testimony of an officer explaining his actions in taking a trip with the witness to determine the exact area in question was admissible.

5. Criminal Law ⇐417(1)

Extrajudicial statements are, under certain circumstances, admissible to show why a person did certain acts.

6. Criminal Law ⇐448(3), 1186(4)

In robbery prosecution, testimony as to whether a police officer had some idea that a place he was attempting to have a witness identify was in the area of residence of people who were robbed was not inadmissible as calling for a conclusion, since such testimony merely went to the state of the mind of the officer at the time he took the trip, and in any event, even if the question were improper, it was not prejudicial. Const. art. 6, § 4½.

7. Criminal Law ⇐508(1)

Direct testimony of a coconspirator is admissible and is competent to establish the facts to which it relates.

8. Criminal Law ⇐422(6)

In robbery prosecution, in view of fact a conspiracy between codefendants was established by testimony of codefendant and by corroborating evidence, conversations between the codefendants were admissible against one defendant, as a coconspirator, even though such conversations took place outside the presence of such defendant.

9. Criminal Law ⇐655(1)

In robbery prosecution, judge would not be deemed to have erred in stating to the jury, when he granted motion of the district attorney to dismiss the matter as against a codefendant under provision of statute authorizing discharge of a codefendant to be a witness for the people, that discharged defendant proposed to fully and freely testify before the court. West's Ann.Pen.Code, § 1099.

10. Criminal Law ⇐1035(2)

Where defendant was charged with robbery in a first indictment along with three other defendants, and in second indictment he was charged with robbery by himself, and the two indictments were consolidated for trial, defendant would not be deemed to have been erroneously tried under two indictments, and in view of fact defendant made no objections and stated in effect, through his counsel, that the procedure adopted was satisfactory to him, he could not make such complaint on appeal.

Joseph M. Rosen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., S. Clark Moore, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from the judgment and from the denial of the motion for a new trial in the causes wherein the defendant was convicted of two counts of armed robbery in the first degree, and one count of kidnapping.

In an indictment returned by the grand jury of Los Angeles county Louis J. Spivak, Richard McFall, Wayne Burke and Alfred J. Pope were charged in count I with robbery, in that they did, on or about June 18, 1957, by force and fear, take from the person of Lauritz Melchior certain personal property in violation of section 211, Penal Code.

In count II the same defendants were indicted for the crime of robbery for taking

personal property at or about the same time from Mrs. Lauritz Melchior.

In count III the same defendants were charged with kidnapping for the purpose of robbery, in that they seized one Willa Huber while armed with deadly weapons, with intent to hold and detain her for the purposes of committing robbery.

Spivak was charged with five prior convictions, having started to serve prison terms in about 1942 in New York state, and continuing down to 1954, when he started serving a term in the California prison system.

In the indictment it was also alleged that Burke had two prior convictions, one for robbery and one for escape. The indictment above referred to was numbered 192,-231, and was filed on June 25, 1957.

On August 26, 1957, the appellant moved to dismiss the indictment numbered 192,231 under section 995, Penal Code. That motion was continued to September 12, 1957, and on that date it was continued to September 25, 1957.

On September 13, 1957, an indictment numbered 194,773 was returned, wherein Spivak alone was charged with the same three counts heretofore listed and the five prior convictions. The motion made under section 955 was withdrawn. On the second indictment Spivak pleaded not guilty and denied the prior convictions.

The defendant McFall changed his plea to guilty as to count I of robbery, and waived a jury trial as to the five prior convictions charged against him.

The defendant Pope changed his plea to guilty as to count I of robbery.

Severance of Spivak and Burke was granted as to the first indictment, which indictment was to be tried with the second. The causes were consolidated for trial, which started on or about November 21, 1957.

Spivak and Burke waived formal re-arraignment, and Spivak, as to both indictments, admitted the alleged second, third and fifth prior convictions, and denied the alleged first and fourth prior convictions. Within due time, and during the presentation of the prosecution's case, the district attorney moved, pursuant to section 1099, Penal Code, that Burke be discharged for the purpose of becoming a witness for the prosecution. The motion was granted. Spivak's motions for a dismissal, and then for a mis-trial, were denied.

The jury found the defendant guilty as charged in all three counts, and of having been armed at the time of the commission of all three named offenses. Further, the jury found the robbery to be that of the first degree.

Spivak moved for permission to file an application for probation and for a new trial. The court permitted him to file the application for probation although it was obvious that he was not eligible for probation under the law (Penal Code, § 1203). The court found the allegations with reference to the second, third and fifth prior convictions (pursuant to Spivak's admission) to be true, and denied the application for probation. The application for a new trial was denied, and appellant was sentenced to the state prison, the sentences to run concurrently.

This appeal is from the judgment of conviction and the denial of the motion for a new trial.

Because of the contentions of the appellant hereinafter set forth, a résumé of the facts in general is given, and thereafter a résumé of the particular testimony of certain witnesses.

Spivak, McFall and Burke all met in Folsom prison while each was serving a term therein. Spivak was released in 1956, and came to Los Angeles county. He moved into the Bristol hotel in May, 1957, where he registered under the name of Joseph Stearns. On June 13, 1957, Spivak met McFall on the street in downtown Los Angeles. On June 15, 1957, Spivak and McFall met again by arrangement. Spivak apparently had been writing bad checks, and had written one for his hotel rent and wanted to move therefrom without attract-

ing much attention. Spivak and McFall entered into an agreement whereby Spivak would purchase television sets with worthless checks and McFall would sell them.

Howard L. Nichols, an ex-convict, knew Spivak and McFall while in prison. Several days before June 18, 1957, Spivak, McFall and Nichols drove in an automobile into the Hollywood Hills, and at one place parked in a wide spot on the road where they could overlook what appeared to be the San Fernando Valley.

The location just referred to was later determined to be about 100 yards from the residence of Lauritz Melchior. Either while riding in the vicinity, or while parked there, Spivak stated to those who were with him that he formerly had an orchestra and had played in that area, and also that he had been a house guest in that area.

Lauritz Melchior met Spivak at an encampment of the Bohemian Club (San Francisco) in 1947, and thereafter, in August, 1947, Spivak worked for Melchior in and about his estate in Los Angeles county for about two weeks. Spivak apparently stole something from the Melchior residence, and left the employment without Melchior's knowledge or consent. During the time he was employed in the Melchior household, Spivak had access to all of the rooms in the house, and resided there. The buildings at the estate at the time of the trial were about the same as they were when Spivak was employed there.

On June 18, 1957, Willa Huber and Charles Luscher lived and worked in the Melchior household, which consisted of Mr. and Mrs. Melchior and the mother of Mrs. Melchior. Shortly after ten o'clock p. m., Willa Huber was awakened in her apartment by a noise at her door. McFall and Burke, both armed, entered and said, "This is a holdup." Upon learning that she did not have a key to the main part of the house, they directed her to dress and then forced her to go to the main house, which was about 100 feet from her apartment, and to ring the doorbell. The doorbell was answered by Charles Luscher and Mrs. Melchior. When the door was opened the two robbers forced Willa Huber into the house and required her to lie down upon a couch. Both men pointed their guns at Mrs. Melchior. Burke stated that it was a holdup and asked "Where is your big diamond?" Mrs. Melchior was then forced to locate and to press the button which would electrically actuate and open the front gate. Alfred J. Pope then entered the front gate and drove an automobile from the street up the driveway to the house. Burke told Mr. Melchior it was a holdup and forced him to go to the basement and open the fur safe located there. Melchior and Burke then went to the trophy room, where Burke inquired of Mrs. Melchior, "Where is the ring and other stuff?" She said she would show it to him. The particular ring referred to was one which she had owned and worn when Spivak had worked there. They then went into a bathroom, where Burke removed several pieces of jewelry from a drawer. At that time Burke's stocking mask broke and Mrs. Melchior was able to see his face. Burke then struck her. They returned to the living room and Mrs. Melchior was then taken to the safe located in the library, and she gave Burke $300 and some more jewelry and some furs. They went back to the living room and Burke inquired, "Where is the pistol?" Burke then got Mr. Melchior's pistol. The robbers then left. During the course of the robbery money in excess of $500, and other personal property, including jewelry and furs insured for over $100,000 were taken.

McFall

McFall pleaded guilty to count I, the robbery of Lauritz Melchior, and at the time of testifying was awaiting a hearing upon his application for probation and sentencing. In brief, McFall testified as follows: That he met and knew Spivak in Folsom and San Quentin prisons. He was released from Folsom prison in 1955, and had resided in Los Angeles county since that time. Further, that he and Spivak met for the first time since his release, in down-

town Los Angeles on about June 11, 1957, where they exchanged addresses and telephone numbers. Spivak was then residing at the Bristol hotel under the name of Stearns. The two of them later met at the Bristol hotel where Spivak told McFall that he had a "good score" (which, in their parlance, meant that Spivak knew where they could make an illegal gain). That Spivak stated to him that he was familiar with the Melchior residence, and that knowing that Melchior had a very substantial amount of money and jewelry there, he would like to see him, that is McFall, and one or two others, rob the place and divide the proceeds with him. Spivak stated that he formerly had been a house guest at the Melchior home. That night, at the Alibi Room, a bar on Crenshaw Boulevard, McFall spoke to Burke about the proposed robbery. On June 14th or 15th, 1957, he met with Spivak at the Bristol hotel, where he told Spivak that he had secured one man to go on the robbery, and perhaps one other. They discussed the grounds of the Melchior estate and some of the personal property which might be obtained; Spivak specifically mentioning a large emerald ring and a large diamond ring, each valued at about $20,000, and a large sum of money. Spivak told him that he would draw a diagram of the grounds and another of the house. Spivak further stated, however, that he did not want to be involved by having his name mentioned to any of the persons who were to participate in the robbery.

McFall also testified that Spivak wanted to leave the Bristol hotel because he had given a bad check to the hotel for the rent. Spivak and McFall came to an understanding that a false telegram would be sent to Spivak at the hotel which would falsely set forth that some relative of Spivak's was ill and that his presence was needed. McFall further testified that he sent such a telegram to "Joe Stearns," the name Spivak was using at the hotel.

On Monday, June 17, 1957, McFall helped Spivak move to McFall's hotel, the Harvey, on Santa Monica Boulevard in Los Angeles. Before arriving at the Harvey hotel they talked about the floor plan of the Melchior house, and Spivak gave McFall maps and drawings of the premises and the house. These drawings showed the electrically controlled gate which Spivak had told McFall operated from a button or buttons within the house. McFall testified further that three or four days before the robbery, McFall, Spivak and Nichols had been in the vicinity of the Melchior estate, having gone there in McFall's automobile. Nichols was a passenger. McFall did the driving and Spivak directed McFall where to go. After several attempts they located the entrance to the estate (the gate of the Melchior residence), but they did not, at that time, get out of the car. McFall never had been there before. Later, McFall, Burke, and perhaps Nichols, drove to the same location.

Spivak was to get one-third of any proceeds of any robbery of the Melchior establishment. McFall or his accomplice was to sell the jewelry.

McFall told Spivak that he was "dubious as to the condition of two of the tires on my car." Spivak said he would issue a worthless check to buy "a couple of tires for the car." They went to Sears, near Western and Santa Monica, and there Spivak issued a check for the tires, tubes and an air seat for McFall's automobile. The robbery was talked of and discussed on the afternoon of the robbery by Spivak and McFall.

McFall further testified that he and Burke and Pope, on the day of the robbery, drove to the Melchior residence and arrived there about 10:30 o'clock p. m. That Burke and McFall climbed the fence and went onto the grounds, Pope remaining outside in the car. Burke and McFall each had a pistol and wore a mask. They entered the maid's room with guns pointed at her, and directed that she take them to the main entrance, which she did. They were let in and then told the Melchiors that it was a holdup. They stayed about twenty minutes, and during this time, McFall asked Mrs. Melchior if she had a diamond ring and an emerald ring, each

worth $20,000, and she answered that she had such. Burke pressed the button opening the gate entrance and Pope entered. McFall got some jewelry from a dressing room and a gun from Mrs. Melchior, which latter he kept, and he gave his own gun to Pope. McFall got "the two rings of value" plus other things. Burke and McFall and the Melchiors went to the safe, where Mrs. Melchior got $300, which Burke took. McFall later got approximately one-half of this, and subsequently gave $10 or $20 to Spivak. They also took various furs. Burke and McFall then tied up the Melchiors, and the three robbers left in Pope's car. Burke and McFall then left the Pope car and got into McFall's automobile, leaving some of the jewelry and furs in Pope's car. They agreed to meet at the apartment of John Heath the bartender of the Alibi Room bar. McFall and Burke got to the apartment first and divided the money. They agreed that Burke was to dispose of the jewelry, however, in the event he was unable to do so, McFall was to attempt to dispose of it. Pope took the furs. McFall then drove Burke to the Alibi Room and he went on to the Harvey hotel. He met Spivak and Nichols there at the hotel, and McFall gave Spivak some money. McFall told Spivak and Nichols about the robbery. They then listened to a radio to hear of the robbery. On the next day Spivak and McFall talked of the robbery and Spivak was told that two other men had participated in the robbery with McFall. McFall went to San Francisco and then on to Montana, in which state he had previously served in the state prison, and he was arrested in Montana on August 10, 1957.

Burke

The charges against Burke were dismissed under section 1099, Penal Code. A résumé of Burke's testimony is as follows: He first knew McFall in Folsom prison. He met Pope at the Alibi Room a few days before the robbery. McFall had told Burke that Spivak had a good "score." Later in another talk McFall told Burke that Spivak had been a guest at the Melchior home and that Spivak was the brother of Charlie Spivak. McFall had said that Spivak knew the layout of the Melchior house and where the safes were located. They discussed the electrically controlled and operated gate. Later, he, McFall and Nichols drove up Mulholland Drive and located the Melchior residence, and examined the place. McFall had said there was $300,000 in jewelry and $60,000 in cash to be had, and that he had secured this information from Spivak. On Monday, June 17, 1957, he, Burke, agreed to go on the robbery. On Tuesday, June 18, 1957, McFall and Burke met at the Alibi Room where McFall showed Burke maps of the grounds of the Melchior estate. McFall stated that one-third of the returns from the robbery were to go to Spivak. Burke told Pope, who was at the bar, of the proposed robbery, and Pope agreed to go with them. They agreed to, and did meet at 8:30 o'clock that evening near the Alibi Room. Before this McFall (also called Murf) told Burke there was a $20,000 ring and furs to be had. They went to within about a half-mile of the Melchior estate in two cars, parked the McFall car and all continued to the Melchior estate in Pope's car. They were armed with two pistols. McFall and Burke went over the fence at the estate. The door to the Melchior residence was locked, so they went to the maid's room where the door was open, awakened her and stated that it was a robbery. They pointed a gun at her and told her to get dressed. Upon their instructions she then went with them to the Melchior house where she knocked on the door or rang the buzzer, and the door was then opened. Burke told Charles Luscher, and Mr. and Mrs. Melchior that it was a robbery. Mrs. Melchior showed them the location of the button that was used to open the gate and Mrs. Melchior pressed it. Pope then drove in. Burke told Melchior to take him to the fur vault which he, Burke, knew about because McFall had told him. Burke and Melchior did go to

the fur vault in the basement and got the furs. Burke had been told of two other safes in the house and he asked Melchior where they were and Melchior told him where the safes were located. They went to the safe in the library and then returned to the living room. Burke went back to the safe in the library, joining, McFall and Mrs. Melchior who handed Burke an envelope containing $300. Burke then went with Mrs. Melchior into the bedroom and got a fur coat; McFall and Burke then tied up the victims while Pope put the furs into his car. The robbers then left. Burke and McFall went to Heath's apartment. McFall emptied a brief case of jewelry. Burke gave Pope $60, and McFall and Burke took the remainder. Pope took the furs and Burke took the big jewelry and "stashed" it. The next day McFall and Burke met, and the former wanted to dispose of the jewelry at once but Burke refused. Burke was fearful of what McFall might do because Burke was of the opinion that McFall was a narcotic addict. Later, Burke and Officer Jokisch recovered the jewelry and they then went to Pope's apartment and recovered the furs.

Spivak

Spivak stated that he had worked for the Melchiors in 1947 for two or three weeks as a chauffeur and gardner, however, that he was not allowed inside of the house; that he did no house cleaning nor making of beds, nor was he informed as to the location of any safes. He said he was only in the house twice, and then only as far as the kitchen. Further, he said that the entrance gates were manually operated, and not electrically operated; that he had no knowledge of the telephones in the house, and that he never took a ride into the Hollywood hills with McFall and Nichols. He knew McFall in Folsom prison, and while there discussed with McFall and a man by the name of Baker the jewelry belonging to Mrs. Melchior. Spivak had come to Los Angeles in September, 1956, after his release from Folsom, and in May, 1957, moved into the Bristol hotel under the name of Joseph Stearns. He was using a fictitious name because he had written bad checks. He met McFall in Los Angeles on Thursday, June 13, 1957, and had spoken to him about having written a bad check in payment of his hotel rent, and stated that he, Spivak, would have to leave by Monday, June 17th. They arranged to meet at the Bristol hotel on the next day. On Saturday, the 15th, McFall and Spivak met at the latter's hotel, and McFall agreed to send Spivak a false telegram that would, on its face, give a reason for Spivak's leaving the hotel. They also made an arrangement whereby Spivak would issue worthless checks to purchase television sets which McFall would sell, and they would then divide the proceeds. They then went to the Harvey hotel, joining Nichols. They talked of the Melchior residence and how it appeared. No mention was made about "scoring" on the place. The three went to a drive-in to eat. On Monday McFall sent a telegram to Spivak stating that Spivak's mother was ill. Later McFall appeared and they agreed to, and did move Spivak to the Harvey hotel where McFall was staying. They also agreed to secure some more television sets. They went to the Hollywood Music City store and Spivak issued a worthless check for a television set. Spivak, McFall and Nichols went to Sears, where they purchased with a worthless check another television set, and also bought some tires under the same plan. Spivak stated that McFall had agreed to give Spivak $10 each for two tires for his car. After leaving there, McFall sold one of the television sets, but was unable to sell the other. They returned to the Harvey hotel, where Spivak put the remaining television set in his room. McFall gave Spivak $20 and told him that he had sold the first television set for $80, and had collected $35 or $40 of such amount, and was to get the balance the next day. The next day Nichols, McFall and Spivak had breakfast together and he, Spivak, demanded the remaining money due him for the television set and for the tires. Later

Spivak went to the races. That night Nichols came by and watched television with Spivak. At about 11:00 or 11:30 o'clock Nichols left and Spivak went to bed. The next morning at about 2:00 or 2:30 o'clock a. m., Spivak was awakened by Nichols who told him that McFall wanted to see him, and Spivak and Nichols went to McFall's room where Spivak again demanded his money from the television set sale and for the tires. McFall told Spivak that he would get the money for him the next day, and then asked Spivak to drive him to Lancaster, which Spivak refused to do.

The next morning Spivak, Nichols and McFall had breakfast together and again Spivak asked McFall for money, and the latter promised to get it for him. McFall and Nichols left together and later on Spivak went to a movie. That day Spivak read in the newspapers of the Melchior robbery and wondered if McFall could have done it, remembering that they had spoken of the Melchiors a few days before. Spivak said he decided that McFall had not done it, and on Thursday morning he, Spivak, checked out of the hotel. He had waited for McFall but McFall had not returned, and as Sears was across the street from his hotel, he had decided it was time to leave, but that he did not leave because of the Melchior robbery. Before leaving the hotel Spivak sold the remaining television set for $75 to a man in the restaurant. Spivak and Nichols went downtown and checked into another hotel, and on that day Spivak saw the names of Morgan and Pope in the newspapers, and on Friday night Spivak left Los Angeles. At that time Spivak's name also appeared in the Los Angeles papers. On August 3, 1957, Spivak was arrested in San Francisco. Spivak stated that he had never discussed the Melchior robbery with McFall, nor did he draw any map of the Melchior's house or premises.

Spivak, the appellant, now contends that there was (1) insufficient corroboration of accomplice testimony; (2) that errors occurred in the admission of evidence, and (3) in the remarks of the trial court, and (4) in prosecuting Spivak under two indictments.

Section 1111, Penal Code, provides as follows:

> "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

The Supreme Court of California has recently had occasion to speak on the problem involved in this case. In People v. MacEwing, 45 Cal.2d 218, at page 225, 288 P.2d 257, at page 261, it was said:

> "The decisions applying section 1111, relating to accomplices, hold that the corroborative evidence required by that provision must be considered without the aid of the testimony which is to be corroborated and that it is not sufficient if it requires the interpretation and direction of such testimony in order to give it value. (Citing cases.) There are two opinions which, although not clear, indicate that a similar rule applies with respect to section 1108. See People v. Crain, 102 Cal. App.2d 566, 579, 228 P.2d 307 * * *; People v. Murphy, 60 Cal.App.2d 762, 772, 141 P.2d 755 * * *. In our opinion both statutes must be construed to mean that corroboration is not adequate if it requires aid from the testimony of the person to be corroborated in order to connect the defendant with the commission of the offense charged. The instruction is therefore erroneous."

And in People v. Brown, 49 Cal.2d 577, at page 584, 320 P.2d 5, at page 9, it is set forth:

"The People rely also upon the testimony of Dr. Randall, who treated Clara on January 30, 1956, as corroboration. The doctor's testimony does not meet the test of connecting defendant with the abortion which Clara underwent. People v. Ramsey, (1948), 83 Cal.App.2d 707, 713, 717 [4] 189 P.2d 802, is inconsistent with People v. MacEwing (1955), 45 Cal.2d 218, 255 [7], 288 P.2d 257, supra, insofar as it suggests that testimony which does not itself connect the defendant with the criminal abortion is sufficient corroboration; in this respect the Ramsey case does not represent the law and, to avoid possible confusion, is to that extent disapproved."

In People v. Santo, 43 Cal.2d 319, at page 327, 273 P.2d 249, at page 253, the court said:

"The accomplice need not be corroborated as to every fact to which he testifies. The evidence which corroborates the accomplice need not be direct; it may be circumstantial. Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the defendant. (Citing cases.) To be sufficient the implicating evidence 'must relate to some act or fact which is an element of the offense.' People v. Gallardo, (1953), 41 Cal.2d 57, 63, 257 P.2d 29 * * *."

In People v. Lyons, 50 Cal.2d 245, 324 P.2d 556, at page 562, the court said:

"The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. [Citing cases.]"

[1] The evidence required by the section in question may be sufficient, even though slight and entitled to but little consideration when standing alone. People v. Wayne, 41 Cal.2d 814, 822, 264 P.2d 547; People v. Walker, 88 Cal.App.2d 265, 198 P.2d 534.

In People v. Perry, 123 Cal.App.2d 74, at page 80, 266 P.2d 515, at page 519, the court said: "Therefore, unless we can say that the corroborating evidence is either incompetent or is of such a character that it could not tend to connect appellant with the commission of the crime and could not reasonably support an inference of such connection, the finding of the jury on that issue cannot be disturbed on appeal. People v. McNamara, 103 Cal.App.2d 729, 738, 230 P.2d 411. * * *" "The entire conduct of the parties, their relationship, acts, and conduct during and after the crime, may be taken into consideration by the jury in determining the sufficiency of the corroboration." People v. Griffin, 98 Cal.App.2d 1, 25, 219 P.2d 519, 534.

[2] Applying the rules just set forth to the testimony in this case, we are convinced that there is ample corroboration of the accomplice testimony.

Nichols stated that he and Spivak and McFall drove to the Hollywood Hills to a location overlooking the San Fernando Valley. Nichols said the place where they parked had a "wider shoulder;" he said Spivak claimed to have been a house guest there; that the location was near a white gate. Later on Nichols went to the location with Officer Vietti, Sergeant Buckley and another person, and parked at the same location where he had previously parked. Nichols told the police officers that it was the same location. Officer Vietti testified

that the location, in fact, was on Mulholland drive about 100 yards down hill from the Melchior home. Spivak denied making any such a trip. The jury could very well have drawn the conclusion that Spivak was at the location in question and that he was there with McFall for the purpose of showing McFall the Melchior premises to the end that McFall could assist in committing the robbery. The testimony certainly corroborates the story which McFall related, and relates to acts or facts which are elements of the offense. Furthermore it is the type of corroboration which does not require aid from McFall's testimony in order to connect Spivak with the commission of the crime.

Further, by his own admissions, Spivak left the hotel where he was staying two days after the robbery and moved into a new hotel. On the next night he went to Santa Monica and then to San Francisco. He left the hotel even though he had paid a week's rent in advance. "Flight is a factor tending to connect an accused with commission of an offense." People v. Hoyt, 20 Cal.2d 306, 313, 125 P.2d 29, 33. And further, "* * * 'corroboration need not be by direct evidence, but the entire conduct of the defendant may be looked to for corroborating circumstances and if, from those circumstances, his connection with the crime may be fairly inferred, the corroboration is sufficient.'" People v. Hoyt, 20 Cal.2d at page 313, 125 P.2d at page 33, supra.

The jury very well could have determined that the flight of Spivak was because of his involvement in the Melchior robbery.

It is also true that Spivak made statements as to material facts which were wilfully untrue. Spivak said he did not go to the Hollywood Hills, Nichols said he did. The Melchiors stated that Spivak worked inside of their house and had been in it on several occasions and had access to the rooms. Spivak denied having worked in the house. Mr. Melchior stated that the gate worked electrically when Spivak worked there. Spivak said that it worked manually, and that he did not know that it operated electrically and was actuated by any buttons.

[3] In People v. Wayne, 41 Cal.2d 814, at page 823, 264 P.2d 547, at page 551, supra, the court said:

> "'* * * But where a material fact is established by evidence and it is shown that a defendant's testimony as to that fact was wilfully untrue, this circumstance not only furnishes a ground for disbelieving other testimony of this defendant [citations], but also tends to show consciousness of guilt or liability on his part and has probative force in connection with other evidence on the issue of such guilt or liability. Such false testimony is in the nature of an admission from which with other evidence guilt or liability may be inferred. [Citations.]'"

The denials of Spivak show a consciousness of guilt from which the jury could deduce that he had a connection with the robbery.

There are various other circumstances which by themselves, perhaps, would not supply sufficient corroboration, but when taken together do, in our opinion, make the appellant's contentions of little worth. Spivak worked for the Melchiors and had a knowledge of the house and grounds; while in prison he talked with McFall of the Melchiors and their jewelry; Spivak bought tires for McFall's automobile shortly before the robbery, and that automobile was used in the robbery, and further, Spivak was involved with McFall in a scheme to secure television sets illegally, to sell them and to divide the proceeds with McFall.

The jury could, and undoubtedly did take into consideration the relationship of the parties and their acts and conduct. See People v. Ross, 46 Cal.App.2d 385, 395, 116 P.2d 81; People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519.

Furthermore, the jury could properly have considered the fact that Spivak and McFall were arguing about money. The jury could well have believed that the mon-

ey which brought about the disputes between them was not the money from the sale of the television sets, but rather was that secured from the robbery.

[4] Appellant's next contention is that the court erred in admitting certain testimony of Officer Vietti. The question put to the officer was:

"Q. (By Mr. Amstutz) Had you been informed that Mr. Nichols had gone to a certain location around the area of the Mulholland Drive?

"Mr. Rosen: I will object to that, again, as calling for hearsay.

"The Court: Overruled.

"A. Yes.

"The Court: Purely foundational."

The prosecution had already introduced evidence to the effect that Nichols, Spivak and McFall had driven into an area in the Hollywood Hills. Nichols had described the area, but he had not located it precisely. Later Nichols took a trip with Officer Vietti and others to the same location. The prosecution put the officer on the witness stand to tell of the location of the area where he and Nichols had gone. To explain the actions in taking the trip it was necessary and proper for the officer to state the circumstances giving rise to it. See Daniels v. United States, 9 Cir., 17 F.2d 339, 344; Coleman v. State, 43 Ga.App. 350, 158 S.E. 627, 628; Fitzpatrick v. Commonwealth, 210 Ky. 385, 275 S.W. 819; State v. Rotolo, 39 Wyo. 181, 270 P. 665, 667.

[5] Extrajudicial statements are, under circumstances such as in the present case, admissible to show why a person did certain acts.

[6] The second question put to Officer Vietti objected to by Spivak was:

"Q. (By Mr. Amstutz) Did you have some idea, Mr. Vietti, that the place where you were attempting to reach was up or in the area of the Melchior residence?

"Mr. Rosen: Object to that as calling for a conclusion.

"The Court: Overruled.

"Mr. Rosen: Hearsay.

"A. Yes."

In our opinion the question did not call for a conclusion as such term is used in discussing the law of evidence. The question really goes to the state of mind of the officer at the time he took the trip. He either thought he was going to the area of the Melchior house, or he thought to the contrary.

In any event, assuming the questions were improper, the testimony complained of did not bring about a miscarriage of justice. Calif.Const. Art. VI, § 4½.

[7, 8] The next contention of Spivak is that the court erred in admitting the conversations between the accomplices Burke and McFall. McFall, by his testimony, disclosed that a conspiracy existed, and such was corroborated. Burke told of the talks between himself and McFall. The direct testimony of a co-conspirator is admissible and is competent to establish the facts to which he testifies. See People v. Steelik, 187 Cal. 361, 377, 203 P. 78. Once the conspiracy has been established, the extrajudicial declarations of a conspirator against his co-conspirators are admissible. Code Civ.Proc. § 1870, subd. 6.

We find no error in permitting Burke to testify to the statements of McFall made out of the presence of Spivak under the particular circumstances of this case.

[9] Appellant's next contention is that the judge erred in making a statement to the jury when he granted the motion of the district attorney to dismiss the matter as against Burke under the provisions of section 1099, Penal Code. The judge simply and properly explained the procedure to the jury. Any juror or layman might very well have wondered about the legality of such a procedure had there been no explanation in the first instance. The judge explained the matter fairly and correctly and that is all that we can find in his statement. A Texas court stated the matter succinctly in

Camron v. State, 32 Tex.Cr.R. 180, 22 S.W. 682, at page 682, wherein it said:

"From the earliest times it has been found necessary, for the detection and punishment of crime, for the state to resort to the criminals themselves for testimony with which to convict their confederates in crime. While such a course offers a premium to treachery, and sometimes permits the more guilty to escape, it tends to prevent and break up combinations by making criminals suspicious of each other, and it leads to the punishment of guilty persons who would otherwise escape."

The judge said, in so many words, "I am informed by the People and counsel for the defendant Burke that he proposes to fully and freely testify before this Court now concerning the same circumstances."

[10] Lastly, Spivak contends that it was error to be tried under two indictments. In the first indictment he was indicted with three others, and in the second indictment the proceeding was against Spivak by himself. The two indictments were consolidated. See People v. Follette, 74 Cal.App. 178, 189, 240 P. 502, 507, wherein the court said: "* * * The strict rules prevailing prior to these amendments often hampered prosecuting officers in their attempts to enforce the law, and resulted in many miscarriages of justice. In view of the more liberal rules now prevailing in the institution and conduct of criminal proceedings and after a consideration of the above authorities, we are of the opinion that there is nothing in the law of this state which affects the regularity or validity of the second indictment presented against the defendant."

In the present case the indictments were identical insofar as Spivak was concerned. Furthermore, Spivak made no objections and stated, in effect, through his counsel that the procedure adopted was satisfactory to him. He cannot now complain. Spivak was not prejudiced in any way.

A thorough reading of the entire transcript leaves no doubt in our minds that the appellant was fairly tried and properly convicted. Any error, if there was such, was not prejudicial to the appellant.

The judgment of conviction and the order denying a motion for a new trial are, and each is, affirmed.

WHITE, P. J., and LILLIE, J., concur.

167 Cal.App.2d 20

W. W. COWLES, as Trustee In Bankruptcy of the Estate of A. G. Eldred & Co., a copartnership consisting of Arthur Gordon Eldred and Genevieve I. Eldred, Bankrupt, and as Trustee in Bankruptcy for the Estate of Arthur Gordon Eldred, Bankrupt, Plaintiff and Respondent,

v.

Joseph K. ZLAKET, doing business as Cal-Properties, Defendant and Appellant.

Civ. 5753.

District Court of Appeal, Fourth District, California.

Jan. 8, 1959.

Action to recover for alleged usury. Judgment for the plaintiff in the Superior Court of Orange County, Robert Gardner, J., and the defendant appeals. The District Court of Appeal, Griffin, P. J., held that evidence was sufficiently clear and convincing to establish that transactions which were in form of a sale and an option back were in fact simply loans from the defendant to the plaintiff and that usury was exacted and paid and that plaintiff was entitled to recover therefor.

Judgment affirmed.

1. Usury ⇦113

There is a presumption of law that transactions are legal and not usurious.

2. Appeal and Error ⇦1011(1)

Mortgages ⇦38(2), 39

Where a conveyance is absolute in form with an option to repurchase, one

asserting that it is a loan must establish that fact by evidence which is clear and convincing, and whether the evidence received is such is usually a question of fact for the trial court and upon conflicting evidence it is not ordinarily open to review on appeal.

3. Mortgages ⇐32(3)

Conveyances absolute on their faces may be shown to be in fact loans or security transactions.

4. Usury ⇐117

Evidence was sufficiently clear and convincing to establish that transactions which were in form of a sale and an option back were in fact simply loans from the defendant to the plaintiff and that usury was exacted and paid and that plaintiff was entitled to recover therefor.

5. Usury ⇐117

Evidence established that trust deeds and notes originally in the possession of borrower were assigned by him to the lender by virtue of ostensible authority for the purpose of securing money, and that the consideration was paid to the borrower and not to the trustors, so as to entitle the borrower to recover for usury exacted by the defendant in the transaction. West's Ann.Civ.Code, §§ 1916, 1916–2, 1916–3.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, and Milford W. Dahl, Santa Ana, for appellant.

Carl C. Cowles, Santa Ana, for respondent.

GRIFFIN, Presiding Justice.

Plaintiff and respondent W. W. Cowles, as trustee in bankruptcy of the estate of A. G. Eldred & Co., a copartnership consisting of Arthur Gordon Eldred and Genevieve I. Eldred, bankrupt, and Arthur G. Eldred, an individual, a bankrupt, brought this action against Joseph K. Zlaket, doing business as Cal-Properties, to recover $17,889.51 claimed due under alleged usurious transactions.

The complaint is long but the allegations are more or less simple. It sets out 16 separate causes of action. Each is essentially based on very similar facts and circumstances. All of the transactions involved took place in 1953 and 1954 between Arthur G. Eldred (hereinafter referred to as Eldred) on the one hand, and Joseph K. Zlaket (hereinafter referred to as Zlaket) on the other hand. After the transactions complained about transpired, Eldred filed a voluntary petition in bankruptcy and was adjudicated as such. Thereafter Cowles was appointed trustee in bankruptcy of the Eldred estates and brought this action in his capacity as trustee.

Eldred owned or had control of 16 separate promissory notes secured by deeds of trust on real property situated in Orange County. (Exhibit 4.) For the purpose of separately identifying them, at the trial they were referred to in the record and will hereinafter be referred to as the Sandcamp, Bartee, Solis, Abernathy (1), Abernathy (2), Johnson, Gardea, Flores, Gaspar-Porath, Pluneda, Mendoza, Moss-White, Plasencia, Pokyn, Robinson and Cernich notes and deeds of trust. All were first liens on real estate in Orange County with the exception of the Bartee note and trust deed which was second to a very small balance remaining unpaid on a first deed of trust and for this reason it also was, for all practical purposes, a first deed of trust. The real estate covered by each of said deeds was of ample value to fully secure the notes.

On or about June 22, 1953, Eldred assigned and transferred to Zlaket the Sandcamp note and deed of trust. The principal was $7,500, and nothing had been paid on it. At the same time Zlaket delivered and transferred to Eldred $6,000 in cash and gave Eldred a so-called 90-day written agreement to reassign. About September 28, 1953, Eldred delivered and turned over to Zlaket cash in the sum of $6,240, and at the same time Zlaket reassigned and delivered back to Eldred the Sandcamp note and deed of trust. This transaction

was not directly involved in the 16 causes of action set forth in the complaint but was put into evidence as being the first of a series of transactions between the parties and bearing on their subsequent actions and transactions.

About December 14, 1953, Eldred again assigned and delivered back to Zlaket this same Sandcamp note and deed of trust, and at the same time Zlaket delivered to Eldred $5,200 and gave to Eldred the written instrument entitled "Ninety Day Agreement", being the second of the group of written agreements (Exhibits 1 and 2). They were typed upon mimeographed forms prepared by Zlaket, and read in part as follows:

"This Agreement, entered into this ——— day of ——— by and between A. G. Eldred (or A. G. Eldred for the assignor) hereinafter referred to as the Assignor/s and Cal-Properties, Joseph K. Zlaket, hereinafter referred to as the Assignee, Witnesseth:

"That Whereas; On this ——— day of ——— 195— the aforementioned Assignor/s did sell, transfer and assign to the aforementioned Assignee, all right, title and interest to and within the following instruments of record, to wit:"

(Then follows a detailed description of the note and trust deed and the balance due, as indicated on said note.)

"And Whereas: That for and in consideration of the aforementioned right, title and interest to and within the ——— secured by ——— above described, and as the full purchase price therefor, the said Assignee did pay to the said Assignor/s the sum of ——— (net), lawful money of the United States, the receipt of which is hereby acknowledged by the said Assignor/s.

"Now Therefore: it is mutually agreed and understood by both the Assignor/s and the Assignee, that at any time prior to the expiration of Ninety (90) Days from date of this agreement, the said Assignor/s shall have the right and privilege to repurchase and have reassigned back to them the right, title and interest to and within the instruments hereinbefore described upon their performance and fulfillment of the acts and conditions as hereinafter stipulated, to wit:

"1.—That within the time limit of Ninety (90) days from date of this agreement, the said Assignor/s, for the purpose of repurchase, shall repay to the said Assignee the full sum above stipulated as the purchase price, which sum is $———, plus a sum of $——— (about 10 per cent of the purchase price), which sum constitutes a charge for services rendered or paid for, plus a sum equal to Six (6%) Percent per annum on the stipulated remaining Principal Balance as of date of this assignment from date of this agreement to the date that repayment be made to the Assignee.

"2.—That upon the payment by the Assignor/s to the Assignee of the total sums or a sum equal to all sums designated in paragraph numbered One (1) of this agreement in lawful money of the United States, the said Assignee agrees to resell and to reassign back to the said Assignor/s the right, title and interest to and within the instruments hereinbefore mentioned.

"It Is Further Mutually Understood And Agreed, that in the event the said Assignor/s shall fail to repay to the said Assignee the sum of money herein agreed upon and above stipulated, then at the expiration of the Ninety (90) Day period, the right and privilege of the said Assignor/s to repurchase or repay shall cease and no further obligation or duty shall rest upon the Assignee to the Assignor/s and this agreement shall be construed as null and void * * *

(Signed) "A. G. Eldred
(Assignor)

"Joseph K. Zlaket
"Cal-Properties (Assignee)"

About April 26, 1954, Eldred delivered to Zlaket cash in the sum of $5,740.26, and Zlaket again transferred and reassigned the said Sandcamp note and deed of trust back to Eldred.

About December 16, 1953, Eldred transferred and assigned to Zlaket seven of the trust deeds mentioned in Exhibit 4. At the same time Zlaket delivered to Eldred cash in the sum of $13,700, and Zlaket executed and delivered to Eldred seven separate written "Ninety Day Agreements", as above described, covering each of the respective aforesaid notes and deeds of trust. About December 21, 1953, Eldred transferred and assigned to Zlaket the remaining deeds of trust included in the group mentioned in Exhibit 4. At the same time Zlaket delivered to Eldred cash in the sum of $12,050, and Zlaket delivered to Eldred eight separate written "Ninety Day Agreements" similarly prepared. Thereafter, and prior to April 1, 1954, Eldred delivered to Zlaket the so-called "option price" mentioned in said "Ninety Day Agreements" covering five of that group and Zlaket reassigned and delivered back to Eldred said five notes and deeds of trust. All sixteen notes and deeds of trust set forth in the complaint were similarly and eventually reassigned and redelivered by Zlaket to Eldred, and Eldred paid the amount demanded by Zlaket.

Throughout the testimony given by Zlaket he referred to said transaction as a sale from Eldred to him and a repurchase by Eldred from him under the terms of an option agreement. On the other hand, Eldred, throughout his testimony, referred to said transactions as loans and the repayment of loans. The whole case revolved about and depended upon the interpretation to be placed on these transactions in the light of the entire record. Plaintiff's theory of the case was that while the papers evidencing these transactions were in form a sale with an option back, yet they were in truth and in fact simply loans from Zlaket to Eldred, and that casting the transactions in the form of a sale with option to repurchase does not insulate them from the usury laws, citing Orlando v. Berns, 154 Cal.App.2d 753, 316 P.2d 705; Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038; Milana v. Credit Discount Co., 27 Cal.2d 335, 340, 163 P.2d 869, 165 A.L.R. 621; and Wood v. Angeles Mesa Land Co., 120 Cal.App. 313, 317, 7 P.2d 748.

The trial court found that these transactions were in fact loans masquerading under the cloak of sales and resales under an option to repurchase; that usury was exacted and paid, and the plaintiff was entitled to recover in accordance with the judgment entered.

Zlaket has appealed from the trial court's decision on two grounds: first, that the evidence does not support the trial court's findings; that the transactions could not be loans as there was no promise to repay; and second, that in any event plaintiff was not entitled to recover as to certain of said transactions for the reason that the evidence and the record shows that Eldred was not the owner of the securities which were pledged for certain of the loans.

[1] It is further argued that there is a presumption of law that the transactions were legal and not usurious, citing Rose v. Wheeler, 140 Cal.App. 217, 220, 35 P.2d 220; Lindsey v. Campbell, 132 Cal.App.2d 746, 282 P.2d 948; and 91 C.J.S. Usury § 11, p. 579; and that the documents themselves create and support the presumption of validity.

As will be noted, there is a direct conflict between the testimony of Eldred and Zlaket as to their interpretation of the nature of the transactions. In Eldred's deposition, taken while he was serving a prison term for conviction on three counts of theft involving two forgeries in connection with certain assignments herein involved, he testified generally that he was engaged in the real estate and mortgage loan business in Orange County; that Zlaket was also there engaged in a similar business; that he entered Zlaket's office and while sitting at his "loan desk" he said to him: "I see you are making a lot

of loans", and that Zlaket replied "Yes"; that Zlaket then said he had a "new wrinkle" in loaning, i. e., he could charge above the legal rate of interest on loans; that he told him about these "Ninety Day Agreements" herein set forth whereby he purportedly purchased the notes and trust deeds with an option to repurchase, and accordingly on the repurchase he would receive 10 per cent of the amount advanced plus two per cent service charge plus six per cent interest on the unpaid balance on the trust deed; that he asked Zlaket if this form of an agreement was not more or less of a sham or an invasion of the law, and Zlaket said "No, his lawyer had prepared the document" and as far as he was concerned it was perfectly legal. Zlaket denied any such conversation. Throughout Eldred's testimony he referred to the transactions as loans and said his first approach to Zlaket was that he wanted to borrow money on these notes and trust deeds and would repay him in a week or within two or three months at the most; that he told him the lump sum he wished to borrow and furnished Zlaket with a list of the trust deeds he had to place as security for the loan; that Zlaket examined the property and after some discussion, agreed to loan him the total sum sought; that it was agreed that Eldred would continue accepting the amounts of interest and principal on the notes in his office and then later turn them over to Zlaket, which he did; that he gave no notice to the trustors of the sale of the trust deeds or notes to Zlaket; and that he held assignments from the trustors to him. Cancelled checks of Eldred were received in evidence corroborating the fact of purchase by Zlaket and repurchase by Eldred in the amounts and at the times indicated.

Zlaket testified generally that he was in the real estate and opportunity brokerage business and had made some loans; that in the original transaction in reference to the Sandcamp trust deed, he bought it at the price of $6,000 and it was assigned to him by Eldred; that he drew up an original "Ninety Day Agreement", as described; that he and Eldred agreed therein that he should have the right to repurchase it within 90 days after payment of his usual profit of 10 per cent plus two per cent plus interest accrued, and that he resold said trust deed to Eldred for $6,073.15; that he bought it again at $5,200, and Eldred reassigned it to him with a second "Ninety Day Agreement" to repurchase, and that the other trust deeds and notes were similarly handled. He claims, however, no discussion was had about these transactions being for the purpose of securing a loan but they were absolutely an out and out sale with the right to repurchase. He testified Eldred asked him not to notify the trustor and not to collect the interest and payments for him; that he did tell the trustor in the Sandcamp transaction he had acquired the trust deed and note by assignment from Eldred and that Eldred was "peeved" because he did so; that on many occasions he visited Eldred's office for the purpose of obtaining the interest and payments but found nothing but evasive answers. He said, in buying the several trust deeds and notes, he specifically told Eldred if he repurchased them he would have to pay Zlaket the usual 10 per cent of the purchase price as profit, plus two per cent service charge, plus 6 per cent interest carried by the notes on the unpaid balance.

Defendant called Eldred's former secretary as his witness. She testified Eldred told her he was "selling" to Zlaket a series of trust deeds and asked her to type up the assignments. She testified, however, that he never showed her the "Ninety Day Agreements" executed in connection therewith. His secretary in charge of collections testified she received several irritating telephone calls from Zlaket wanting to know if Eldred had collected certain payments of interest and principal on the notes held by him, and wanted to know why Eldred was accepting payments from them and why Eldred had not sent out notices to them of the assignments to Zlaket; that she told Eldred of the calls and he said nothing.

It appears to us that the question of the veracity of the parties to these transactions was one for the determination of the trial court and it cannot be said, as a matter of law, that the testimony of Eldred was inherently improbable, as contended by defendant, even though it was impeached by proof of a conviction of a felony.

[2] It is true that it has been held in certain cases that where a conveyance is absolute in form with an option to repurchase, the one asserting that it is a loan must establish that fact by evidence which is clear and convincing. Cannon v. Seattle Title Trust Co., 1927, 142 Wash. 213, 252 P. 699; O. A. Graybeal Co. v. Cook, 111 Cal.App. 518, 529, 295 P. 1088; Milana v. Credit Discount Co., 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621; Terry Trading Corp. v. Barsky, 210 Cal. 428, 433, 292 P. 474.

Whether or not the evidence received is clear and convincing is usually a question of fact for the trial court and upon conflicting evidence it is not ordinarily open to review on appeal. Brison v. Brison, 90 Cal. 323, 334, 27 P. 186; Couts v. Winston, 153 Cal. 686, 96 P. 357; Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583; Beckman v. Waters, 161 Cal. 581, 119 P. 922; Garrick v. J. M. P., Inc., 150 Cal. App.2d 232, 309 P.2d 896.

After reviewing the entire evidence there are also many circumstances to be considered in connection with the testimony of Eldred in support of the court's findings. (1) All of the notes provided for monthly payments of principal and/or interest and after the assignments to Zlaket Eldred continued to collect the monthly payments and turned them over to Zlaket. (2) There was great disparity between the value of the individual notes and deeds of trust, as reflected by an exhibit in evidence. It also showed the consideration passing from Zlaket to Eldred on acquiring them, and from Eldred to Zlaket upon Eldred reacquiring them, which might well indicate Eldred would undoubtedly repurchase them within the term period required. Lynch v. Lynch, 22 Cal.App. 653, 135 P. 1101; Husheon v. Husheon, 71 Cal. 407, 12 P. 410; Orlando v. Berns, 154 Cal. App.2d 753, 316 P.2d 705; Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583; 17 Cal.Jur. 788, sec. 88; 33 Cal.Jur.2d sec. 49; 90 A.L.R. 953, 963. (3) In no case did Eldred allow Zlaket to retain the notes and trust deeds, but in all 16 cases he did obtain a reconveyance. (4) The "Ninety Day Agreements" provided that the trust deeds were to be reconveyed to Eldred upon payment to Zlaket of the precise amount Zlaket had paid, plus interest, plus 10 per cent of the purchase price and 2 per cent service charge. Farmer v. Grose, 42 Cal. 169; Hickox v. Lowe, 10 Cal. 197; Lee v. Evans, 8 Cal. 424. (5) Zlaket knew that persons other than Eldred were or might be interested in the title to the deeds of trust, thus showing he expected Eldred to redeem.

[3, 4] Conveyances absolute on their face may be shown to be in fact loans or security transactions. 17 Cal.Jur. 735, sec. 41, et seq.; 33 Cal.Jur.2d 421, sec. 1, et seq.; Beckman v. Waters, 161 Cal. 581, 119 P. 922; Sec. 2925, Civ.Code. The court was justified in finding that the essential elements of usury, as set forth in Shelley v. Byers, 73 Cal.App. 44, 238 P. 177; and 165 A.L.R. 628, relied upon by defendant, had been sufficiently established.

[5] One other question raised by defendant involves the ownership of the security pertaining to about five of these notes and trust deeds in which Eldred assigned or attempted to assign the notes and trust deeds and a "Ninety Day Agreement" to repurchase, which recite "A. G. Eldred for ———", the trustors named. It appears that these trust deeds and notes were originally in the possession of Eldred either by purchase or assignment and he did attempt to assign them to Zlaket by virtue of such ostensible authority for the purpose of securing money, either as a loan or as a sale. The consideration was paid to Eldred and not to the trustors.

They were repurchased by Eldred and he paid the repurchase price demanded. There is no evidence that anyone else paid the amount claimed to be usurious. There is no merit to defendant's claim that the evidence established a direct sale by the trustors to Zlaket.

Certain exhibits were before the trial court and a compilation of them is set forth in respondent's brief. It shows the original principal amount of each note, the balance due thereon, date of transfer to Zlaket, consideration paid by him, date Eldred repaid Zlaket on the repurchase, amount he paid, amount Zlaket gained by the transaction, and the period his money was used. The court made findings as to the amount due on each of the transactions respecting usurious interest, and no complaint is made in the briefs as to this computation, or in fixing the amount due in accordance with the usury law, secs. 1916, 1916–2, and 1916–3 of the West's Annotated Civil Code.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

167 Cal.App.2d 49

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alex Lopez AYALA and Richard Gilbert Garcia, Defendants,

Richard Gilbert Garcia, Appellant.

Cr. 6319.

District Court of Appeal, Second District, Division 2, California.

Jan. 9, 1959.

Rehearing Denied Feb. 2, 1959.

Hearing Denied March 4, 1959.

Prosecution for unlawful possession of heroin. The Superior Court, Los Angeles County, J. Howard Ziemann, J., entered judgment of conviction, and denied defendant's motion for a new trial, and he appealed. The District Court of Appeal, Fox, P. J., held, inter alia, that it is not necessary that one have narcotics in his possession, in the sense that that term is used in statute proscribing possession of narcotics, in order to be under the influence or addicted to their use, and therefore a defendant who was charged with and convicted of addiction to unlawful use of narcotics was not in jeopardy for the offense of unlawful possession of a narcotic, even though both charges arose out of one transaction.

Judgment and order affirmed.

Ashburn, J., dissented.

1. Indictment and Information ⇐191

Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.

2. Criminal Law ⇐200(1)

It is not necessary that one have narcotics in his possession, in the sense that that term is used in statute proscribing possession of narcotics, in order to be under the influence or addicted to their use, and therefore a defendant who was charged with and convicted of addiction to unlawful use of narcotics was not in jeopardy for the offense of unlawful possession of a narcotic, even though both charges arose out of one arrest. West's Ann.Health & Safety Code, §§ 11500, 11721.

3. Criminal Law ⇐1209

Although applicability of statute providing that offenses punishable in different ways by different provisions of Penal Code may be punished under either of such provisions, but in no case under more than one, is not limited to necessarily included offenses, such section is not applicable where separate and distinct transactions are established, and each case is to be decided by a consideration of the particular facts involved. West's Ann.Pen.Code, § 654.

4. Criminal Law ⇐29

Drug addiction, as a physical state, is distinct from unlawful possession of a drug both in point of time, manner of accomplishment, and physical relationship between the individual and the contraband, and therefore, where there is possession of a drug not incidental to addiction, a defendant may be convicted of both addiction, and unlawful possession, even though both offenses are charged as the result of one transaction. West's Ann.Health & Safety Code, §§ 11500, 11721; West's Ann.Pen. Code, § 654.

5. Criminal Law ⇐200(1)

In prosecution for unlawful possession of heroin, even though possession of heroin in question might have been incidental to a continuation of defendant's habit, in view of fact it was not incidental or necessary to a commission of addiction for which defendant was convicted, conviction for addiction, under such circumstances, did not preclude punishment for possession. West's Ann.Health & Safety Code, §§ 11500, 11721; West's Ann.Pen.Code, § 654.

6. Criminal Law ⇐29

Addiction to drugs is a chronic rather than an acute offense, and, as such, once use has reached the state of addiction, the offense of addiction is complete, and, once addicted, it cannot be said that subsequent unlawful possession of a drug was incidental thereto, for the crime of addiction under such circumstances was fully consummated without regard to the subsequent possession. West's Ann.Health & Safety Code, §§ 11500, 11721; West's Ann.Pen. Code, § 654.

William A. Drake, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant Garcia was convicted of possession of heroin in violation of section 11500, Health and Safety Code. He has appealed from the judgment and order denying the motion for a new trial.

On the evening of November 26, 1957, Officer Woodring, of the Monterey Park Police Department, observed three young men emerge from a car that he had had under intermittent surveillance and enter a restroom of a service station. They remained there some 35 minutes. In the meantime, Officers Hoiten and Kraft joined Woodring in response to his request for assistance. When the young men drove away, Officer Woodring followed their car closely, clocking it at a speed of 53 miles per hour in a 35 mile zone and ordered it to stop. One Contreras was driving. Appellant and defendant Ayala were also in the front seat. The other officers arrived immediately. The occupants were ordered out of the car and were questioned by Officer Woodring as to whether they had been drinking, to which they replied that they had been drinking beer. Contreras was informed that he would be cited for speeding. During the conversation, Officer Hoiten observed appellant remove his hand from his trouser pocket and toss backhanded a Pall Mall cigarette package that landed on the parkway a few feet behind him. Hoiten recovered the package, opened it and discovered that it contained a white powder which upon analysis proved to be heroin. Appellant and the other two men were arrested and searched. A hypodermic needle was found on Ayala.

As an outgrowth of the interrogation of appellant and information subsequently obtained, a criminal complaint was filed in the municipal court of Alhambra charging appellant with "the misdemeanor offense of: violation section 11721, Health and Safety Code (Addicted to unlawful use of narcotics)." Appellant was convicted of addiction and sentenced to 180 days in the county jail.

In the instant case, appellant pled the above municipal court conviction and judgment in bar of this prosecution for unlawful possession. This defense, however, was

overruled and appellant was found guilty of possession as charged.

In seeking a reversal appellant argues that (1) he had been once in jeopardy, and (2) the sentence herein constituted double punishment for the same act, in violation of Penal Code, section 654. There is no merit in either of these contentions.

Appellant's first contention is based on the theory that a violation of section 11721 for addiction cannot be committed without necessarily committing a violation of section 11500 (possession). His position, however, is not sound.

[1] The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. In re Hess, 45 Cal.2d 171, 174, 288 P.2d 5.

[2] It is not necessary that one must have narcotics in his possession, in the sense that term is used in section 11500, in order to be under their influence or addicted to their use, since another person could administer the narcotics to the user without his ever having possession thereof prior to their injection into his system. Thus a person may at a given moment have narcotics coursing through his veins and have an unconsumed narcotic in his pocket or in his hand. Such possession is independent of the fact that other narcotics have been consumed and have been assimilated into the blood stream of the user and he is then under the influence of narcotics or perhaps addicted to the use thereof.

It is therefore clear that appellant has not been once in jeopardy for the offense which is charged herein, viz., possession of a narcotic. Rather he has been charged and convicted of two separate offenses consisting of entirely different elements: one being possession, dominion and control; the other the addiction to narcotics.

Appellant's argument that he has been subjected to double punishment is based on the theory that "the evidence shows but one criminal act was committed"; that "the 'possession' was merely incidental to the 'addiction' * * *." In support of his position appellant relies on section 654, Penal Code, and quotes as follows from People v. Johnson, 163 Cal.App.2d 58, 328 P.2d 809, at page 811: "That code section [§ 654, Pen.Code] embodies a rule of law somewhat broader than the double jeopardy rule and its corollary of included offenses. It provides that 'An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one'. Under the rule of this section, as interpreted by the Supreme Court, a single criminal act, whether it gives rise to included offenses or not, can only be punished once. By this section, it is indispensable in order to impose separate punishments that there be evidence of separate and divisible acts that are not incidental to each other."

[3] While it is true that the applicability of section 654 is not limited to necessarily included offenses (People v. Brown, 49 Cal.2d 577, 591, 320 P.2d 5; People v. Knowles, 35 Cal.2d 175, 187, 217 P.2d 1), this section is not applicable where separate and distinct transactions are established, and each case is to be decided by a consideration of the particular facts involved. In People v. Brown, supra, 49 Cal.2d at page 591, 320 P.2d at page 14, the court states the rule as follows: "Section 654 has been applied not only where there was but one 'act' in the ordinary sense [citation], but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654. Where the question is whether a transaction is divisible or indivisible, each case must be resolved on its facts. [Citations.]"

In the Brown case, supra, death resulted from the commission of an unlawful abortion, and it was held that section 654 precluded convictions for both abortion and murder. In that case, there was but one

act. In People v. Knowles, supra, the defendant was convicted of both armed robbery and kidnapping for the purpose of robbery. Our Supreme Court held that as the seizure and confinement were an inseparable part of the robbery, section 654 precluded punishment for both, distinguishing cases where the acts that formed the basis of the kidnapping conviction were separate from those that involved the actual taking of property. See People v. Dorman, 28 Cal.2d 846, 172 P.2d 686; People v. Brown, 29 Cal.2d 555, 176 P.2d 929. In People v. Kehoe, 33 Cal.2d 711, 204 P.2d 32, People v. Clemett, 208 Cal. 142, 280 P. 681, and Schroeder v. United States, 2 Cir., 7 F.2d 60, where it was clear that more than one crime was committed by the defendant's conduct, it was held that only one conviction could be upheld in that separate and distinct acts were not established.

[4] There is no question in the instant case that there was more than one criminal act involved. Addiction, a physical state, is distinct from possession both in point of time, manner of accomplishment and the physical relationship between the individual and the contraband. Therefore, we are here only concerned with the question of whether the possession was incidental to addiction so that it may properly be said both were part of one transaction. This question was raised and discussed in People v. Tenney, 162 Cal.App.2d 458, 328 P.2d 254, where the defendant was convicted of unlawful possession, sale and transportation of narcotics. On appeal, the judgment was affirmed as to counts charging unlawful possession and sale. At page 463 of 162 Cal.App.2d, at page 258 of 328 P.2d the court stated: "Keeys' testimony, however, does support both the sale and possession charges. As to the sale count this is obvious. As to the possession count, while the possession obviously existing in appellant prior to the sale was incidental to the sale, that is not true of the possession subsequent to the sale. Under the evidence, Keeys only purchased a portion of the heroin possessed by appellant. When appellant left Keeys' hotel room after the sale was complete, he took the remainder of the heroin with him. While that subsequent transportation cannot be separated from the subsequent possession, and so cannot support a separate transportation charge, it does support a separate possession charge. *The subsequent possession by appellant was in no way incidental to the prior sale.* * * *" (Emphasis added.)

[5, 6] The facts of the instant matter establish that defendant was convicted of addiction, the validity of which is not challenged. The possession here involved was not incidental to his addiction, and the mere fact that evidence of possession was received in the municipal court case does not alter this fact. While possessing the instant heroin may have been incidental to a continuation of appellant's habit, it was not incidental or necessary to a commission of the first offense (addiction) for which appellant was convicted. The crucial point is that "addiction is a chronic rather than an ordinary acute offense" (People v. Jaurequi, 142 Cal.App.2d 555, 560, 298 P.2d 896, 900) and as such, once *use* has reached a state of *addiction*, the offense of addiction is complete. Once addicted, it cannot be said that *subsequent* possession was incidental thereto, for the crime of addiction was fully consummated without regard to the subsequent possession.

The judgment and order are affirmed.

HERNDON, J., concurs.

ASHBURN, Justice (dissenting).

Judicial philosophy which weakens efficient enforcement of the laws, especially those aimed at suppression of the sale and use of narcotics, is to my mind a deplorable development of recent years. But I cannot acquiesce in what I believe to be double punishment for a single indivisible transaction wherein an addict is in possession of a narcotic.

Section 654, Penal Code,[1] while it speaks in the singular of an act or omission, has not been construed so narrowly, and has been applied in such manner as to accomplish its benign purpose of punishing a wrongdoer but once for a single wrong consisting of a combination of immediately related acts. The questions involved in application of § 654 to a given case are distinct from those of former jeopardy and included offenses. People v. Kehoe, 33 Cal.2d 711, 713, 204 P.2d 32. People v. Clemett, 208 Cal. 142, 144, 280 P. 681, says: "As early as People v. Shotwell, 27 Cal. 394, and People v. Frank, 28 Cal. 507, it was held that co-operative acts constituting but one offense, when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted as one offense." At page 145 of 208 Cal., at page 682 of 280 P.: "That the rule announced in said earlier decisions is the settled law of this state is confirmed by many subsequent cases." People v. Roberts, 40 Cal.2d 483, 491, 254 P.2d 501, quotes with approval and applies the foregoing language. People v. Brown, 49 Cal.2d 577, 591, 320 P.2d 5, says: "Section 654 has been applied not only where there was but one 'act' in the ordinary sense * * * but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654. Where the question is whether a transaction is divisible or indivisible, each case must be resolved on its facts." People v. Tenney, 162 Cal.App.2d 458, 328 P.2d 254, 257 (hearing denied), quotes People v. Branch, 119 Cal.App.2d 490, 495, 260 P.2d 27, as follows: "In determining this question the courts have refused to dissect the evidence minutely in an attempt to find separate offenses, but, on the contrary, have held that a broad transactional approach should be made." That we have at bar a single indivisible transaction, or "co-operative acts constituting but one offense, when committed by the same person at the same time" seems clear from the record.

Alerted by somewhat suspicious movements of an automobile occupied by defendant Garcia and his co-defendants Ayala and Contreras, Police Officer Woodring "staked out" the vehicle which was parked in a service station. The three occupants went into the rest room where they remained for 35 minutes. They came out together and drove off. The officer followed, clocked their speed at 53 miles in a 35 mile zone and stopped them. All three got out of the car. Asked if they had been drinking, all said they had been drinking beer. Woodring saw Garcia remove an article from his left pants pocket, make a backward throwing motion with his left arm, and Sergeant Hoiten picked up a Pall Mall cigarette package which contained heroin and an eye dropper. Search revealed in Ayala's pocket a paper match book with a hypodermic needle in it. This was on November 26, 1957. The three men were arrested and on the next day one D. La Penna, of the narcotic detail of Los Angeles County Sheriff's office, filed in the municipal court of Alhambra Judicial District a complaint charging appellant with a misdemeanor committed on November 26, 1957, a violation of § 11721, Health and Safety Code, namely, addiction to unlawful use of narcotics. On the same day La Penna filed in the same court a complaint charging appellant with a felony committed on November 26, 1957, a violation of § 11500, Health and Safety Code, possession of narcotics. On December 12th appellant was tried upon the misdemeanor charge, found guilty and sentenced to 180 days in jail; commitment was issued. At that trial the witnesses were Officer Thomas E. Wood-

1. Pen.Code, § 654: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * *"

ring, Officer Stanley G. Fletcher and Charles Avila; the heroin and paraphernalia taken from the three men at the time of arrest on the 26th were introduced in evidence. On December 16th a preliminary hearing was had upon the felony charge and Woodring, Fletcher, Sergeant Hoiten and Officer Klein (a forensic chemist) testified; the same exhibits were received in evidence which had been received in the misdemeanor trial and appellant was held to answer in the superior court. When that trial was reached he entered a plea of former jeopardy and it was stipulated that defendant "be deemed to have testified if he was called and sworn he would testify that the prosecution for the narcotic addiction as reflected in that docket arose out of an arrest in this case involving the possession of heroin." There was no evidence to the contrary. The same exhibits were placed in evidence and the case was submitted upon the preliminary transcript plus the stipulation just mentioned and a transcript of the docket of the Alhambra Municipal Court in the misdemeanor case. Officer Woodring testified that while the three men were in the rest room he suspected a felony was in progress: "I didn't feel that they were in there to do things that people normally do in restrooms." The magistrate at the close of the preliminary hearing in the felony case said: "Well, as to Ayala, he had paraphernalia in his presence which is ordinarily used by heroin users. He is found in the immediate presence of someone who has heroin in his possession and also has a kit. He also spent 45 minutes, which up to now is unaccounted for—or 35 minutes, excuse me, in a men's toilet, and although we didn't have any expert testimony on the subject matter, I believe that there is a reasonable inference that they were there for something other than washing their hands." After conviction in the superior court and upon the hearing of application for probation the subject of addiction was discussed but probation was denied.

Certainly the possession and the addiction were contemporaneous in this instance. The addiction conviction rested upon the incidents above recited, not some earlier or later episode. It is not necessary to the application of § 654, Penal Code, that the one act be an integral part of the other. There need be only "co-operative acts constituting but one offense * * * committed by the same person at the same time, [which] when combined, charge but one crime * * *." What is a single offense is to be determined under People v. Brown, supra, 49 Cal.2d 577, 591, 320 P.2d 5, by solving the question whether "a course of conduct" violating more than one statute "comprised a divisible transaction." I think it highly technical to hold that this addiction and possession form parts of a severable transaction. There is nothing in the record to raise an inference that defendant's possession had any purpose other than satisfying his craving for the drug. For aught that appears he is a victim of narcotics, not a "pusher." In reality this appellant offended society but once on this occasion, and he should not be punished for a misdemeanor and then punished again for a felony where both convictions are based upon the one episode, a single indivisible series of events. The instant situation is factually analogous to People v. Roberts, supra, 40 Cal.2d 483, 491, 254 P.2d 501, People v. Branch, supra, 119 Cal.App. 2d 490, 496, 260 P.2d 27, and People v. Tenney, supra, 162 Cal.App.2d 458, 328 P.2d 254, in which it was held that possession and transportation for purpose of sale and the sale itself are but a single offense and punishable but once.

Section 654, Penal Code, not only forbids double punishment but also precludes a second prosecution in a situation such as we have here; it says: "[A]n acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *" Appellant was convicted and sentenced upon the misdemeanor charge and it was thereafter unlawful to prosecute him in this felony case.

The judgment at bar should be reversed with instructions to dismiss the information.

167 Cal.App.2d 211

Muriel M. BROWN, Plaintiff and Appellant,

v.

Ralph I. GUY, doing business as Rigko Offices, and The Rig Company, Defendants.

Ralph I. Guy, Respondent.

Civ. 23388.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1959.

Action for alleged permanent and disabling injury allegedly caused by one defendant's negligence. The Superior Court of Los Angeles County, John J. Ford, J., rendered judgment for defendants, and plaintiff appealed and one defendant moved to dismiss appeal. The District Court of Appeal, Lillie, J., held that where two trials of cause were at great length, appellant alleged that poverty, coupled with permanent and disabling injury caused by defendant's negligence, necessitated her assumed right to file settled statement, and difficulty was encountered because of inability of reporter to locate several key items of testimony in voluminous transcript, although appellant's bringing up a record, part of which was transcript and part of which was settled statement, was a departure from prescribed rule, it was excusable under the circumstances and appeal would not be dismissed.

Motion to dismiss denied.

1. Statutes ⇐207

Parts of a statute must be construed together and harmonized as far as possible to avoid repugnancy.

2. Appeal and Error ⇐573, 607(1)

Rule on appeal with reference to record on subsequent appeals in same case does not authorize bringing up a record, part of which is transcript and part of which is a settled statement. West's Ann. Rules on Appeal, rule 11(a, b).

3. Appeal and Error ⇐801(1)

There is strong public policy in favor of hearing appeals on their merits and not depriving party of right of appeal because of technical noncompliance where he is attempting to perfect appeal in good faith, but respondent is entitled to have appellant proceed with expedition and, if appellant fails to comply with the Rules, to have appeal dismissed, but such right of dismissal is not absolute, except for failure to file notice of appeal. West's Ann.Rules on Appeal, rules 11(a, b), 53(b).

4. Appeal and Error ⇐607(1)

In determining whether an appellant should be relieved from default in preparing record, length of default, circumstances surrounding default, relative injury that will flow to either party by granting or denying relief, and nature of default must be considered, each case must turn on its own facts, and precedents are of little value. West's Ann.Rules on Appeal, rules 11 (a, b), 53(b).

5. Appeal and Error ⇐573, 607(1)

Where difficulty was encountered in preparing settled statement of oral proceedings because of inability of reporter to locate items of testimony in voluminous transcript and respondent contended that settled statement was neither fair nor complete as to him, but respondent would have been in no better position had appellant correctly proceeded under rule with respect to reporter's statement authorizing trial court to prepare settled statement of missing portions, or rule with respect to court's transcript and original papers, respondent was not entitled to dismissal of appeal. West's Ann.Rules on Appeal, rules 4 and subd. (e), 5, 7.

6. Appeal and Error ⇐573

Where respondent seeking dismissal of appeal did not point out a single particular in which settled statement of oral proceedings was deficient in content and trial court certified record as correct, in view of such certification, appeal would not be dismissed on ground of alleged in-

sufficiency to reflect oral proceedings. West's Ann.Rules on Appeal, rules 4 and subd. (e), 5, 7.

7. Appeal and Error ⇐573, 607(1)

Where two trials of cause were at great length, appellant alleged that poverty, coupled with permanent and disabling injury caused by respondent's negligence, necessitated her assumed right to file settled statement, and difficulty was encountered because of inability of reporter to locate several key items of testimony, although appellant's bringing up record, part of which was transcript and part of which was settled statement, was a departure from prescribed rule, it was excusable under circumstances and appeal would not be dismissed. West's Ann.Rules on Appeal, rules 4(a), 7 and subd. (a), 11 and subd. (b).

8. Appeal and Error ⇐607(1)

Document containing notice to prepare transcripts and notice of intention to proceed by settled statement constituted a notice of election under rule providing that notice of election to proceed by narrative statement must be given within 10 days after filing of notice of appeal. West's Ann.Rules on Appeal, rule 7 and subd. (a).

9. Appeal and Error ⇐607(1)

Purpose of rule requiring that notice of election to proceed by narrative statement must be given within 10 days after filing notice of appeal is to enable parties to prepare condensed statement of oral proceedings while evidence is fresh in memories of counsel. West's Ann.Rules on Appeal, rule 7 and subd. (a).

10. Appeal and Error ⇐607(1)

Where appellant gave unequivocal notice of her intention to proceed in part by settled statement within 10 weeks after motion for a new trial was argued and respondent's counsel had personally participated in both trials, appeal was not subject to dismissal because appellant filed notice of intention to proceed by settled statement 34 days after she filed her notice of appeal rather than 10 days as required by rule. West's Ann.Rules on Appeal, rule 7 and subd. (a).

11. Appeal and Error ⇐607(1)

Even though appellant secured or took a total of 104 days' extension in preparation of record for appeal in violation of rule providing that extensions granted by superior court for doing of any act involved in preparation of record shall not exceed 90 days in aggregate, in view of rule to effect that reviewing court for good cause may relieve party from default occasioned by failure to comply with rules, appeal would not be dismissed. West's Ann.Rules on Appeal, rules 45(b), 53(b).

Elmer Patrick Friel, Los Angeles, for appellant.

Carl B. Sturzenacker, DeForrest Home and Albert Hampton, Los Angeles, for respondent.

LILLIE, Justice.

Respondent has moved to dismiss the pending appeal on the ground of certain defects in the record heretofore filed, and noncompliance with pertinent time provisions of the Rules on Appeal.

The cause was previously before this court which affirmed an order granting a new trial (144 Cal.App.2d 659, 301 P.2d 413). Following a second adverse judgment and the denial of her motion for a new trial, appellant seasonably filed her notice of appeal. Thirty-four days later, on November 26, 1957, appellant filed a "Notice to Clerk of the Superior Court to Prepare Clerk's Transcript and for Preparation of Reporter's Transcript on Appeal." Therein reference was made to the previous appeal and to a stipulation entered into by counsel prior to the second trial, and approved by pre-trial order, "whereby * * * testimony and exhibits introduced at the first trial of said cause could be introduced by both parties at the second trial of said cause by designating, one to the other, such portions of the said testimony desired to be read at the second trial from the said reporter's transcript on appeal * * *." Such testimony was introduced at the second trial in this manner.

Specifying her reliance on Rule 11, Rules on Appeal, appellant then designated in the foregoing "Notice" the portions of the prior record which she desired incorporated by reference, including the oral testimony at the first trial read into evidence by stipulation as aforementioned, and the entire contents of the clerk's transcript in the first case. She further requested a clerk's transcript of the proceedings on the second trial, designating the papers and records desired; and "(p)ursuant to Rule 7, Rules on Appeal" gave notice that "plaintiff will prepare and set forth the oral proceedings by a settled statement of all of the rest of the oral proceedings at said second trial * * * the said statement to be in the form of a condensed narrative statement of all the foregoing." The narrative statement was not served on respondent until the following June and was settled by the trial court on August 12, 1958. After securing an extension of time therefor, appellant filed her opening brief on November 3, 1958; thereafter, on November 25, 1958, respondent made this motion to dismiss. Written opposition to the motion was filed by appellant, including a request that she be relieved from any default found to exist.

Respondent contends that (1) Rule 11(b), added in 1951, does not authorize the filing of a record partially in the form of a settled statement and partially in the form of a reporter's transcript incorporated by reference; (2) appellant's notice of election to proceed by settled statement was not served within the time required by Rule 7(a); and (3) contrary to Rule 45 (b), time extensions for preparation of the record in excess of the 90-day aggregate limit were granted by the trial court.

Rule 11 is entitled "Record on Multiple Appeals" and subdivision (a) thereof provides in part that in the case of cross-appeals "a single record * * * shall be prepared * * * in accordance with Rules 4 and 5 unless all appellants give notice of intention to proceed under Rule 7, or unless the parties stipulate to proceed under Rule 6." Subdivision (b) added in 1951, governs subsequent appeals in the same case and allows the use of an abbreviated record in the second or subsequent appeal, incorporating by reference the necessary material in the record on the earlier appeal. Unlike subdivision (a), however, there is no positive provision as to the method of preparation of the record on the second or subsequent trial.

[1, 2] Respondent argues that there are but three recognized types of record on appeal (Russi v. Bank of America, 69 Cal. App.2d 100, 101, 158 P.2d 252); (1) the transcript; (2) the settled statement; and (3) the agreed statement; that by bringing up a record, part transcript and part settled statement, appellant is actually urging that a fourth method of appeal was created by Rule 11(b). It is a cardinal rule of statutory construction that parts of a statute must be construed together and harmonized as far as possible to avoid repugnancy (People v. Moroney, 24 Cal.2d 638, 642, 643, 150 P.2d 888); therefore, in the absence of any positive and controlling provision in the subdivision to the contrary, we must agree with respondent that a "fourth method of appeal" was not created by the adoption of Rule 11(b) and that records of second or subsequent trials must be brought up as provided in Rule 11(a).

Presented to us now is the query whether this court should relieve appellant from her default and permit a hearing on the merits. As it involves Rule 11(b), the issue presented appears to be without precedent. Rule 53(b), supra, provides that the reviewing court may for good cause relieve a party from default occasioned "by any failure to comply with these rules, except the failure to give timely notice of appeal."

[3, 4] This court's attitude, in connection with relief from defaults generally, is set forth in Jarkich v. Badagliacco, 68 Cal.App.2d 426, 431, 156 P.2d 969, 971: "In determining whether to relieve from default we are faced with two conflicting policies. There is, of course, a strong public policy in favor of hearing appeals on

their merits and of not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith. On the other hand, a respondent is likewise entitled to consideration. He is entitled to have the appellant proceed with expedition, and if the appellant fails to comply with the Rules, to have the appeal dismissed. But this right to a dismissal is not absolute, except for failure to file the notice of appeal. Under the Rules, the trial court may grant extensions not to exceed 90 days, the appellate court may grant additional extensions (Rule 45(c), and the appellate court may relieve from default (Rule 53(b). In determining whether an appellant should be relieved from default, various factors must be considered such as the length of the default, the circumstances surrounding the default, the relative injury that will flow to either party by granting or denying the relief, the nature of the default and other factors. Each case must turn on its own facts, and precedents are of little value."

[5] It appears from the affidavits filed herein that both trials of the instant cause were of great length, appellant's counsel specifically averring that the second trial lasted one month. Appellant's affidavit further states that her poverty, coupled with a permanent and disabling injury assertedly caused by respondent's negligence, necessitated her assumed right to proceed under Rule 7 and that "(i)f appellant is considered to have been in default, it is by sheer inadvertence and mistake."

From the affidavit of respondent's counsel, it appears that difficulty was encountered in preparing a settled statement because of the inability of the reporter to locate several key items of testimony in the voluminous transcript, and that for this reason, in addition to the allegedly dilatory tactics of appellant, the settled statement is neither fair nor complete as to the respondent. This does not appear to be of substantial import because in such a state of the record, it seems to us, respondent would have been in no better position had appellant correctly proceeded under Rules 4 and 5. The reporter being unable to transcribe certain portions of the oral proceedings (Rule 4(e), appellant would have been authorized to move the trial court for leave to prepare a settled statement of the missing portions (Rule 4 (e), supra), thus placing the parties in substantially their present situation.

[6] Respondent's chief complaint seems to be directed not so much to the manner in which the record was brought up as to its alleged insufficiency to reflect the oral proceedings below. In this regard respondent concedes that the trial court conducted "six sessions" lasting "over a period of several months" and made "great and sincere efforts" to settle the statement to the satisfaction of both parties. Furthermore, respondent has not pointed out a single particular in which the statement is deficient in content; and the trial court has certified the record as correct. Respondent's contention must give way in the face of such certification.

[7] While disapproving appellant's departure from the procedure provided in Rule 11(b), we nevertheless believe it to be excusable under the peculiar circumstances here existing. The instant case does not present the flagrant violation of the rules and time provisions thereof which confronted the court in Russi v. Bank of America, supra, relied on by respondent. In that case, a far different situation appeared, appellant first electing to proceed on the judgment roll alone and after all briefs had been filed, then sought a transcript under Rule 4(a).

[8] Respondent's next point relates to appellant's failure to give timely notice of election to proceed by narrative statement under Rule 7, which provides that such notice must be given "within 10 days after filing the notice of appeal" (Rule 7(a). Appellant filed her notice of appeal on October 23, 1957, and, as heretofore pointed out, she took no further action respecting the prosecution of her appeal until November 26, 1957, some thirty-four days later, when she filed, as one document, a notice

to prepare transcripts pursuant to Rule 11 and a notice of intention to proceed by settled statement under Rule 7. Through her counsel's affidavit, she seeks to justify this delay by referring to an order of the trial court, not appearing in the record, extending time for the preparation and filing of the notice for incorporation of the prior record (Rule 11). It is alleged that such order had to be secured because of the additional time required for the segregation of testimony read into evidence at the second trial (to be incorporated by reference under Rule 11) from the remainder of the oral proceedings. According to a further averment by her counsel, such order "had the effect, it was *understood,* of extending time for Notice of Election under Rule 7." These averments are not denied by respondent, who first contends, without arguing the point, that the document dated November 26, 1957, does not in fact constitute a notice of election. Under Rule 53(a), we are enjoined to liberally construe the requirements governing the appellate process, and find such contention without merit.

[9, 10] A more serious problem is presented by the departure from the time provision prescribed by Rule 7. As stated in Brock v. Southern Pacific Co., 74 Cal.App. 2d 806, 809, 169 P.2d 402, 404: "The obvious purpose of this time limitation is to enable the parties to prepare the 'condensed statement of the oral proceedings' while the evidence is fresh in the memories of counsel." Respondent relies heavily on this and other pronouncements in the Brock case, in which a motion for relief from default was denied and the appeal dismissed on motion. Unlike the situation in the case at bar, appellant Brock initiated his appeal solely under the method authorized by Rules 4 and 5, and five months later, after securing extensions of time to prepare his record, gave notice of election to proceed under Rule 7. The court properly observed that respondent was unfairly imposed upon since there was nothing in the record to show that the second method was contemplated by either party until long after the time had expired. The record before us is otherwise. Appellant herein unequivocally gave notice of her intention to proceed in part by settled statement within ten weeks after the motion for a new trial was argued. As appellant observes, the evidence should then have been reasonably fresh in the memory of respondent's counsel who personally participated in both trials. Furthermore, an "entirely different form of record" was not here involved. We are persuaded that the reasoning of the Brock case is inapplicable to the instant motion, and accordingly relieve appellant from the additional default herein discussed.

[11] Respondent's final contention concerns appellant's claimed violation of Rule 45(b) which provides that time extensions granted by the superior court for the doing of any act involved in the preparation of the record "shall not exceed 90 days in the aggregate, and no single extension shall be for a period in excess of 30 days." According to respondent, although the record is silent on most of such matters, appellant secured an extension of 25 days on October 28, 1957, and an additional 28 days on December 20, 1957, and still another additional 28 days on January 21, 1958; furthermore, says respondent, appellant took an extension of 23 days without benefit of court order, "making a total of 104 (sic) days." Since we have already relieved appellant from defaults of an equally serious nature, we are disposed to accord her further relief as we are empowered to do under rule 53(b). We believe that the cumulative effect of these rule violations is outweighed by the fundamental principle that appeals, wherever possible, should be heard on their merits.

For the foregoing reasons the motion to dismiss is denied.

WHITE, P. J., and FOURT, J., concur.

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J. C. MILLETT CO., a corporation, et al., Plaintiffs and Respondents,

v.

LATCHFORD-MARBLE GLASS CO., a corporation, et al., Defendants and Appellants.

Civ. 23247.

District Court of Appeal, Second District, Division 2, California.

Jan. 20, 1959.

Action for breach of contract and for accounting. From an order of the Superior Court of Los Angeles County, Kenneth N. Chantry, J., changing the place of trial from Los Angeles County to City and County of San Francisco, the defendants appealed. The District Court of Appeal, Fox, P. J., held that the evidence did not establish that the trial judge abused his discretion in granting the motion to change the place of trial.

Affirmed.

1. Appeal and Error ⇐965
Venue ⇐51, 52(1)

A change of venue for the convenience of witnesses and the promotion of justice is essentially within the sound discretion of the trial judge and his ruling will not be disturbed unless it appears as a matter of law that there has been an abuse of discretion. West's Ann.Code Civ.Proc. § 397, subd. 3.

2. Appeal and Error ⇐965

As respects ruling of the trial judge on a change of venue for the convenience of witnesses, the question on appeal is whether the trial court abused its "discretion", that is, whether it exceeded the bounds of reason, all the circumstances before the court being considered. West's Ann.Code Civ.Proc. § 397, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Discretion".

3. Affidavits ⇐17

An affidavit wholly devoid of probative facts necessary to be stated is insufficient.

4. Venue ⇐66

An affidavit in support of a motion for change of venue for the convenience of witnesses was not insufficient as consisting of mere conclusions and hearsay statements. West's Ann.Code Civ.Proc. § 397, subd. 3.

5. Venue ⇐67

Affidavits on a motion for change of venue for the convenience of witnesses was not insufficient as failing to state the names of the witnesses though the affiant did not state that any particular person would actually be a witness since such an affirmative declaration was unnecessary and it was sufficient if the proposed witnesses were identified by name and it was stated that they would be necessary witnesses. West's Ann.Code Civ.Proc. § 397, subd. 3.

6. Venue ⇐68

On a motion for change of venue for convenience of witnesses, the movant has the burden of showing the relevancy and materiality of the proposed witnesses' testimony. West's Ann.Code Civ.Proc. § 397, subd. 3.

7. Venue ⇐67

Affidavit in support of a motion for change of venue for the convenience of witnesses was not insufficient for failing to set out the substance of the testimony of any alleged witness where the affidavits did state the subjects upon which the testimony would be given by four former employees and also stated they would be called under the statute. West's Ann.Code Civ. Proc. §§ 397, subd. 3, 2055.

8. Venue ⇐67

On motion for change of venue for convenience of witnesses, there is no requirement that the movant show the relevancy and materiality of the proposed witnesses' testimony where adverse witnesses are involved and the statute respecting the calling of such witnesses will be relied upon. West's Ann.Code Civ.Proc. § 2055.

9. Venue ⇐67

Affidavits in support of a motion for change of venue were not insufficient on

ground of failure to demonstrate that both the convenience of witnesses and the ends of justice would be promoted by the transfer. West's Ann.Code Civ.Proc. §§ 397, subd. 3, 1989, 2055.

10. Venue ⇐67

Where affidavits on motion for change of venue to San Francisco did not state why it would be inconvenient for the named witnesses to attend trial in the county of suit or that such witnesses would in fact object to attending trial there, affidavits were not insufficient where the trial court was justified in drawing reasonable inferences from the evidentiary facts stated in the affidavits and could reasonably infer that it would be inconvenient for the witnesses to travel over 400 miles from their places of employment and residence to a trial of indefinite duration and it was inferable from the facts that it would be inconvenient for the corporation witnesses to transport their books and records from San Francisco to Los Angeles. West's Ann.Code Civ.Proc. §§ 397, subd. 3, 1989, 2055.

11. Venue ⇐52(2)

While generally the convenience of employees of either party will not be considered on a motion for change of venue for convenience of witnesses when such employees are being called by an adverse party, the court may properly consider their convenience. West's Ann.Code Civ.Proc. §§ 397, subd. 3, 1989, 2055.

12. Venue ⇐70

Where action was transferred to Los Angeles because individual defendants resided there and plaintiffs made a motion to change the place of trial to San Francisco for convenience of witnesses and to promote the ends of justice, evidence supported order transferring cause to San Francisco on ground that the ends of justice would be better subserved by such transfer. West's Ann.Code Civ.Proc. §§ 397, subd. 3, 1989, 2055.

Dryer, Hails, Burris & Lagerlof and H. Melvin Swift, Jr., Los Angeles, for appellants.

J. Albert Hutchinson, Leon A. Blum, San Francisco, for respondents.

FOX, Presiding Justice.

Defendants appeal from the order granting plaintiffs' motion to change the place of trial from Los Angeles County to the City and County of San Francisco.[1]

Plaintiffs commenced this action for breach of contract and for an accounting in San Francisco. Defendants moved for a change of venue to Los Angeles since the individual defendants resided there. The superior court of the City and County of San Francisco denied defendants' motion. On appeal the order was reversed[2] and the action was then transferred to Los Angeles. Thereafter, plaintiffs made a motion to change the place of trial to San Francisco for the convenience of witnesses and to promote the ends of justice. Said motion was supported by an original and supplemental affidavit of Leon A. Blum, attorney for the plaintiffs. In substance, Mr. Blum deposed as follows:

"The First Cause of Action, as stated in paragraph XI thereof, alleges that defendants (who had previously employed plaintiffs as their agents for the sale and distribution of glass bottles and other goods in Northern California, and thereafter—and while their agreement with plaintiffs was still in effect, organized and incorporated subsidiary corporations to compete with plaintiffs in that same business) 'with the intent of competing unfairly with plaintiffs, enticed several employees of plaintiffs to leave their respective employment with plaintiffs and to accept employment

1. As a precautionary measure, defendants have appealed from both the minute order and the subsequent written order transferring the case to San Francisco.

2. J. C. Millett Co. v. Latchford-Marble Glass, 144 Cal.App.2d 838, 301 P.2d 914.

with the said subsidiary corporation defendants'.

"The employees above referred to include: Frank Toso, Jr., who is now the general manager of the Latchford Package Co., one of the defendants; Kenneth H. Hoffman, who is now office manager of the Latchford Package Co., one of the defendants; Clarence Coulter and Edward H. Norman.

"All of said employees are employed by the defendant corporations in the City and County of San Francisco, State of California, and reside in said City and County or in the immediate vicinity thereof, and will be needed as witnesses at the trial of this action to prove the allegations in paragraph XI of the First Cause of Action in said Amended Complaint.

"All of said employees, being currently employed by defendants, will have to be subpoenaed and examined as adverse witnesses under the provisions of section 2055 of the Code of Civil Procedure, and cannot be compelled to attend the trial at a place more than 150 miles out of the county in which they reside under the provisions of section 1989 of the Code of Civil Procedure.

"The Second Cause of Action of said Amended Complaint, paragraph II thereof, alleges that (after so enticing plaintiffs' said former employees) 'all of the said defendants, thru the instrumentality of said subsidiary corporation defendants and the plaintiffs' said former employees, and in violation of business ethics and the rights of plaintiffs, did offer for sale and sold and made deliveries to customers of plaintiffs in Northern California—in direct competition with plaintiffs and without plaintiffs' consent, wine, liquor and beverage bottles, and continued to do so until the expiration of the said written agreement on December 31, 1952.'

"The customers of plaintiffs to whom such sales and deliveries are alleged to have been made, include but are not limited to the following:

Regal Amber Brewing Co.	currently located at	3250–20th St., S.F.
Italian Swiss Colony	"	615–4th St., "
Haas Bros.	"	2400 Army St., "
Lewis Westco Co.	"	222 Front St., "
Alexander-Balart Co.	"	455 Allan St., "
California Wine Co.	"	221–14th St., "
Lucky Lager Brewing Co.	"	2061 Newhall "
Pepsi-Cola Bottling Co.	"	640 Valencia "

"The testimony of said customers, and of several other customers in Northern California will be required to prove the allegations of the Second Cause of Action of said complaint, and to prove the dates, amounts and circumstances under which the said alleged sales and deliveries were made.

"Said customers cannot be compelled to attend the trial at a place more than 150 miles out of the county in which they reside or have a place of business according to the provisions of section 1989 of the Code of Civil Procedure."

The above was supplemented by Mr. Blum to include the following: "Supplementing paragraph I of my said affidavit with particular reference to former employees of plaintiffs who have been employed by defendants or one of them, Frank Toso, Jr., Kenneth H. Hoffman, Clarence Coulter and Edward H. Norman, each of them presently employed by the defendants and formerly employed by the plaintiffs, should testify as to the following facts within their own knowledge and recollection: (a) how long each of them had been employed by plaintiffs during and prior to

year 1952; (b) the acquaintance of each of them with each of plaintiffs' customers and customers' employees, purchasing practices, needs and preferences and the information and knowledge of each of them of plaintiffs' customers' lists and lists of preferred customers; (c) the date when each of them left the employ of the plaintiffs; (d) the date when, and circumstances under which, each of them became employed by defendants; and (e) what each of them did or was requested to do by the defendants during the period from June 19, 1952 to December 31, 1952, and the information and acquaintance with plaintiffs' business and relationship with plaintiffs' customers used and employed in defendant's behalf, which tended to be a benefit to defendants and a detriment to the plaintiffs; and (f) any other related matters which will tend to establish a course of conduct and conspiracy on the part of the defendants as alleged in paragraph XI of the Amended Complaint.

"Supplementing paragraph II of my said affidavit with particular reference to former customers of plaintiffs Regal Amber Brewing Co., Italian Swiss Colony, Haas Bros., Lewis Westco Co., Alexander-Balart Co., California Wine Co., Lucky Lager Brewing Co., Pepsi-Cola Bottling Co., through their respective officers, employees or purchasing agents, should testify and produce records of the following facts: (a) as to any conversation with and solicitation by defendants or defendants' agents or employees relating to making future purchases from defendants instead of from plaintiffs; (b) dates and amounts of purchases made by each of said business firms from defendants pursuant to such solicitation (if any) between June 19, 1952 and December 31, 1952 when plaintiffs' contract with the defendants expires; (c) whether such solicitation on behalf of defendants, if any there was, was made by a former employee of plaintiffs, who had accepted employment with defendants during said period; and (d) similar and relevant matter tending to show a course of conduct and conspiracy on the part of the defendants, as alleged in paragraph II of the Second Cause of Action of the Amended Complaint; that each of said business organizations last above named is a substantial business organization employing corporate executives, managing and purchasing agents, accountants, receiving and shipping agents, and billing clerks engaged in their employers' dealings with plaintiffs and with defendants and the identity of each of such employees of said organizations and the scope of the testimony of each cannot be fully anticipated at this date."

[1, 2] Section 397(3) of the Code of Civil Procedure empowers a trial court to change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change. A change of venue made pursuant to this section lies essentially within the sound discretion of the trial judge and his ruling will not be disturbed unless it is made to appear as a matter of law that there has been an abuse of that discretion. Wrin v. Ohlandt, 213 Cal. 158, 159, 1 P.2d 991; Scott v. Stuart, 190 Cal. 526, 527, 213 P. 947; Edwards v. Pierson, 156 Cal.App.2d 72, 76, 318 P.2d 789; Chaffin Const. Co. v. Maleville Bros., 155 Cal.App.2d 660, 662–663, 318 P.2d 196. As stated in Wrin v. Ohlandt, supra, 213 Cal. at page 159, 1 P. 2d at page 991, "[i]t is well settled that a motion for a change of venue grounded upon the convenience of witnesses rests largely in the discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing of its abuse."

The question presented on this appeal is whether the trial court abused its discretion, that is, whether it exceeded "the bounds of reason,—all the circumstances before it being considered." Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345, 366; In re Guardianship of Kiles, 80 Cal.App.2d 751, 755, 182 P.2d 639.

Defendants anchor their argument that the trial court abused its discretion in

granting plaintiffs' motion upon asserted deficiencies in the affidavits filed in support of the motion. It is to an examination of the affidavits that attention will now be directed.

[3, 4] Defendants first argue that an affidavit in support of a motion for change of venue which consists of conclusions and hearsay statements should be disregarded and cannot support an order based thereon. While it is true that an affidavit wholly devoid of the probative facts necessary to be stated is insufficient (see Baird v. Smith, 21 Cal.App.2d 221, 224, 68 P.2d 979; Pacific States Corp v. Shepardson, 105 Cal. App. 747, 751, 288 P. 714), it is obvious that more than mere conclusions were set forth in the instant affidavits. For example, Leon Blum deposed, not on information and belief (Pacific States Corp. v. Shepardson, supra), but based on facts within his own knowledge, that defendants induced four named individuals to leave plaintiffs' employment and thereafter employed these named persons themselves. That these former employees reside in or near San Francisco and will be needed as witnesses to testify to specified matters. The above involves neither conclusions nor hearsay. From the foregoing it is apparent defendants' argument is not well founded factually.

[5] Defendants' contention that plaintiffs' affidavits failed to state the names of the witnesses is without merit. The affidavits in support of plaintiffs' motion lists the names and addresses of eight of plaintiffs' former customers and the names of four former employees and states such customers and employees will be needed to testify at the trial in order for plaintiffs to prove their case. It is true that Blum did not state that any particular person *would actually be a witness,* but such an affirmative declaration is unnecessary (see Wood v. Silvers, 35 Cal.App.2d 604, 610, 96 P.2d 366, 97 P.2d 265) and it is sufficient if the proposed witnesses are identified by name and it is stated they will be necessary witnesses (see Wood v. Silvers, supra). Furthermore, the fact that the eight former customers named by plaintiff may be corporations rather than individuals does not, contrary to defendants' belief, mean they cannot be deemed a "named" witness. Furthermore, their books and records are subject to subpoena.

[6–8] Defendants next argue that the affidavits in support of the motion failed to set out the substance of the testimony of any alleged witness. While it is no doubt true that the moving party has the burden of showing the relevancy and materiality of the proposed witnesses' testimony (Edwards v. Pierson, supra, 156 Cal. App.2d at page 75, 318 P.2d at page 791; Juneau v. Juneau, 45 Cal.App.2d 14, 17, 113 P.2d 463; Art Frost of Glendale v. Hooper, 130 Cal.App.2d Supp. 903, 905, 280 P.2d 229), there is no requirement, where adverse witnesses are involved and section 2055 of the Code of Civil Procedure will be relied on, that the precise testimony be anticipated in the supporting affidavits. This would be impossible in many cases. Under such circumstances, the trial court should be able to pass on the relevancy and materiality of the proposed testimony where the affidavits state the subjects to which the proposed testimony will relate. In the instant case, the affidavits did state the subjects upon which testimony would be given by the four former employees and also stated they would have to be called under 2055.

There is language in some California cases which indicates that the moving party must show that the witnesses' testimony will be favorable to his position. See, e. g., Chaffin Const. Co. v. Maleville Bros., 155 Cal.App.2d 660, 318 P.2d 196; Ennis-Brown Co. v. Long, 7 Cal.App. 313, 316, 94 P. 250. However, such is not a rigid requirement. Even when a friendly witness is involved in a case where the substance of what he might testify to is not spelled out and it is therefore impossible to forecast whether his testimony would be favorable or unfavorable to the moving party, the trial court is not thereby precluded from exercising its discretion.

This court, in Edwards v. Pierson, supra, 156 Cal.App.2d at page 75, 318 P.2d at page 791, commented on the question as follows: "In the present instance the moving affidavits state the *subjects* upon which the witnesses are expected to testify but fail to reveal the *substance* of what any of them would say, and it is impossible to tell whether their testimony would be favorable or unfavorable to plaintiff. However, as the object of the stated requirement of the affidavit is to enable the court 'to determine the materiality of the evidence or the necessity of testimony from such witnesses' (citation), the vagueness of the affidavits at bar cannot be said to vitiate although it does present a situation which properly may be considered by the trial judge in exercising his discretion." (Emphasis added.)

[9] Finally, defendants argue that Blum's affidavits failed to demonstrate that both the convenience of witnesses and the ends of justice would be promoted by a transfer of the instant action from Los Angeles to San Francisco. We are of the opinion that plaintiffs satisfied the double burden of showing that both the convenience of witnesses and ends of justice would be advanced by such a transfer as is required by law. See Peiser v. Mettler, 50 Cal.2d 594, 328 P.2d 953; Prewitt v. Prewitt, 128 Cal.App.2d 344, 346, 275 P.2d 63; Rios v. Lacey Trucking Co., 123 Cal. App.2d 865, 867–868, 268 P.2d 160.

[10] The affidavits do not state why it would be inconvenient for the named witnesses to attend a trial in Los Angeles or that such witnesses would in fact object to attending trial there. Nevertheless, a trial court is justified in drawing reasonable inferences from the evidentiary facts stated in the affidavits. Harden v. Skinner and Hammond, 130 Cal.App.2d 750, 753, 279 P.2d 978; Dick v. La Madrid, 82 Cal.App.2d 450, 452, 186 P.2d 149. In Dick v. La Madrid, supra, 82 Cal.App.2d at page 452, 186 P.2d at page 151, the court stated that "[c]onsiderable discretion is vested in the trial court by section 397, Code of Civil Procedure. When such a motion is made, the burden of proof necessarily rests upon the moving party. While inferences may be drawn from facts presented, there must be some evidentiary showing in order to justify the drawing of such inferences." In the case at bar, the names and addresses, or at least city residence and place of employment, were stated. From this, the trial court could have reasonably inferred that it would be inconvenient for these individuals to travel over 400 miles from their place of employment and residence to a trial of indefinite duration. Furthermore, it was inferable from the facts stated that it would be inconvenient for the corporation witnesses to transport their books and records from San Francisco to Los Angeles.

[11] While generally the convenience of the employees of either party will not be considered (Chaffin Const. Co. v. Maleville Bros., 155 Cal.App.2d 660, 663, 318 P.2d 196; Willingham v. Pecora, 44 Cal. App.2d 289, 293, 112 P.2d 328), when such employees are being called by an adverse party, the court may properly consider their convenience. Harden v. Skinner and Hammond, 130 Cal.App.2d 750, 751, 279 P.2d 978.

[12] As pertains to a showing that the ends of justice will be promoted, Harden v. Skinner and Hammond, supra, 130 Cal. App.2d at page 755, 279 P.2d at page 980, states that "[t]he trial court may rely not only on the direct facts set forth in the affidavits, but also on any reasonable and relevant inference arising therefrom." In the instant action there are several logical and valid inferences arising from the averments in the affidavits to support the trial court's conclusion that the ends of justice would be better served by transferring the trial closer to the witnesses. In the first place, the witnesses would be readily accessible for immediate recall if further testimony was desirable, thus preventing needless delays. The obvious saving in

the witnesses' time and expense in traveling to Los Angeles and returning to San Francisco also promote justice. Furthermore, as four of the witnesses are adverse, it would be necessary for plaintiffs to obtain their testimony by deposition if trial were held in Los Angeles, and the ends of justice are better served by representing to the trier of fact oral testimony rather than submitting the same through depositions. Bartholomae Oil Corp. v. Associated Oil Co., 203 Cal. 176, 179–180, 263 P. 516; Carr v. Stern, 17 Cal.App. 397, 408, 120 P. 35. As stated in Carr v. Stern, supra, 17 Cal. App. at page 408, 120 P. at page 40, "[i]t is true, of course, that, should the trial be had in San Francisco, their depositions could be taken, if their personal attendance could not be secured, still it is manifestly always more satisfactory and desirable, in jury cases in particular, to present the testimony first hand to those who must determine the questions of fact, than to submit the same through depositions, which, in practical effect, is always a sort of hearsay way of adducing the proofs."

It is true that defendants' counsel in his affidavit "pledged" the attendance of the four employees at a trial in Los Angeles. However, the trial court was warranted in rejecting this pledge in that defendants themselves had no way of assuring their attendance at the time of trial and, in any event, the process of court would be more effective than a personal pledge.

Therefore, it cannot be said that the trial judge abused his discretion in granting plaintiffs' motion to change the place of trial. Under all the circumstances it does not appear that the trial judge exceeded the bounds of reason in concluding that the testimony of specified witnesses would be material and relevant and that the ends of justice and the convenience of these witnesses would be promoted by a change in the place of trial.

Affirmed.

ASHBURN and HERNDON, JJ., concur.

167 Cal.App.2d 174

Carl B. BOONE, Plaintiff and Appellant,

v.

SPRING HOLLOW FARMS, etc., et al., Defendants and Respondents.

Civ. 5793.

District Court of Appeal, Fourth District, California.

Jan. 16, 1959.

Hearing Denied March 11, 1959.

Action by motorcyclist for injuries sustained in an intersectional collision with an automobile. From adverse judgment of the Superior Court, Orange County, Ronald Crookshank, J., the motorcyclist appealed. The District Court of Appeal, Mussell, Acting P. J., held that where affidavits in support of motion for new trial indicated that a juror had made certain statements to cojurors, but such juror filed an affidavit denying such assertions, reviewing court must assume that trial court, which denied the motion for new trial, found that juror had not made the statements attributed to her.

Judgment affirmed.

1. New Trial ⇐142

Affidavits of jurors are admissible which relate to occurrences during trial and deliberations of jury tending to establish bias of a juror or other prejudicial circumstance existing at time of his impanelment which he concealed during the voir dire examination directed to that particular point.

2. Appeal and Error ⇐933(4)

Where affidavits in support of motion for new trial indicated that a juror had made certain statements to cojurors, but such juror filed an affidavit denying such assertions, reviewing court must assume that trial court, which denied the motion for new trial, found that juror had not made the statements attributed to her.

3. Appeal and Error ⇐854(6)

An order denying a new trial will not be disturbed if the record shows any basis upon which it may be upheld.

Adams & Hunt and Vernon W. Hunt, Jr., Santa Ana, for appellant.

Parker, Stanbury, Reese & McGee and Richard E. Reese, Los Angles, for respondents.

MUSSELL, Acting Presiding Justice.

This is an action for damages for personal injuries sustained by plaintiff when a motorcycle which he was operating in a westerly direction on Second Street at or near its intersection with Campo Walk, in the city of Long Beach, collided with an automobile being driven by one of the defendants. A jury trial resulted in a verdict in favor of the defendants and against the plaintiff. Judgment was entered in accordance with the verdict. Plaintiff's motion for a new trial was denied and he appeals from the judgment, claiming that irregularities occurred in the proceedings of the jury which denied appellant a fair trial as a matter of law; that the matters complained of consist of concealment of certain prejudices and attitudes on *voir dire* examination, reception of evidence outside of court and use of unauthorized sources of law; that the same acts constituted misconduct of jurors which denied appellant a fair trial. Insufficiency of the evidence to support the verdict and judgment is not specified as a ground of appeal.

In support of his motion for a new trial and of his contention that irregularities occurred in the proceedings of the jury, appellant filed several affidavits. It is stated in the affidavit of Evelyn Sutherland that she was a juror at the trial; that during the deliberations in the jury room a co-juror, Mrs. Brock, stated to the group that she had gone to the intersection where the accident occurred three times during the trial; that the curve was very dangerous; that Mrs. Brock then read from a summary of the Vehicle Code which she had brought with her into the jury room. Matilda Smith, another juror, stated in her affidavit that Mrs. Brock stated that she had gone to the scene of the accident and had experimented with her car in making the turn, as the defendant had done, and that the defendant could not have done anything besides what he did; that Mrs. Brock read to the jury from a pamphlet which she said was the Vehicle Code of the State of California; that subsequent to the trial Mrs. Anderson, forewoman of the jury, stated to affiant that she was against awarding substantial amounts as damages for pain and suffering because it made her insurance premiums go up.

The affidavit of Ida May Roberts states, in substance, that Mrs. Brock stated she had gone to the scene of the accident and experimented with her car and that Mrs. Brock read from a Vehicle Code summary. The affidavit of juror Zelma Bosshard was to the same effect as those of the other jurors concerning the statements made by Mrs. Brock. Zelma Bosshard further stated in her affidavit that Mrs. Anderson had stated to her that she did not believe in awarding much in damages because it would cause her insurance rates to be raised. Affidavits were also filed by Hazel L. Moody and Atha D. Merriman to the effect that Mrs. Anderson had stated in another case in which she was a juror that she was against large verdicts because they caused insurance rates to be high.

In a counter affidavit filed by juror Edith Anderson it was stated as follows:

> "I was selected and sat as a juror in the trial of the above entitled matter.
>
> "No questions were asked of me at the trial of this action during the time the jurors were being questioned by the lawyers as to whether I had any belief that a large judgment in favor of the plaintiff in this action might affect my insurance rates.
>
> "I at no time stated to Zelma Bosshard that I 'did not believe in awarding much in damages because it would cause my insurance rate to be raised.'
>
> "At no time did I state to Matilda Smith that I, 'was against awarding substantial amounts as damages for pain and suffering because it made my insurance premiums go up.' I have

at all times stated to whoever asked me concerning my frame of mind concerning the award of damages in personal injury actions that I would at all times follow the Court's instructions to the best of my ability and base any award for damages which I might make on the evidence before me and the instructions of the court. This has always been my frame of mind and still is my frame of mind concerning damages in accident cases. Had it been my decision to award damages in this case, which it was not, I would have voted to award plaintiff a sum of money which would fair [sic] and adequately compensate him under the evidence in the case and under the Court's instructions, whether that sum might be large or small, and without allowing anything to be taken into consideration other than what I heard in Court and the Judge's instructions.

"I have at all times had a fair and open mind concerning this or any accident case and there has at no time been any statement of mine on my part which would prevent me from returning a fair and impartial verdict based upon evidence and the law as given to me by the Court. My decision in this case was based upon evidence and the law as I saw it."

In Kollert v. Cundiff, 50 Cal.2d 768, 329 P.2d 897, 899, it is held that it is the general rule in California that affidavits may not be used to impeach a verdict (citing many cases) and that

"An exception to the general rule is made by statute where 'any one or more of the jurors have been induced to assent to any general or special verdict * * * by a resort to the determination of chance. * * *' Code Civ.Proc., § 657, subd. 2. Another exception, recognized by judicial decision, is that affidavits of jurors may be used to set aside a verdict where the bias or disqualification of a juror was concealed by false answers on *voir dire*. E. g., Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407.

"Subdivision 1 of section 657, which provides that a verdict may be vacated for 'irregularity in the proceedings,' does not refer to jurors' affidavits and may not be regarded as permitting the use of such affidavits in situations where they would not otherwise be proper. Cf. People v. Evans, 39 Cal. 2d 242, 250, 246 P.2d 636 [rejecting a similar argument made with respect to Pen.Code, section 1181, subd. 2]. The statements to the contrary in Shipley v. Permanente Hospital, 127 Cal.App. 2d 417, 424, 274 P.2d 53, 48 A.L.R.2d 964, are disapproved."

In Watson v. Los Angeles Transit Lines, 157 Cal.App.2d 112, 116, 320 P.2d 890, 893, it is said:

"A juror cannot impeach his own verdict, nor may a dissenting juror impeach the verdict of his fellow jurors, by affidavit except where the verdict was reached by lot or chance. Code Civ.Proc., § 657, subd. 2; McWilliams v. Los Angeles Transit Lines, 100 Cal.App.2d 27, 29, 222 P.2d 953; Woods v. Pacific Greyhound Lines, 91 Cal.App.2d 572, 576, 205 P.2d 738.

"An additional exception has been recognized whereby affidavits of jurors may be considered which relate to occurrences during the trial and the deliberations of the jury tending to establish the bias of a juror or other prejudicial circumstance *existing at the time of his impanelment which he concealed during the voir dire examination directed to that point.* Forman v. Alexander's Markets, 138 Cal.App.2d 671, 674, 292 P.2d 257. It must be shown that the bias or other prejudicial circumstance existed at the time of the *voir dire* examination and was concealed by the juror. Shipley v. Permanente Hospital, 127 Cal.App.2d 417, 424, 274 P.2d 53, 48 A.L.R.2d 964, distinguishing between that which had origin after the impanelment and before the discharge of the jury from that which had origin before the impanelment and continuing until the discharge of the jury. Williams v.

Bridges, 140 Cal.App. 537, 540, 35 P.2d 407."

In Maffeo v. Holmes, 47 Cal.App.2d 292, 117 P.2d 948, two of the jurors had, during the trial, visited the scene of the accident involved and reported their observations during deliberations. The court cited the general rule announced in the Watson case, supra, and held that on the motion for a new trial affidavits or testimony or extrajudicial statements offered to disclose the behavior of a juror should be rejected upon considerations of public policy. See also McWilliams v. Los Angeles Transit Lines, 100 Cal.App.2d 27, 29, 222 P.2d 953.

[1] Affidavits of jurors are admissible which relate to occurrences during the trial and the deliberations of the jury tending to establish the bias of a juror or other prejudicial circumstance existing at the time of his impanelment which he concealed during the *voir dire* examination directed to that point. Forman v. Alexander's Markets, 138 Cal.App.2d 671, 674, 292 P.2d 257.

The record shows that the following took place during the *voir dire* examination of juror Edith Anderson:

"Q Is there anything about the amount of $147,000, just in and of itself, before you have heard any of the evidence in this case, which would affect you one way or the other? A No, I wouldn't think so.

"Q In other words, you'd be willing to wait until the evidence is all in and from the evidence and the Judge's instructions you'd be willing to see what the evidence justified? A I understand that is the way we are supposed to do.

"Q That's right, and if it did justify a verdict for that amount, you would be willing to bring a verdict in for that amount? A Yes, sir. * * *

"Q I should make this clear, that all of these things which I am discussing with you are to test out your attitude and your open mindedness on the subjects and the Court is the one that will give you the law and you will take the instructions from the Court, and should you happen to have any ideas of your own, either as to what the law is or should be, you will be willing to lay those aside and follow the court's instructions? A Yes, sir.

"Q Do you know of any reason why you could not be fair and impartial in this case? A No, sir, I don't."

[2] While the affidavits in support of the motion for a new trial indicate that juror Edith Anderson made certain statements to co-jurors, her affidavit contains a denial of these assertions. We therefore must assume that the trial court found that she had not made the statements attributed to her. This supports the implied finding of the trial court to the same effect. Bates v. Newman, 121 Cal.App.2d 800, 812, 264 P.2d 197.

In Sharp v. Keating, 13 Cal.App.2d 637, 640, 57 P.2d 539, 541, the court said:

"Plaintiff assails the action of the trial court in denying the motion for a new trial, but we are of the opinion that such order should not be disturbed on appeal, because the weight of authority seems to be that where, as in this case, such motion is based on affidavits in support thereof, opposed by counter affidavits fully denying all the material allegations contained therein, the order denying the motion for a new trial will be affirmed on appeal. Diller v. Northern California Power Co., 162 Cal. 531, 123 P. 359, Ann.Cas.1913D, 908; Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann.Cas.1914D, 232."

[3] An order denying a new trial will not be disturbed if the record shows any basis upon which it may be upheld. Landrum v. Severin, 37 Cal.2d 24, 28, 230 P.2d 337.

Judgment affirmed.

SHEPARD, J., concurs.

167 Cal.App.2d 78

Peter DIMAS, Plaintiff, Respondent and Cross-Appellant,

v.

Ettie B. IRVINE, Defendant, Appellant and Cross-Respondent.

Civ. 23361.

District Court of Appeal, Second District, Division 2, California.

Jan. 12, 1959.

Action by sublessee against lessee for wrongful eviction from premises upon default by lessee under her lease. From a judgment of the Superior Court, Los Angeles County, J. F. Moroney, J., in favor of the sublessee, and from an order denying lessee's motion for new trial, the lessee appealed and the sublessee cross-appealed. The District Court of Appeal, Ashburn, J., held that where sublessee leased a portion of the premises for $90 a month for about 24 years and erected a $7,000 restaurant thereon which was to belong to owner of land at end of term, and he in turn subleased restaurant to another for two year term at a rental of $250 a month, and lessee defaulted while sublease still had 19 years 3½ months to run and while there was still 17 months to run on sublease of restaurant and sublessee was forced to vacate premises and lost his building, award of $9,786.50 to sublessee against lessee was neither excessive nor inadequate.

Judgment affirmed and attempted appeal from order denying new trial dismissed.

1. Landlord and Tenant ⇐178

Sublessee did not waive his right to damages for wrongful eviction by accepting a new tenancy under owner of land upon default of his lessee.

2. Landlord and Tenant ⇐180(5)

Where sublessee leased a portion of premises at $90 per month for about 24 years and erected a $7,000 restaurant thereon, which was to belong to owner of land at end of term, and he in turn subleased restaurant to another for two-year term at a rental of $250 a month, and lessee defaulted while lease still had 19 years 3½ months to run and while there was still 17 months to run on sublease of restaurant and sublessee was forced to vacate premises and lost his building, award of $9,786.50 to sublessee against the lessee was neither excessive nor inadequate.

3. Evidence ⇐574

The fact that there is not testimony to the contrary does not require that an expert's testimony be accepted regardless of its credibility.

4. Evidence ⇐570

The testimony of an expert witness is worth no more than the reasons he gives for it, and when he bases his opinion upon hypotheses which are obviously unsupported by the evidence, no trier of facts is duty bound to accept it.

Marcus C. Clark, Los Angeles, for appellant and cross-respondent.

Mac A. Propp, Los Angeles, for respondent and cross-appellant.

ASHBURN, Justice.

Defendant appeals from the judgment and attempts to appeal from an order denying her motion for new trial. Plaintiff takes a cross-appeal from the judgment. The court awarded plaintiff $9,786.50 as damages for wrongful eviction from premises held by him under a sublease from defendant Irvine.

Defendant had leased certain premises from James R. Palmer and Carrie Palmer for a term ending on December 31, 1971, at a rental of $200 a month. Defendant subleased a portion of the premises to plaintiff at the rate of $90 a month for a term beginning January 27, 1948, and ending on December 30, 1971, the sublessee to pay the taxes upon improvements placed upon the subleased parcel. Plaintiff was required by his lease to erect a building upon the premises, which would belong to the landowner at the end of the term. He erected a restaurant building at a cost of $7,000,

also installed fixtures and restaurant equipment at an additional outlay of $12,000. In 1951 plaintiff subleased to Pete Buzas for a two-year term beginning November 16, 1951, at a rental of $250 a month for the building and all its equipment. On or about May 5, 1952, the Palmers served upon defendant as their lessee, and plaintiff as sublessee, a notice of default upon the main lease in that the rent due on May 1, 1952 in the sum of $200 was unpaid, and taxes amounting to $481.83 were delinquent. Said notice required payment of said items within 30 days, failing which the lease would be terminated and the landlord would reenter the premises. Mrs. Irvine made no payments and the lease was terminated, the Palmers taking possession on June 3, 1952. After receiving his notice of default plaintiff went to see defendant several times and offered to take over any deal she could make with Palmer. But she was trying to get a lower rent and no deal with Palmer was ever made. When plaintiff offered her his rent for May defendant said, "I am giving up my lease"; "I am defaulting in my lease"; and "I can't take this check because I am defaulting in my lease." Plaintiff also went to see Mr. Palmer who said that Mrs. Irvine had defaulted and if the sums due were not paid by June 3rd, "you all have to move out." After Palmer had sent plaintiff to see his attorney an arrangement was made by which plaintiff rented from Palmer on a month to month basis the same portion of the premises which he had held under the sublease, but at a rental of $110 a month; this lasted until September when Buzas, who was in possession, was required to surrender the premises. Plaintiff then moved his fixtures and restaurant equipment to another location, but the building had reverted to the Palmers and remained on the premises.

[1] Defendant plainly defaulted upon her obligation to plaintiff as her sublessee, and counsel are agreed that plaintiff's renting for a period of four months from the Palmers on a different basis did not and could not restore his sublease or the right to possession thereunder. See, 30 Cal.Jur. 2d, § 132, p. 275; Wheelock v. Warschauer, 34 Cal. 265, 269; Kansaburo Ohsaki v. Ahern, 61 Cal.App. 787, 790, 215 P. 714; Hawley Corporation v. West Virginia Broadcasting Corporation, 120 W.Va. 184, 197 S.E. 628, 629–630, 118 A.L.R. 120. Plaintiff was not required to await physical eviction, nor did he waive his right to damages by accepting a new tenancy under the owner of the land. In the Kansaburo Ohsaki case, supra, 61 Cal.App. at page 790, 215 P. at page 715, the court said: "Under such circumstances, one who has received possession of property under a contract from a person who has no title or who has subsequently lost the same may yield it to the true owner without waiting for the latter to take it forcibly or by legal proceedings. Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 354, 45 P. 680."

[2] The main question presented on appeal is the measure of defendant's liability. Indeed, all arguments presented by both sides converge upon this central controversy. Defendant says the damages awarded are excessive and even speculative. Plaintiff says they are inadequate and opposed to uncontradicted expert evidence upon the subject.

The trial judge rightly criticized counsel for both sides because of inadequacy of their presentation, reopened the case and heard additional evidence, submitted the matter and later awarded $9,786.50 without any explanation of the method of arriving at that amount. Counsel for each side asserts inability to explain the court's figure. We find ourselves in the same position but we are able to determine whether it is within a permissible range of probabilities. First we approach the matter from the standpoint of defendant's claim that the damages are excessive.

Buzas had a sublease from plaintiff extending two years from November 16, 1951, at $250 a month, thus yielding a net sum of $160 a month less taxes of about $10 a month to plaintiff. At the time of eviction on June 3, 1952, his unexpired term covered

a period of one year and five months. Plaintiff thus lost $150 a month for 17 months, or $2,550; for four months he had to pay $110 (rather than $90) to Palmer and thus lost an additional $80. He had made an initial rent deposit to defendant and $275 of that amount remains owing to him; it cost him $275 to move his fixtures. The total of these items is $3,180. In addition thereto he lost his building which, according to his testimony, had cost him $7,000; it was about four years old and the record is silent as to the amount of depreciation it had suffered. Treating it as worth $7,000 when plaintiff was evicted, his damages aggregated $10,180 or thereabouts. Therefore, it cannot be said that the award of $9,786.50 was excessive or speculative.

[3, 4] Cross-appellant Dimas bases his claim of inadequate damages upon the testimony of one witness who assumed as an expert to value the lease through capitalization of net income, using $150 a month as the basis. He assumed that this profit would continue for the balance of plaintiff's lease term, or 19 years and 3½ months, although Buzas' tenancy at $250 a month was for two years only, included the use of restaurant fixtures and equipment as well as land and building, and the Palmers exacted only $110 a month for the use of the premises for the four months following the eviction. The result of this expert's computation was $19,873, which included $1,000 gratuitously assessed by the witness as a penalty for termination. There is no basis in the record for estimating the rental value of the premises some five, ten, fifteen or nineteen years hence. True, there was no witness that swore to the contrary, but that does not establish, as cross-appellant claims, an obligation to accept the expert's testimony regardless of its credibility. The testimony of an expert witness is worth no more than the reasons he gives for it. Gazzera v. City and County of San Francisco, 70 Cal.App.2d 833, 838, 161 P.2d 806; People v. Martin, 87 Cal.App.2d 581, 584, 197 P.2d 379; 19 Cal.Jur.2d, § 309, at p. 39. See, also, People v. Cole, 47 Cal.2d 99, 105, 301 P.2d 854, 56 A.L.R.2d 1435. When he bases his opinion upon hypotheses which are obviously unsupported by the evidence no trier of facts is duty bound to accept it. Such is the situation at bar.

The judgment is affirmed and the attempted appeal from order denying new trial is dismissed.

FOX, P. J., and HERNDON, J., concur.

167 Cal.App.2d 168

Clayton BALL and Stephen Ball, dba Ball & Company, Plaintiffs, Cross-Defendants and Appellants,

v.

Thomas Bridges HARDER and Leonora Harder, Defendants, Cross-Complainants, and Respondents.

Civ. 5799.

District Court of Appeal, Fourth District, California.

Jan. 15, 1959.

Action involving boundary line dispute between adjoining property owners. The judgment of the Superior Court of San Bernardino County, Jesse W. Curtis, Jr., J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Mussell, Acting P. J., held that there was substantial evidence to establish that there had been an uncertainty as to the true boundary line, that there had been an agreement between defendants and plaintiffs' predecessor in title to establish common boundary line, that a fence was built up to agreed boundary and that defendants occupied realty to such line and parties acquiesced in boundary line thus established for period equal to statute of limitations.

Affirmed.

Boundaries ⇐37(5)

In action involving disputed boundary line between adjoining landowners, there was sufficient substantial evidence to support finding that there had been an uncertainty as to true boundary line involved, that between defendants and plaintiffs' predecessors in title there was an agreement to establish a common boundary, that a fence was built thereon and defendants occupied realty to such line and parties acquiesced in boundary line thus established for period equal to statute of limitations.

Frank Aspinwall, Fontana, for appellants.

Robert Ritchie, Fontana, and Knauf, Henry & Farrell, San Bernardino, for respondents.

MUSSELL, Acting Presiding Justice.

This is an action involving a boundary line dispute between owners of real property in lots 181 and 188, Etiwanda Vineyards Tract, in the Township of Fontana, San Bernardino county.

It is alleged by appellants in their first amended complaint that they are owners of the west one-half of the east one-half of each of said lots; that respondents are the alleged owners and in possession of property adjacent to the west side of the appellants' property; that prior to September 21, 1955, respondents placed and maintained a large board fence, running in a northerly and southerly direction along and upon the west side of appellants' property and extending inside of it approximately 13.75 feet; that appellants had demanded that respondents remove said fence and that they refused to do so. The prayer of the complaint was that appellants have judgment for the encroachment and trespass on their property, for damages, and that respondents be required to remove said fence.

Respondents, in their answer, admitted ownership of the property adjacent to the west of that of appellants'; admitted placing and maintaining the fence; admitted a demand was made for its removal, and that they had refused to comply with said demand. In addition to their answer, respondents filed a cross-complaint in which they alleged that they were the owners of the west one-half of said lots 181 and 188; that appellants claimed an interest therein adverse to respondents and had unlawfully erected a fence upon the east side of respondents' west one-half of lot 181; that appellants were unlawfully in possession of a 13 foot strip of respondents' property on the east side of their west one-half of said lot 181; and that appellants had refused to give up said strip, although requested to do so. Respondents prayed for judgment quieting title, for removal of appellants' fence, and for damages.

It is admitted by the parties hereto that the record title of the west one-half of the east one-half of lots 181 and 188 is in appellants and that the title to the west one-half of lots 181 and 188 is in the respondents; that the respondents have erected a fence along what they claim to be the east boundary line of their west one-half of lot 188; that appellants have erected a fence along what they claim to be the boundary line dividing the east and west halves of lot 181; that appellants claim that the fence on lot 188 is approximately 14 feet east of the true boundary line; that respondents claim that the fence on lot 181, which is directly to the north of lot 188, is approximately 13 feet west of the true boundary line and that the respondents' fence on lot 188 is 13.75 feet west of the true survey line.

The principal question involved herein is whether the fence erected by respondents on lot 188 and the northerly extension of the line thereof through lot 181 constituted the agreed boundary line.

Respondents have been the owners of and in possession of the west one-half of said lots 188 and 181 since May, 1946. In that year these lots were unimproved and there were no markers of any kind thereon with respect to the east boundary line of the west one-half of said lots. Respondents did not have their property surveyed

before they bought it and in 1946 and early 1947 they were not certain as to the location of the east boundary line of their property. In the early summer of 1947 they established what they determined to be the east boundary line by measuring 330 feet easterly from the center of the first street west of their property. On this line they dug post holes and erected a board fence. In 1947 the property to the east of that of respondents' was owned by Carl T. Hogan and Alva Marks and when Harder and Babcock were digging holes for the fence posts and building a fence, Hogan and Marks were present. Thomas Harder testified in this connection that Hogan wanted an explanation of what they were doing and they told him what they had done and informed him as to the measurements taken; that he (Hogan) looked at the stakes to satisfy himself that they were right; that Hogan then said, "Everything lines up, so I think we are all right.", and "Well, looks all right to me.", or words to that effect.

Hogan testified that he walked out to the border line at the property line where they were beginning the fence; that he asked Harder what was going on and Harder said they were building a fence; that he (Hogan) said "Are you in the right spot?", and Harder replied that he thought so; that Hogan checked and, as far as he could see, Harder was in the right spot; that neither he nor Hendrickson (husband of Alva Marks) objected to the location of the fence then or at any other time.

Respondents occupied the property up to this fence from the time it was built in 1947 and all the predecessors in interest of appellants Ball and the successors in interest of Hogan and Hendrickson accepted such fence as the true boundary line.

In 1949 or 1950 a Mr. Gribble extended the fence northerly on lot 181. George Pavlick, the immediate predecessor in interest of appellants, considered the fence built by Harder to be the true boundary line, and the first time it was questioned was after Pavlick had opened an escrow for the sale of his property to appellants Ball in 1953.

The trial court found that the true east boundary line of the west halves of lots 181 and 188 was fixed by agreement between the respondents and the predecessors in interest of appellants more than five years before appellants acquired title to the east halves of said lots; that with reference to lot 188, the true boundary line between the east and west halves thereof is marked upon the ground by the wooden fence erected by respondents and, with reference to lot 181, the true boundary line is a prolongation of said fence; and that said boundary line is a distance of 343.38 feet east from the center of Lime Avenue, as said center is shown on the record of survey of Etiwanda Vineyards Tract, Map Book 17, page 29, San Bernardino County records. Judgment was rendered in favor of defendants and cross-complainants and plaintiffs and cross-defendants were ordered to remove the fence which they had erected on the east side of the west one-half of lot 181.

In Nutting v. Hulbert & Muffly, Inc., 155 Cal.App.2d 464, 468, 317 P.2d 1007, 1010, the court said:

> " 'When owners of adjoining lands have acquiesced for a considerable time, at least equal to the period prescribed by the statute of limitations, in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line.' Martin v. Lopes, 28 Cal.2d 618, 622, 170 P.2d 881, 884, citing Sneed v. Osborn, 25 Cal. 619, 627. Further, in Martin v. Lopes, supra, the statement is made that in order to invoke the doctrine of agreed boundaries all that need be shown is lack of knowledge by both parties where the fence line should be drawn.
>
> "The fact that an accurate survey is possible is not conclusive of the

question of whether a doubt exists as to the location of the boundary. The doubt may arise from the believed uncertainty which may be inferred from the circumstances surrounding the parties at the time the agreement was deemed to have been made and if, in good faith, the parties resolve their doubt by fixing the location of the common boundary it will be considered the boundary called for in the deed. Mello v. Weaver, 36 Cal.2d 456, 224 P.2d 691; Madera School District of Madera County v. Maggiorini, 146 Cal.App.2d 390, 303 P.2d 803."

In Mello v. Weaver, 36 Cal.2d 456, 460, 224 P.2d 691, it is held that an agreement to locate a boundary line need not be express, but it may be implied from long acquiescence; that the implied agreement must have been based on a doubtful boundary line; that a dispute or controversy is not essential but it may be evidence of the existence of a doubt or uncertainty; that it is not required that the uncertainty should appear from the deed or from an attempt to make an accurate survey from the calls of the deed; that a doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made, and if in good faith the parties resolve their doubt by the practical location of the common boundary it will be considered the boundary called for by the deed.

In York v. Horn, 154 Cal.App.2d 209, 212, 315 P.2d 912, 915, the court said: "The fact that an accurate survey is possible is not conclusive of the question of whether a doubt exists as to the location of the boundary."

We conclude that, under the rules stated in the cases cited herein, there is sufficient substantial evidence to establish that there was an uncertainty as to the true position of the boundary line herein; that there was an agreement to establish such a common boundary line; that a fence was built up to the agreed boundary; that respondents occupied their real property to such line and that the parties acquiesced in the boundary line thus established for a period equal to the statute of limitations.

Judgment affirmed.

SHEPARD, J., concurs.

167 Cal.App.2d 202

Amaryllis L. CARDEN, Plaintiff, Cross-Defendant and Respondent,

v.

Morris CARDEN, Defendant, Cross-Complainant and Appellant.

Civ. 9369.

District Court of Appeal, Third District, California.

Jan. 19, 1959.

Hearing Denied March 18, 1959.

Action by widow of deceased against deceased's brother to obtain decree that whatever apparent interest deceased brother had in certain realty be held in trust for widow and brother cross-complained. The Superior Court, Yolo County, C. C. McDonald, J., entered decree for widow and deceased's brother appealed. The District Court of Appeal, Van Dyke, P. J., held that under records showing that brothers had purchased as partners farm land for which they equally contributed to down payment but after a few years the partnership was dissolved with deceased and his widow carrying on farm operations alone and making all payments due under the contract as well as all taxes and costs of improvement, there was substantial evidence to support finding that deceased's brother had abandoned interest in land.

Affirmed.

1. Abandonment ⇦5

In widow's action against her deceased husband's brother for a decree that what-

ever apparent interest brother had in certain real property be held in trust for widow, where record disclosed that brothers had, as partners, purchased farm land for which they equally contributed to the down payment but after a few years partnership was dissolved with deceased and his widow carrying on farming operations alone and making all payments due under contract for purchase of land as well as paying all taxes and costs of improvements, evidence sustained finding that brother had abandoned his interest in realty.

2. Abandonment ⊂2

"Abandonment" of property is the voluntary relinquishment thereof by its owner with intention of terminating his ownership, possession and control and without vesting ownership in another person.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

3. Abandonment ⊂6

Intention to abandon is generally a question of fact and may be inferred from conduct.

4. Abandonment ⊂2

Under common law any title to or interest in land other than a fee simple may be abandoned, and equitable rights in land may also be abandoned.

5. Abandonment ⊂7

Where brothers, as partners, had contracted to purchase farm land and both contributed equally to down payment therefor, but after a few years partnership was dissolved and deceased and his widow carried on farming operations alone and made all payments under contract as well as paying all taxes and costs of improvement, and there was substantial evidence that brother had abandoned interest in farm, even though on final payment under contract vendor executed a deed to widow and brother as their interests might appear, brother had no interest in property except a bare legal right which he held in trust for widow. West's Ann.Civ.Code, § 853; West's Ann. Civ.Code, § 2223.

Rodegerdts & Means by E. L. Means and Oliver J. Northup, Jr., Woodland, for appellant.

J. A. Montgomery, Jr., and Richard A. Case, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This action was brought by Amaryllis L. Carden, hereinafter called "Amaryllis", against Morris Carden, hereinafter called "Morris", to obtain a decree that whatever apparent interest Morris had in certain real property he held in trust for Amaryllis. Morris cross-complained, asking that it be decreed he was the owner of one-half interest in the property and that Amaryllis should account to him for its use. The trial court decreed that Amaryllis was the sole owner of the property and from that judgment Morris appeals.

On January 6, 1934, R. E. Carden, hereinafter called "Robert", and appellant, who were brothers, entered into a contract with P. N. and Mamie C. Ashley, whereby they agreed to purchase the real property involved in this action. Amaryllis, through the death of Robert, her husband, has succeeded to Robert's interest. Robert and Morris made an initial payment of $1,750, each contributing one-half. At that time they were and for several years had been partners in rather extensive farming operations. Morris has claimed herein that they contracted to purchase the property as partners and that their interest therein was a partnership asset. Amaryllis has disputed this and the trial court found in her favor on that issue. In the latter part of 1937, the brothers dissolved their partnership and divided the partnership assets between themselves save that there was no express agreement distributing whatever interest each may have had in the subject real property. Robert continued to occupy and to farm the property until his death in 1951, after which Amaryllis occupied and farmed it. She and Robert made all the payments on the contract purchase price after the partnership dissolution and she alone made the payments after Robert's death. Full payment having

been made, the Ashleys executed a deed to Amaryllis and to Morris "as their interests may appear." Thereafter, Amaryllis began this action.

The trial court made the following findings of fact: The purchase price of the property was $35,000, payable $1,750 upon execution of the agreement and the balance, together with interest on deferred payments at 6%, was to be paid in the following manner: The contract required of Robert and Morris that they crop the land in 1934 to sugar beets and deliver to the Ashleys one-fourth of the amount received upon sale of the crop, to be credited first on interest due and second on principal. Robert and Morris were bound after 1934 to crop the land each year and pay over one-fourth of the amount of the crops. The buyers had the right to cover crop and the sellers agreed to waive interest as to the acreage planted to cover crop up to a full year's interest. The entire purchase price was to be paid in 20 years. Robert and Morris took possession of the land and farmed the same together through the year 1937. During that period they paid on principal and interest $4,777.59, of which $919.77 was credited on account of principal. At the end of 1937, Morris quit possession of the property and thereafter did not perform any of the obligations of the contract. After 1937 he never went upon the property, never participated in any way in the farming or management of it, never paid anything on taxes, principal or interest, nor for farming expenses. He paid no cost of the leveling done by Robert. From the time he quit possession, Morris considered the responsibility for the performance of the terms, conditions and obligations of the contract, together with the responsibility for carrying on farming operations, to be that of Robert alone. Robert, from 1937, and until he died December 1, 1952, remained in the sole actual possession of the property, performed all the terms and conditions of the contract, paid all taxes and carried on and conducted all farming operations. From 1937 until he died, Robert paid on the purchase price, without any contribution from Morris, $14,327.22 and $10,017.77 interest. Amaryllis, as successor to Robert after his death, remained in the sole actual possession of the property, carried on the farming operations, managed and supervised the property and paid on the principal $17.038.24 plus interest in the sum of $321.66. Robert expended on leveling the property the sum of $9.279.46. Robert and Amaryllis paid in taxes the total sum of $9,441.49. On January 17, 1955, Amaryllis paid the Ashleys $6,494.76, which was the final payment for the property and on January 24th following the Ashleys executed their deed as heretofore stated. The reasonable market value of the property as of October 30, 1956, was the sum of $125,000. The increase in the market value resulted from the work, labor and efforts of Robert and of Amaryllis and from changes in economic conditions subsequent to 1937 and was not attributable to anything done by Morris. The partnership was finally wound up and dissolved in 1938. During the winding up proceedings Robert and Morris divided the partnership property and assets then remaining between themselves, but did not enter into any agreement concerning their respective rights and obligations in and to the said contract of purchase or in and to the real property described therein. From 1937 until the death of Robert, Morris asserted no claim to the property, never offered to pay to Amaryllis one-half of the amounts put out by Robert and herself in acquiring the property and, more specifically, had never offered to repay one-half the taxes or one-half the cost of leveling the property. He did, however, offer to pay her one-half the amount of the final payment she made on the purchase price. That was the only offer he made to share in the cost of acquisition. This offer Amaryllis refused. Morris, from the year 1937, knew that up to the time of his death Robert had been in the sole actual possession of the property and had during all of that time farmed and managed the same and carried on the farming operations thereon by himself alone. He knew or could have ascertained that after the death of Robert, Amaryllis had been in the sole actual pos-

session of the property and by herself alone had managed it and carried on all farming operations. Morris, from 1937 until the death of Robert, had never demanded any accounting of the farming operations from Robert. Thereafter, he never demanded from Amaryllis any account of payments she had made to acquire the property. The foregoing findings are substantially supported by the evidence.

By his answer and cross-complaint Morris pleaded that when the partnership had been dissolved he and Robert had orally agreed Robert would perform all the obligations of the contract of purchase in consideration of Morris's relinquishing to Robert his one-half share of the profits in excess of the payments that had to be made; that all payments made by Robert on the contract were to be made for the benefit of both. The court found no such agreement had been made. This finding, too, is supported.

[1] The court concluded from the foregoing findings that Amaryllis was the owner in fee of the real property; that Morris had no right or interest therein or claim thereto and that whatever apparent title or interest he acquired by the deed and from the Ashleys he held in trust for Amaryllis with the obligation to convey to her; that he had released, relinquished, or abandoned whatever interest he had; that the deed from the Ashleys to Morris and Amaryllis did not operate to vest any title in Morris; and that Morris ought to be decreed to convey the property to Amaryllis, failing to do which the clerk of the court should convey for him. Judgment was entered accordingly.

The course of reasoning appearing in the trial court's memorandum of decision whereby the trial judge arrived at his conclusion that Morris had abandoned his interests is so cogent we wish to quote therefrom even at the expense of some repetition:

"Let us not forget that the contract for the purchase of the property in question was entered into between R. E. and Morris Carden with Mr. and Mrs. Ashley on January 6, 1934, which was right at the worst of the depression. Money was scare and farm products were very cheap. After the contract was executed and the purchasers had made their down payment of $1,750.00 they must have decided that they made a bad bargain for on the same day they prevailed upon the Ashleys to execute a supplemental agreement providing that the purchasers should have until the 15th day of August 1935 to cancel and rescind the contract by giving written notice to the Ashleys of their election to rescind. In the event of such rescission the purchasers were to deliver one-fourth of the crop grown on the property and could recover the $1,750.00 made by them as a down payment.

"The plaintiff testified that the property had been planted year after year for so long to grain without crop rotation that the land had lost its fertility. Her statement is corroborated by a provision in the contract of purchase which provides: 'It is further understood and agreed between the parties hereto that when, as and if a cover crop is put in all or a part of this land then in that event the interest will be waived by parties of the first part as acreage planted to said cover crop bears to the total interest due until a full year's interest has been waived by parties of the first part, and the one-fourth return from the crops as herein described shall be applied to the principal of said indebtedness.'

"The plaintiff's testimony that the land was not productive is further corroborated by the small amount the purchasers were able to pay on the purchase price of the land during the four years they farmed it together. It will be remembered that they farmed it together in the years 1934, 1935, 1936 and 1937. Under the terms of the contract they were to farm the land and deliver one-fourth of the crop of sugar beets or one-fourth of such other crops as they may grow on the property to the sellers' account and pay the taxes assessed against the land. From the proceeds derived from their one-fourth of the crops the sellers were to credit the purchasers first on the interest

which had accrued at six per cent and the balance on the purchase price.

"The exhibits of both parties in evidence show that from the farming operations by the purchasers for the four years up until the time they dissolved and terminated the partnership they were only able to pay on the purchase price the sum of $1,839.54. Add to that the $1,750.00 paid on the purchase price and you have the total sum paid on the purchase price at the time the partnership was terminated. The total sum paid was $3,589.54. One-half of that sum is $1,794.77 or the value of the defendant's equity when he abandoned the property and ceased to perform under the contract of purchase. At that time there was still a balance owing on the purchase price of $31,410.46. During the four years R. E. and Morris Carden farmed the land they paid the interest which amounted to $7,715.65. In addition to that the purchasers were required to pay and did pay the taxes levied against the land. Under the terms of the contract the purchasers were required to pay the entire principal within 20 years from the date of the contract.

"For the four years the purchasers farmed the land they were only able to pay on the purchase price at the rate of $459.88 per year. After deducting the down payment of $1,750.00 from the purchase price of $35,000.00, we have a balance of $33,250.00. To pay that sum at the rate of $459.88 per year would have required 72.33 years. Morris Carden could plainly see that with the yield the land was producing and with the prices the produce was bringing they could not possibly pay for the land in 20 years from the date of the contract and there was no provision in the contract for an extension of time for performance. In addition to the requirement to pay interest at six per cent and the taxes, the purchasers were required to keep the well on the premises in good condition, state and repair at their expense and keep the premises free from noxious weeds at their expense.

"The foregoing evidentiary facts is not only corroborative of the plaintiff's testimony that the land had lost its fertility but it is conclusive evidence not only of the fact that the defendant waived and relinquished his rights in the land under the contract with the Ashleys to R. E. Carden but why he did so.

"The defendant testified that after the year 1937 he never set foot on the property; that he never made any recommendations to R. E. Carden as to how the land should be farmed; that he made no objections to R. E. Carden as to the way he was farming the land; that he made no recommendations to R. E. Carden as to how he should comply with the Ashley contract; that he did not pay one cent of the taxes, one cent of the interest, one cent of the principal, and that he did absolutely nothing toward complying with the terms of the contract of purchase. He testified that he considered those matters Bob's responsibilities.

"The defendant testified that they were Bob's responsibilities because of the agreement he had with Bob after the dissolution of the partnership. This agreement has already been set forth. Of course it is fantastic. He knew only too well that there would be no profit for Bob from the farming operations after Bob had complied with the terms of the contract of purchase and he knew only too well that owing to the condition of the land and other prevailing conditions that Bob could not comply with the terms of the contract of purchase. Moreover, he knew that Bob was as well aware of those facts as was he.

"The plaintiff testified that R. E. Carden (Bob) realized that in order to restore fertility to the soil and make it more productive it was necessary to plant the land to alfalfa. In order to do this successfully it was necessary to level and check the land so as to make it irrigable. This he proceeded to do at a cost to him of $9,279.46, which he paid. It was stipulated at the trial that from 1938 to date R. E. Carden and the plaintiff expended in the payment of taxes on the land in question the sum of $9,441.49. The evidence shows that to complete the purchase of the land, R. E. Car-

den and the plaintiff expended the total sum of $66,124.41, whereas subsequent to the year of 1938 the defendant expended nothing.

"R. E. Carden died December 1, 1952. The defendant, in 1938, had the same right to enter upon the real property in question and perform under the contract of purchase and acquire by purchase an undivided one-half interest in the property as did R. E. Carden. Yet by his own testimony he did nothing toward that end. He testified that he made no claim on the property until after R. E. Carden's death. Thus for 15 long years he did not move a finger insofar as effort is concerned nor did he expend one cent to acquire his one-half interest in the land.

"Under the terms of the contract of purchase with P. N. and Mamie C. Ashley the defendant could not be compelled to perform or be held liable for any more than he had expended prior to 1938. The only recourse the Ashleys had under the contract was to retain what had been paid them as rent, terminate the contract and repossess the property.

"It is very apparent from the evidence in the case that the defendant considered that he had made a bad bargain; that acquiring the land by performance of the Ashley contract was not worth the effort and that rather than put forth any further effort or expenditure he would sacrifice what he had expended toward the purchase of the land prior to 1938.

"It was stipulated at the trial that the present value of the land is $125,000.00. This is due solely to the efforts of R. E. Carden subsequent to the year 1938 and the change in economic conditions. It is not due to any effort of the defendant."

In addition to the matters commented upon by the trial judge in the foregoing quotation, it appeared in the testimony that, although asserting at the trial he at all times had an equal interest with Robert in the real property being purchased, Morris never at any time reflected such claim in his income tax returns. He never called upon either Robert or Amaryllis for information as to what amount, if any, he should return as income and pay a tax upon. It also appeared that at the dissolution of the partnership Morris tried to sell to Robert his interest under the contract, but Robert would not buy.

[2–4] We think the trial court properly found that Morris abandoned his interests and that Robert took over. Abandonment of a right or property is the voluntary relinquishment thereof by its owner with the intention of terminating his ownership, possession and control and without vesting ownership in another person. 1 C.J.S. Abandonment, § 1 p. 4. Intent to abandon is generally a question of fact (Wiltsee v. Utley, 79 Cal.App.2d 71, 77, 179 P.2d 13), and may be inferred from conduct. 1 C.J.S. Abandonment § 4 p. 12. Under the common law any title to or interest in land other than a fee simple may be abandoned. 1 C.J.S. § 4 p. 12. Equitable rights in land may be abandoned. (Id.) The facts amply support the trial court's conclusions.

[5] The result of what has been said is that the equitable title to the land was in Amaryllis when she completed the payments, but by virtue of the existing written contract an apparent title rested in Morris. Reasonably enough, the Ashleys would not assume the risk of conveying to Amaryllis alone lest they be subject to the claims of Morris, which by that time he was asserting. Amaryllis was compelled to accept from them the form of conveyance they were willing to execute, that is, a deed conveying to her and to Morris "as their interests may appear" or to litigate with the Ashleys and Morris. She elected to accept the deed and to establish her rights as to Morris. The situation then was that she was entitled to the equitable decree she received. Morris was by then a mere interloper seeking to capitalize on a bare legal title. It makes no difference whether the theory of the decision be that of a "purchase money trust" (Civil Code, Sec. 853; Bogert on Trusts and Trustees, Vol. 2A, p. 419, et seq.) or of a constructive trust

(Civil Code, Sec. 2223, Bogert, Vol. 3, p. 3, et seq.) The technical differences between the two are immaterial here. It is equally immaterial if we assume, as argued by counsel for appellant, that the purchase of the land was a partnership venture, for the evidence would support a finding that Morris's interest after dissolution was abandoned. The judgment is based on abandonment.

For the reasons given, the judgment is affirmed.

PEEK, J., and WARNE, J. pro tem., concur.

167 Cal.App.2d 29

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Shelby LOEPER, Defendant and Appellant.

Cr. 1193.

District Court of Appeal, Fourth District, California.

Jan. 8, 1959.

Defendant was convicted of the unlawful sale of narcotics and from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial, Edward F. Fogg, J., the defendant appeals. The District Court of Appeal, Griffin, P. J., held that an instruction on intent was adequate; that reference by the prosecutor to a tape recording of a statement made by codefendant as a confession was not prejudicial; and that evidence of other sales by codefendant did not require reversal in view of cautionary instructions.

Judgment and order affirmed.

1. Criminal Law ⇐823(4)

In narcotics prosecution, general instruction on intent was adequate where it was followed by another instruction on intent of the defendant to commit the crime charged making it apparent that before the jury could find defendant guilty, he must have had knowledge that the substance transferred was a narcotic, and where defendant's defense was that he made no sale to the purchaser under any circumstances. West's Ann.Health & Safety Code, § 11500.

2. Poisons ⇐9

In prosecution for the unlawful sale of narcotics, when jury found that a sale was made by the defendant, the transaction under the circumstances implied knowledge by the defendant of the narcotic nature of the substance sold. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⇐729, 730(3)

Where a tape recording was made of statements attributed to codefendant out of the defendant's presence and the prosecution unsuccessfully sought to introduce the recording in evidence as to the codefendant, fact that the prosecutor referred to the recording as a "confession" was not prejudicial error where prosecutor withdrew the remark and the trial court gave cautionary instructions. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⇐673(5)

In prosecution for the unlawful sale of narcotics, where the charged sale was made on December 9, evidence of other sales made by codefendant to the same purchaser on different dates did not require a reversal where the court instructed the jury that such evidence was not admissible against the defendant and did not involve him. West's Ann.Health & Safety Code, § 11500.

5. Criminal Law ⇐370, 371(12), 372(1)

In prosecution for the unlawful sale of narcotics, evidence of other sales is admissible against the defendant who sold it, to prove a material fact, or when the question of that defendant's knowledge or familiarity with the substance sold becomes involved, or for the purpose of showing a motive, or system, and the admission of such offenses generally depends upon the particular fac-

tual situation. West's Ann.Health & Safety Code, § 11500.

Robert P. Lawton, La Habra, for appellant.

Edmund G. Brown, Atty. Gen., Arthur C. deGoede, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendant-appellant Loeper, together with one Vincent Quintero, were charged in an amended grand jury indictment that on December 9, 1957, they did feloniously sell a narcotic (marijuana) in violation of Health and Safety Code section 11500. Appellant was charged with two prior convictions of felonies (burglary and escape from state prison). He pleaded not guilty to the charge and later admitted the prior convictions. A motion for a separate trial was denied. The jury returned a verdict of guilty as to Loeper and not guilty as to Quintero. Appellant's motion for a new trial was denied.

The questions raised on this appeal are (1) whether it was prejudicial error for the trial court to fail to give an instruction on its own motion, that knowledge of the narcotic character of the substance allegedly sold, was an essential ingredient of the offense charged; (2) was it prejudicial error to instruct the jury on the subject of confessions? and (3) was it prejudicial error to admit into evidence offenses pertaining to defendant Quintero other than the offense charged?

A special deputy sheriff, without pay (Hobbs, otherwise regularly employed as a machinist), acted as an undercover investigator. He met appellant's codefendant Quintero at a parking lot in La Habra on December 8, 1957, about 6 p. m. There, other persons were present, including appellant Loeper. Quintero asked Hobbs if he wanted to buy a "pound" or a "tin". (A tin is equivalent to one tobacco can full of marijuana.) Hobbs agreed to buy a "tin" for $15, but wanted to see "Dick" (a fictitious person) to see if he would want to buy one. Quintero inquired when he would return and Hobbs replied "about midnight". Quintero and Hobbs then returned to the lot, and at Hobbs' suggestion they went to see "Dick" to show it to him. Both left in separate cars and parked in front of a bar. There they walked over to a black Buick car where appellant Loeper was seated. Quintero tapped on the windshield and appellant rolled down the window. Quintero told appellant "This is the guy", and appellant then asked Hobbs if he would buy a tin and he said he would if Dick liked it but he wanted Dick to see it over in Carbon Canyon, about six miles away. Appellant said he would have to go down by the tracks to get it. Appellant walked down the tracks and returned in about five minutes, got in appellant's car, and Quintero drove his own car to the spot. En route, appellant stated to Hobbs that he was going to quit "pushing weed" (marijuana), and start "pushing hard stuff" (heroin). They parked in a lot by a cafe and Quintero parked nearby. Hobbs told appellant he would pay for and take one "tin" but he would have to show it to Dick and then return in about 20 minutes. Appellant Loeper held out three brown sacks and told Hobbs to take his pick. He said a "lid" (tin) would cost $12.50. Hobbs took one bag and paid appellant $12.50. Hobbs then walked to his residence, telephoned the sheriff, and related the facts. About 20 minutes later Hobbs returned to the car and appellant and Quintero were seated in it. Hobbs told them that the marijuana was pretty "stemmy" and it was a "short tin" but they would take it anyway. He said Dick wanted a pound and wanted to know what that amount would cost. Appellant replied he would have to see another fellow about that much. Quintero was to let Hobbs know. Defendants left and their arrest followed. The lot Hobbs bought proved to be marijuana.

Appellant testified he was there at the parking lot on December 8th at the time but did not talk to Hobbs; that Hobbs and Quintero did have a conversation which he did not hear; that when Hobbs left Quintero did come over to him and said Hobbs wanted to buy some narcotics but appellant

did not offer to obtain it for him; that he was asleep in his car in front of the bar when Quintero awakened him by tapping on the windshield; that Hobbs was there; that he and Hobbs drove to the canyon to see Dick; that Hobbs then left for a few minutes, returned and talked to Quintero, as though he "was mad about something" and they drove away. He denied ever selling any marijuana to Hobbs and claimed he did not walk down the tracks to obtain marijuana as indicated by Hobbs.

[1, 2] The attorney general concedes that section 11500 of the Health and Safety Code requires a knowledge of the narcotic character of the substance in question. The jury was instructed that "To constitute criminal intent it is not necessary that there should exist an intent to violate the law or to do a wrong. Criminal intent exists whenever a person intentionally does that which the law declares to be a crime, even though he may not know that he is committing a crime or that his act is wrong". It is claimed that this general instruction is proper in alleging crimes where specific intent follows the unlawful act but not in charged narcotic offenses. However, this instruction was followed by another which read in part: "An essential element of the crime of which the defendant is accused is intent. * * * The intent to do the forbidden thing constitutes the criminal intent. The law requires that to be guilty of crime, one must intend the conduct that fits the description of the crime and must engage in that conduct *knowingly* and wilfully." (Italics ours.) The offense charged here was that defendant did wilfully, unlawfully and feloniously sell a narcotic, to wit, marijuana. In People v. Odom, 19 Cal. App.2d 641, 646, 66 P.2d 206, 209, it was said: "An information which charges that a person 'willfully and unlawfully' performed an act is equivalent to alleging that he *knowingly* did so, and thus supplies the element of knowledge of the unlawful act where that element is necessary to be alleged in the pleading", and "To do a thing willfully *is to do it knowingly.*" Citing People v. Swiggy, 69 Cal.App.2d 574, 581, 232 P. 174; Words & Phrases [2d Ser.] p. 1304; and Penal Code, sec. 7, subdivisions 1 and 5. See also 23 Words and Phrases, Knowingly, p. 572. From the instruction given, it clearly appears that before the jury would be authorized to find defendant guilty of the charge, he must have knowledge that it was a narcotic. The appellant's defense was not that his innocence was predicated upon lack of knowledge that it was a narcotic, but he claimed he made no sale to Hobbs under any circumstances. No instruction on this subject was proffered by appellant, as was done in People v. Winston, 46 Cal.2d 151, 293 P.2d 40, relied upon by appellant. Even though such an instruction was not offered, it was argued that it was the duty of the court, on its own motion, to give such an instruction. Appellant relies upon People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367, involving sex offenses under Penal Code section 288. In such cases it was held that it was the duty of the court to give, on its own motion, certain cautionary instructions, because of the nature of the charge. The instant case involves the sale of a narcotic and is thus differentiated. Had appellant offered such an instruction, which was refused, and there were no other instructions given on the subject, a different question might here arise. When the jury found that a sale was made by appellant, under the circumstances related, the transaction would necessarily imply knowledge by appellant of the narcotic nature of the substance sold. People v. Sanders, 163 Cal.App.2d 132, 328 P.2d 825. In effect the jury was told that if appellant sold a substance without the knowledge that it was a narcotic he could not be convicted. We are convinced that the jury was not misled by the instructions given and that no prejudicial error resulted. People v. Watson, 46 Cal.2d 818, 299 P.2d 243.

The court gave an instruction to the effect that "Evidence has been received in this case tending to show that on an occasion other than this trial the defendant Quintero himself made a statement tending to prove his guilt of the alleged crime for

which he is on trial", and that "A statement thus made * * * may be either a confession or an admission." The court then followed this statement with a definition of confession and of an admission. It was followed by an instruction that the mere fact that the court had admitted into evidence the alleged confession did not bind the jury to accept the court's conclusion, but the jury, before it considered it, must conclude that it was a voluntary confession, but that this rule did not apply to an admission.

[3] The contention is that the court instructed the jury there was in fact a confession in the case to be considered by the jury when in fact no confession of either defendant existed. Apparently there was a tape recording made of certain statements attributed to defendant Quintero, out of the presence of appellant. During the trial there was an unsuccessful attempt by the prosecution to admit this tape recording in evidence as to Quintero. The trial judge believed that certain statements made therein by Quintero involved this appellant and in fairness to him felt that an instruction to the jury not to consider those statements as to this appellant would not be entirely effective, and if admitted, might prejudice the rights of appellant. In the presence of the jury the prosecution referred to the recording as a *confession*. Quintero, on cross-examination, was questioned as to whether or not he made certain statements therein. (Apparently for the purpose of impeaching his present testimony.) It appears that appellant's counsel first referred to the recording as a "supposed admission or confession by Mr. Quintero." No objections were made at the time, to the district attorney's reference to it as a confession. Later, when counsel for Quintero objected to the use of the word "confession", the district attorney withdrew the remark and apologized for his "slip". The court especially instructed the jury to disregard the reference and told the jurors they would be the judge as to the nature of its contents. The tape recording was not in evidence and is not before us. There is no indication that the jury inferred that either Quintero or appellant therein confessed to this charge.

On rebuttal the prosecution placed the officer on the witness stand and apparently, after refreshing his memory from the tape recording, he testified that Quintero did make certain statements which Quintero denied he made during his cross-examination by the prosecutor. Complaint is now made of this procedure, claiming that the prosecution was trying to get before the jury the alleged statements which the court had previously rejected as inadmissible, citing People v. Rodriguez, 58 Cal.App.2d 415, 136 P.2d 626. The officer's recollection as to the statements made by Quintero were admissible against him, at least for the purpose of impeachment, and the trial court limited their application to this purpose. The trial judge was more than fair to appellant in rejecting the admission of the tape recording into evidence as to Quintero so that it would not operate to the detriment of appellant. No prejudicial error appears in this respect.

[4, 5] Lastly, appellant complains of evidence of two separate sales of marijuana by Quintero to Hobbs on December 7th (five marijuana cigarettes in evidence), and on December 10th (four such cigarettes in evidence). The charged sale in the instant case was on December 9th. Appellant did not object to evidence of the sale to Quintero on December 7th. The defendants objected to the introduction of the sale on December 10th, and the court sustained the objection by this appellant and the jury was instructed that evidence of the sales of December 7 and December 10 was not admitted as to appellant but could only be considered as against Quintero. Evidence of other sales has been held admissible against that defendant who sold it, to prove a material fact, or when the question of that defendant's knowledge or familiarity with the substance sold becomes involved, or for the purpose of showing motive, scheme, plan, or system. People v. Bean, 149 Cal.App.2d 299, 308 P.2d 27; People v. Freytas, 157 Cal.App.2d 706, 321 P.2d 782; People v. Sanders, 163 Cal.App.

2d 132, 328 P.2d 825. The admission of such offenses generally depends upon the factual situation of the particular case. Since the court instructed the jury that this evidence was not admissible against appellant and did not involve him, no prejudicial error resulted from its admission. People v. Watson, supra.

Judgment and order denying a new trial affirmed.

MUSSELL and SHEPARD, JJ., concur.

166 Cal.App.2d 825

Lincoln E. DELL'ORTO, Plaintiff and Respondent,

v.

Carl J. DELL'ORTO et al., Defendants,

Carl J. Dell'Orto, Appellant.

Civ. 9499.

District Court of Appeal, Third District, California.

Jan. 7, 1959.

Hearing Denied March 4, 1959.

Action by promisee against promisor for specific performance of alleged contract for sale of realty. The Superior Court, Calaveras County, Ross A. Carkeet, J., entered decree ordering specific performance and directing partition by sale of other realty, and promisor appealed. The District Court of Appeal, Schottky, J., held that conflicting evidence sustained Superior Court's finding that one of promisor's offers had been accepted by promisee, and that issues of ability to perform and tender were no longer issues in the case.

Judgment affirmed.

1. Specific Performance ⇐121(4)

In action by promisee against promisor for specific performance of alleged contract for sale of realty, conflicting evidence sustained trial court's finding that one of promisor's offers had been accepted by promisee.

2. Trial ⇐9(1)

Where, in action for specific performance of alleged contract for sale of realty, issues of ability to perform and tender were not raised at pretrial conference or listed in pretrial conference order as issues remaining in dispute, they were no longer issues in the case. Superior Court Rules, rules 8.2, 8.6, 8.8.

Atherton & Dozier, Mazzera, Snyder & DeMartini, Stockton, for appellant, Carl Dell'Orto.

Jones, Lane, Weaver & Daley, Stockton, for respondent.

SCHOTTKY, Justice.

This is an appeal from a decree ordering specific performance of a written contract for the sale of real property and from an order directing partition by sale of other real property. The issue of partition appears to have been abandoned because no reference is made to it by appellant.

Appellant Carl J. Dell'Orto and respondent Lincoln E. Dell'Orto are brothers. Some years prior to the commencement of this action their father devised real property to Carl, Lincoln and a third brother, Earle. The three brothers had been attempting to reach an agreement for the division of the property. On Sunday, October 23, 1955, a meeting was held to discuss the matter. An offer was made by Carl to Lincoln. The next day Carl wrote a letter to Joseph S. Huberty, an attorney which read:

"Sunday evening a meeting at Earle's residence was held, attended by Lincoln and Earle and myself.

"He would not go for a division on the Hatcher line nor an offer for me to buy his interest in the ranch for 23,000.

"However, he was to consider:

1st—to pay me 22,000 for my interest in the ranch, 800 acres, or 2d—23,000 for my interest in the 800 acre ranch and Lot 2 in Block 17,

or 3d—25,000 for all my interest in the 800 acre ranch—together with Lot 2 Block 17 and Lot 1 Block 1.

"As he has not accepted any of the plans I am withdrawing plan number 3, desiring to hold for my own use Lot 1 Block 1, however will go along with either plan Number 1 or 2, if he so chooses."

On October 25, 1955, Mr. Huberty had a conference with Lincoln and afterwards he wrote a letter to Carl on Lincoln's behalf in which Carl was advised that plan 2 was accepted. The letter concluded: "Please advise us as to how you would wish to have the matter concluded."

In April, 1956, Carl and Lincoln released their interest in certain property to Earle; and Earle, in turn, released his interest in other land to Carl and Lincoln. In April, 1957, Lincoln brought this action to compel specific performance of the alleged agreement to sell. Paragraph V of the complaint read: "That subsequent to said written agreement to purchase, the plaintiff tendered the purchase price thereunder to said defendant, and demanded a conveyance of said interest in said real property; that defendant has not executed a conveyance of title to said property, and has refused to sell and convey said interest in said property to the plaintiff; that the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant and hereby tenders the same." This allegation was denied by Carl in his answer.

A pre-trial conference was held and a pre-trial conference order filed. So far as important upon this appeal, said order provides:

"The Court further finds and it is ordered that plaintiff's contentions are as follows:

"1. That plaintiff is entitled to specific performance of the contract alleged in the Complaint, * * *

* * * * * *

"The Court finds and it is ordered that defendant, Carl Dell'Orto's contentions are as follows:

"1. He concedes that an offer of sale was made, but contends that it was withdrawn before acceptance and that *therefor* there was no contract."

The cause then proceeded to trial. The defense was that no contract existed because the offer made on October 23, 1955, was for twenty-four hours only, that the offer had been revoked and that the acceptance which was to have been given to Earle was not proper. The trial court found:

"[T]he terms of said written offer and acceptance to be as follows: The defendant, Carl Dell'Orto, agreed to sell to the plaintiff for Twenty-three Thousand ($23,000.00) Dollars cash, his undivided one-half interest in the approximately 800 acre ranch formerly belonging to the father of said parties, and also his undivided one-half interest in Lot 2 Block 17 * * *; that plaintiff was to deposit said sum in cash in escrow in a responsible title company, or some other mutually agreeable escrow agent, to be delivered to the defendant Carl Dell'Orto in exchange for a grant deed from said defendant in good and sufficient form to convey his title therein to plaintiff, including all improvements, appurtenances, easements, and other hereditaments; that said defendant was to pay the costs of preparation of said deed, and one-half the fee of such escrow holder; that plaintiff was to pay all other costs in connection with said transfer."

[1] Appellant Carl contends that the above finding is not supported by the record and that there was no meeting of minds and hence no contract. This argument is one which goes merely to the weight of conflicting evidence, for there was ample evidence to support the court's finding that plan 2 in appellant's offer was accepted by respondent. Indeed, this contention is only given brief mention in appellant's brief, and the principal contention urged by appellant is that Lincoln failed to prove: (1) that at the time of the commencement of the action he was ready, willing and able to perform,

and (2) that he ever tendered the purchase price to Carl.

Respondent makes two answers to this contention. He first contends that formal tender of the purchase price is excused by the seller's repudiation of the contract of sale. He points out that in the acceptance letter the following appeared: "Please advise us as to how you would wish the matter concluded." Mr. Huberty testified that this meant that Carl was to advise them how he wanted the matter closed, i. e., where the money should be paid and where the deed would be delivered. Respondent also points out that the record shows appellant repudiated the contract shortly after it was entered into, and that throughout the litigation the defendant has taken the consistent position that there was no contract either because the time limit in the offer had expired or the offer was revoked before acceptance.

Respondent quotes from the case of Ray Thomas, Inc. v. Cowan, 99 Cal.App. 140, at page 146, 277 P. 1086, at page 1088:

> "* * * The law is well settled that, where a vendor repudiates the terms of a contract and indicates that he will be no longer bound thereby, a further tender of performance before beginning suit by the vendee is unnecessary. In support of this we may refer to the long list of cases cited in a note appended to the case of Bateman v. Hopkins, as reported in Ann.Cas. 1913C, pp. 642–648, being a case also reported in 157 N.C. 470, 73 S.E. 133. To the same effect is the rule stated in 23 Cal.Jur., p. 499; see, also, Buckmaster v. Bertram, 186 Cal. 673, 200 P. 610. Where the vendor has absolutely repudiated his agreement to sell, it is sufficient, on the part of the vendee, to set forth in his complaint that he is ready, willing and able to perform his part of the contract. Such appears to be the case at bar. The complaint contains the necessary allegations which was followed by the necessary proof introduced upon the trial. * * *"

Respondent also cites Beverage v. Canton Placer Mining Co., 43 Cal.2d 769, at page 777, 278 P.2d 694, at page 700, where the court said:

> "Defendants further contend that plaintiffs are not entitled to a decree of specific performance because of their failure to allege payment or tender of the balance of the purchase price, a condition precedent to plaintiffs' right to demand its conveyance. They rely on the rule that 'to entitle a party to specific performance, he must have (a) performed, (b) offered to have performed, or (c) proved a sufficient excuse for not performing, all the conditions required by him' by the agreement. Reyburn v. Young, 11 Cal. App.2d 476, 477, 54 P.2d 87; Civ.Code, § 3392. However, where a vendor repudiates a contract and indicates that he is not bound thereby, a tender is unnecessary. Ray Thomas, Inc. v. Cowan, 99 Cal.App. 140, 146, 277 P. 1086. While the language of the complaint seems to preclude an allegation of tender, it is not inconsistent with an allegation of repudiation of the contract by the defendant company as vendor. Thus, plaintiffs alleged the company's continued refusal to execute a conveyance of the property despite plaintiffs' repeated demands therefor, and that plaintiffs stand 'ready, willing and able' to pay the balance due. The law does not require the performance of an idle act, and a formal tender of performance is excused by the refusal in advance of the party to accept the performance owing. Civ.Code, §§ 1440, 1511, 3532; Woods-Drury, Inc. v. Superior Court, 18 Cal.App.2d 340, 348, 63 P.2d 1184."

Respondent's second answer to appellant's contention that respondent failed to prove that at the time of the commencement of the action he was ready, willing and able to perform or that he ever tendered the purchase price to appellant is that no issue was raised at the pre-trial conference as to tender or ability to pay on the part of the

respondent and that this was not considered one of the matters at issue during the actual trial. He points to the pre-trial conference order, hereinbefore quoted, and cites Rule 8.8 of Rules Relating to Pre-trial Conferences, which reads: "When filed, the pre-trial conference order becomes a part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case unless modified at or before trial to prevent manifest injustice * * *"

We agree with respondent that the issues of ability to perform and tender were not raised at the pre-trial conference and were not listed in the pre-trial conference order as issues. What was said in Baird v. Hodson, 161 Cal.App.2d, 687, 327 P.2d 215, 217, is applicable:

> "A review of legal history reveals innumerable rules, regulations, laws and processes introduced into the law by which there is a more efficient and effective handling of cases. In each instance not only was it necessary, but progress in the law demanded it. Another of such progressive steps is now part of California law, which may be referred to as Pre-trial Procedure. A review of the rules for pre-trials clearly reveals the reasons behind them. Obviously, the rules were designed to relieve the members of the legal profession and the members of the judiciary from legal technicalities, trivia, details, unessentials, and to have the case tried at an early date upon the real and substantial issues in the case. This is a most laudable and meritorious purpose. In Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 388, 91 L.Ed. 451, in discussing federal court pretrial, it is said:
>
> " 'The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.'
>
> "To satisfy the purposes and obtain the full effectiveness of pre-trial procedures it is necessary not only that the practitioner observe the rules, but that the courts observe them. In the instant case, the pre-trial conference order reflects the contention made by all parties to the action and definitely and numerically sets forth the 'Issues' as '(1) The dates of execution and the due delivery of the documents in evidence; and (2) whether or not the document Exhibit 2 is an option or an offer to purchase.' Further, the order states: 'All discovery proceedings are complete, and the issues are joined.' No action was taken by defendant as allowed to him under Rule 8.7(b).
>
> "This pre-trial conference order then controlled the subsequent course of the case in accordance with Rule 8.8 and the issues raised by the pleadings were superseded. The pre-trial judge, the trial judge and plaintiffs had the right to rely upon that posture of the case. Particularly is this true because defendant did not request a modification of the pre-trial conference order, which he had a right to request under Rule 8.7."

The rules as to pre-trial procedure adopted by the Judicial Council provide that each party "shall be prepared to state orally the factual and legal contentions to be made as to the issues remaining in dispute" (8.2), and Rule 8.6(a) provides: "The pre-trial conference judge shall prepare and sign a pre-trial conference order * * * This order shall contain: (1) A concise and descriptive statement of: * * * (iii) the factual and legal contentions made by each

party as to the issues remaining in dispute; * * *"

[2] As hereinbefore set forth, rule 8.8 provides that the pre-trial order controls where inconsistent with the pleadings unless modified at or before the trial, and in the instant case appellant made no request for a modification of the pre-trial conference order. We, therefore, conclude that the issues of ability to perform and tender, not being raised at the pre-trial conference, and not being listed in the pre-trial conference order as issues remaining in dispute, were no longer issues in the case. To hold otherwise would, in our opinion, not be in conformity with either the letter or the spirit of the Rules Relating to Pre-trial Conferences.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

167 Cal.App.2d 93

Phillip R. WARFIELD et al., Plaintiffs and Respondents,

v.

Jack C. RICHEY et al., Defendants and Appellants.

Jack C. RICHEY, Plaintiff and Appellant,

v.

Phillip R. WARFIELD et al., Defendants and Respondents.

Civ. 5790.

District Court of Appeal, Fourth District, California.

Jan. 12, 1959.

Tenants' suit, to rescind lease and recover damages, was consolidated for trial with landlord's action in unlawful detainer. The Superior Court of San Bernardino County, R. Bruce Findlay, J., rendered judgment adverse to the landlord, and the landlord appealed. The District Court of Appeal, Shepard, J., held that where tenants faithfully managed and cared for premises and faithfully paid rent until it became evident that landlord was not performing his obligations and that there was a serious question as to whether he ever would or even intended to so perform, tenants were entitled to hold up payment of rent for a reasonable time, to find out just what landlord would do about his unfulfilled promises.

Affirmed.

1. Appeal and Error ⇐931(1)

On appeal, reviewing court is required to resolve all conflicts in testimony in favor of judgment and to view evidence in light most favorable thereto.

2. Landlord and Tenant ⇐213(1)

Where tenants faithfully managed and cared for premises and faithfully paid rent until it became evident that landlord was not performing his obligations and that there was a serious question as to whether he ever would or even intended to so perform, tenants were entitled to hold up payment of rent for a reasonable time, to find out just what landlord would do about his unfulfilled promises.

3. Equity ⇐75

Equity is reluctant to impose rule of laches against party who in good faith tried to settle troubles of parties without resorting to court assistance.

4. Fraud ⇐35

Before an offended party in a fraud case may be effectively charged with waiver or estoppel there must have been full knowledge on part of offended party of all facts relating to fraud.

5. Election of Remedies ⇐9

Where there had been no decision on merits and defendant had been in no way prejudiced or harmed, plaintiffs, who had refiled a few days after their dismissal of

first action, would not be deemed to have made such election of remedies as would bar their recovery in subsequent action based on some of same allegations contained in prior action.

6. Fraud ⇐59(3)

In tenant's suit to rescind lease and recover damages, it was not error to use the "out-of-pocket" rule in calculating judgment.

Walley & Davis, Los Angeles, for appellant.

Taylor F. Peterson, San Bernardino, for respondents.

SHEPARD, Justice.

On November 21, 1955, plaintiffs Phillip R. Warfield and his wife Nancy Jeanette Warfield (hereinafter called plaintiffs) and Jack C. Richey (hereinafter called defendant) entered into a lease agreement whereby defendant leased to plaintiffs a hotel and motel at Needles, California, for a term of five years from December 1, 1955, at a rental of 25% of the gross income. The lease contained a deposit requirement of $5,000 as lease security and $3,000 in escrow to be spent in improvements (in the case of neither deposit does the lease say where the deposit shall be made nor does it prescribe conditions of control). Lessor agrees to give lessees access to lessor's books for the preceding year to verify income and operating expenses. Lessor further agrees to make repairs to the marquee and outside of the building, to keep the roof and other parts of the building in good repair, and to cause inspection and put into good operating condition the air conditioning and heating units.

On July 5, 1956, plaintiffs brought an action (85923) alleging violation by defendant of the agreement and on information and belief that the alleged statement by defendant that there had been $25,000 gross income during the year preceding date of lease was false, and asked for cancellation and damages. After filing an answer and some intermediate proceedings defendant, on September 12, 1956, filed notice of motion for permission to file an amended answer and cross-complaint, and on September 14th plaintiffs filed notice of motion for permission to file an amended complaint. On September 24th, the trial court denied permission to file the amended complaint on the ground that it attempted to state a new cause of action, and granted defendant's motion to file an amended answer and cross-complaint. On the same day, plaintiffs caused said action 85923 to be dismissed, and on October 2, 1958, filed this action (86834) alleging false representations as an inducement to the making of the lease, refusal to permit inspection of books, refusal to make agreed repairs, the expenditure of $1,600 on improvements, notice of rescission, offer by plaintiffs to restore everything of value received, with a prayer for cancellation of the lease, return of $5,000 deposit, return of $1,600 expended on improvements, and $5,000 for services rendered in operating the hotel and motel.

On August 16, 1956, the defendant filed an action (86409) in unlawful detainer against these plaintiffs, alleging breach by nonpayment of rent and asking restoration of premises, etc.

After issue joined in both actions, causes were consolidated for trial, tried, and the court found generally in favor of plaintiffs on the allegations of false representation and of promises made without intent to perform; that defendant failed and refused to give plaintiffs access to defendant's books for verification of income during the year preceding the agreement; that defendant failed to repair the marquee and other damaged portions on the outside of the hotel or its roof, and other parts of the hotel; that defendant failed to keep the property in good repair; that defendant failed to have the air conditioning and heating units put in good operating order; that the deposits of $5,000 and $3,000 required to be made by plaintiffs were made; that $1,600 was expended by plaintiffs on improvements; that notice of rescission was duly given; that the reasonable value of

the use and occupation of the premises during the period occupied by plaintiffs under the circumstances of the occupation was $3,884.56; that the equitable time proportionate refund value of the $1,600 expended by plaintiffs for improvements is $1,217.88; that the $5,000 deposit plus the refund of $1,217.88 totals $6,217.88, and decreed this to be owed from defendant to plaintiffs; that the amount owed from plaintiffs to defendant is the reasonable value of the use and occupation of the premises or $3,884.56, making a balance of $2,333.32 adjudged to be paid by defendant to plaintiffs; that the lease be cancelled and rescinded; and that defendant's action in unlawful detainer was unjustified.

[1] This court has reviewed the entire testimony and the exhibits presented in the cause. There is considerable conflict in the testimony, but on appeal this court is required to resolve all such conflicts in favor of the judgment and to view the evidence in the light most favorable thereto. Donato v. Lopopolo, 20 Cal.App.2d 409, 66 P.2d 1256; Jones v. Lewis, 35 Cal.App.2d 398, 95 P.2d 698; Gould v. Escondido Valley Poultry Ass'n, 56 Cal.App.2d 681, 682, 133 P.2d 448.

Viewing the evidence in this light, the record contains testimony of the bad condition of various and sundry parts of the buildings at the time the lease was entered into, which explains the reason for the special provision for repairs to be made by the lessor. There is also evidence of repeated requests from the lessee for performance in this respect for several months after the commencement of the lease down to March, 1956, and perhaps later into the warm months, and also there is evidence of defendant's failure to make such repairs and of his refusal to allow plaintiffs to inspect the books covering the year preceding the commencement of the lease for verification of income and expenses.

The evidence also shows that the $5,000-deposit for lease rental security was made with defendant, and that the $3,000-deposit for use in making improvements was made at a bank in Needles. This "improvement" deposit was apparently in the name of plaintiffs and segregated from other deposits. A review of the whole record indicates that said $3,000-deposit was used from time to time for the making of improvements; that defendant was consulted each time the improvements were made, was aware of the circumstances of the deposits, and made no objection whatever either to the method of deposit or to the course and manner of expenditure. In view of the fact that the lease makes no provision as to where the deposit shall be made and does not purport to set up any system of controls or manner of expenditure, it is apparent that the deposit and its expenditure was in accordance with defendant's understanding of the meaning of the contract and was in substantial compliance therewith.

[2] The evidence shows further that the plaintiffs faithfully managed and cared for the premises, and faithfully paid the rent until it became evident that defendant was not performing his obligations and that there was a serious question as to whether he ever would or even intended to so perform. Under such circumstances the plaintiffs were entitled to hold up the payments of rent for a reasonable time, to find out just what defendant would do about his unfulfilled promises.

> "But the defrauded vendee has another and alternative remedy. He may elect to rescind the contract for fraud, restore possession to the vendor, and recover the purchase money paid less the fair rental value for the use of the property during his occupancy. This right of rescission is available to a vendee in default." Kent v. Clark, 20 Cal.2d 779, 128 P.2d 868, 871, 142 A.L.R. 576; Graham v. Los Angeles First Nat. Trust & Savings Bank, 3 Cal.2d 37, 45(7), 43 P.2d 543.

[3] During the month following the making of the contract the plaintiffs hopefully made frequent requests for defendant to show his books and for the making

of repairs, etc. We think that they did not unduly delay their action. Equity is reluctant to impose the rule of laches against an offended party where the offended party is in good faith trying to settle the troubles of the parties without resorting to court assistance.

> "A delay in rescinding a contract on the ground of alleged false representations which is the result of indulgence shown to the party perpetrating the fraud is not available as a defense in an action for rescission." Graham v. Los Angeles First Nat. Trust & Savings Bank, 3 Cal.2d 37, 44(5), 43 P.2d 543, 547.

In Lobdell v. Miller, 114 Cal.App.2d 328, 339(10), 250 P.2d 357, 364, the court, quoting from Williams v. Marshall, 37 Cal.2d 445, 455, 235 P.2d 372, said:

> "'The courts have frequently declared that there is no artificial rule as to the lapse of time which will justify the application of the doctrine of laches. Each case must be determined upon the basis of its facts, and in the absence of a palpable abuse of discretion the trial court's finding upon the issue will not be disturbed upon appeal.'"

[4] It must be further noted that before an offended party in a fraud case may be effectively charged with waiver or estoppel, there must be full knowledge on the part of the offended party of all the facts relating to the fraud. It is apparent in the case at bar that the facts in their total effect were coming to the plaintiffs piecemeal, and the full disclosure of defendant's false representation respecting the prior year's income did not actually arrive until the trial of this cause.

> "It is the general rule, within which the case here obviously falls, that there can be no estoppel *in pais* where the party against whom the attempt is made to invoke such estoppel does not know the full truth of the facts to which his conduct, declarations, or representations constituting the basis of the alleged estoppel relate." Bisconer v. Billing, 71 Cal.App. 779, 783(1), 236 P. 329, 330; Chung v. Johnston, 128 Cal.App.2d 157, 163(3), 274 P.2d 922.

[5] The defendant claims that plaintiffs made an election of remedies and that they cannot now, by this action, proceed in rescission. Action 85923 was commenced July 5th, 1956, and was based on some of the same allegations of fraud and breach contained in the case at bar. It is entirely possible that plaintiffs were confused as to their remedy, the pleading was not satisfactory to the court nor to the plaintiffs, and after some legal maneuvering plaintiffs apparently believed they were forced to abandon that case and file over. They refiled just a few days after the dismissal. There was thus no decision on the merits, and we are unable to discern that defendant was in any way prejudiced or harmed thereby except, of course, that his case finally did get to the court on its real merits.

> "'When a case is dismissed without evidence having been offered, it is error to render judgment on the merits. There is nothing before the court on which to base any findings determinative of the issues. The absence of proof on either side could not involve a judicial determination of the merits of the controversy. Freedman v. Sirota, 109 App.Div. 874, 96 N.Y.S. 812. * * * 'If the record of a judgment of dismissal fails to show that the judgment was given upon a consideration of the merits of the controversy, it is not available as an estoppel.' * * * Under well-settled principles of the doctrine of estoppel, the disadvantages caused the other party by a change of remedy must be a real injury, such as would, in the contemplation of law, amount to an estoppel, and when it is of this character the doctrine of election of remedies will be applied by the courts. (Citing cases.)" Campanella v. Campanella, 204 Cal. 515, 520, 521, 269 P. 433, 435.

"The doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel, and it has been frequently held that a change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party." Commercial Centre Realty Co. v. Superior Court, 7 Cal.2d 121, 129(5), 59 P.2d 978, 982, 107 A.L.R. 714.

[6] The defendant complains of the method used in calculating judgment. It would appear that the trial court used the "out-of-pocket" rule as approved in many cases in California. Many states have used the "benefit-of-the-bargain" rule, and this latter rule was sometimes used in California, but since 1935 the "out-of-pocket" rule appears to have been followed with fair consistency. Bagdasarian v. Gragnon, 31 Cal.2d 744, 760, 192 P.2d 935; Bank of America Nat. Trust & Savings Ass'n v. Greenbach, 98 Cal.App.2d 220, 240, 219 P.2d 814.

"In the rescission action a plaintiff is entitled to recover the consideration he gave on restoration or offer of restoration of that which he received. He is also entitled to recover compensation for whatever consequential damages he may have suffered by reason of having entered into the contract. In the latter case, a plaintiff is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received together with additional damage arising from the particular transaction." Lobdell v. Miller, supra, 114 Cal.App. 2d at page 343(17) (18), 250 P.2d at page 367.

"As long as there is available a satisfactory method for obtaining a reasonably proximate estimation of the damages, the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." Noble v. Tweedy, 90 Cal.App.2d 738, 746, 203 P.2d 778, 782.

From an examination of the entire cause it appears that the court properly took into account all those factors that could benefit defendant in endeavoring to accomplish justice between the parties, stayed satisfactorily within the rules of equity, and that the judgment is fair and just.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

166 Cal.App.2d 638

PEOPLE of the State of California, Plaintiff and Respondent,

v.

James HOWARD, Defendant and Appellant.

Cr. 3495.

District Court of Appeal, First District, Division 1, California.

Dec. 31, 1958.

Rehearing Denied Jan. 30, 1959.

Hearing Denied Feb. 25, 1959.

Defendant was convicted in the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., for first-degree burglary, and he appealed. The District Court of Appeal, Peters, P. J., held that evidence that one of reasons police went to apartment where stolen goods were found and defendant was arrested was that woman occupying apartment with defendant had complained to them of defendant's felonious sexual conduct toward her was relevant, and that reference thereto in argument was proper.

Affirmed.

1. Criminal Law ⇐1081

Period fixed by rule requiring notice of appeal to be filed within 10 days of ren-

dition of judgment is jurisdictional, and appellate court has no power to relieve defendant from his default in event he files notice beyond period specified. West's Ann.Rules on Appeal, rule 31.

2. Criminal Law ⇐1081

Where defendant is in custody, so that he has no personal access to proper clerk's office, his notice of appeal will be deemed to have been constructively delivered within prescribed time if he places notice in hands of proper prison officials within such time that it can be mailed to clerk's office and reach that office before 10-day period has elapsed. West's Ann. Rules on Appeal, rule 31.

3. Criminal Law ⇐1081

There is no legal requirement that notice of appeal be typed. West's Ann.Rules on Appeal, rule 31.

4. Criminal Law ⇐1081

Affidavits, tending to show that after rendition of judgment, on October 18, defendant had been sent to reception center at Vacaville, that he had delivered a handwritten notice of appeal to proper prison officials on October 23 and had been told that notices of appeal had to be typed, that on October 25 his notice of appeal had been returned to him with statement that it could not be typed, and that handwritten notice which was ultimately mailed had been delivered to prison officials on October 27, justified finding that notice of appeal had been constructively delivered within prescribed time. West's Ann.Rules on Appeal, rule 31.

5. Prisons ⇐4

Prison rules and regulations cannot be used to impair an inmate's important and constitutional right to appeal.

6. Witnesses ⇐350

Even when defendant denies committing felony, he may be impeached by questions as well as by introduction of record of his conviction; but in asking questions prosecutor should not inquire into details and circumstances of offense or constantly reiterate questions concerning denied felony, though he may, if witness equivocates, properly ask such questions as may be reasonably necessary to develop fact of conviction. West's Ann.Code Civ.Proc. § 2051.

7. Criminal Law ⇐1030(1)

Unless error is so flagrant that prejudice necessarily resulted, objection is normally a prerequisite to urging error on appeal.

8. Criminal Law ⇐369(2)

Where conversation is inquired into, it is not error to elicit entire conversation even though such conversation incidentally reveals commission of another offense.

9. Criminal Law ⇐1137(5)

Where it was defendant's counsel who had first asked for conversation, defendant could not complain that full conversation had been brought out.

10. Criminal Law ⇐369(1, 2)

Evidence of commission of prior, independent, unrelated offenses, having no tendency to prove any material fact in prosecution's case, may not be admitted; but whenever case is such that proof of one crime tends to prove any fact material in trial of another, such proof is admissible, and fact that it may tend to prejudice defendant in minds of jurors is no ground for its exclusion.

11. Criminal Law ⇐369(2)

Evidence to explain arrest of defendant and circumstances surrounding it is admissible, even if other crimes are thereby disclosed.

12. Criminal Law ⇐369(2), 720(8)

In burglary prosecution, evidence that one of reasons police went to apartment where stolen goods were found and defendant was arrested was that woman occupying apartment with defendant had complained to them of defendant's felonious sexual conduct toward her was relevant, and reference thereto in argument was proper.

13. Criminal Law ⇐1036(1), 1037(1)

That defense counsel had made no objections to evidence of another offense or to argument with regard thereto was not conclusive, but was worth noting, on issue of whether prejudicial error had resulted.

14. Criminal Law ⇐394.4(1)

Evidence secured in an illegal search is not admissible.

15. Searches and Seizures ⇐7(27)

If defendant or someone with apparent authority consents to entry, and entry is made in good faith, it is not unlawful.

16. Searches and Seizures ⇐7(27)

Anyone in joint occupancy of house has authority to permit an entry without a warrant.

17. Arrest ⇐63(4)
Searches and Seizures ⇐7(27)

Where woman who had been living in apartment with defendant for several months told officers that defendant had committed a felonious act upon her and that he had some stolen property at apartment and asked their protection while she removed her belongings, and it was she who admitted officers to apartment, their entry was lawful, and search which they made after observing some of stolen property in plain sight was legal; and discovery of stolen property, together with information received from woman that defendant had committed felony and corroboration of part of her story from bruises on her body, justified arrest of defendant without a warrant.

Nathan S. Smith, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged and convicted of two first-degree burglaries. From the judgment entered on this verdict he appeals.

[1] The attorney general contends that this court lacks jurisdiction to consider the appeal because, so it is urged, the appeal was filed beyond the 10-day period permitted by Rule 31 of the Rules on Appeal. That rule requires that, in criminal cases, the notice of appeal must be filed within 10 days of the rendition of judgment. The period fixed by this rule is jurisdictional, and the appellate court has no power to relieve the defendant from his default in the event he files the notice beyond the period specified. People v. Lewis, 219 Cal. 410, 27 P.2d 73; People v. Riser, 47 Cal.2d 594, 305 P.2d 18; People v. Cato, 136 Cal. App.2d 503, 289 P.2d 119.

In the instant case, judgment was rendered October 18, 1957. The notice of appeal is dated October 27, 1957, but was not filed in the proper county clerk's office until October 29, 1957. Thus, on its face, the notice of appeal was filed one day too late.

[2] Although the appellate court is without power to relieve a defendant from his default in filing the notice beyond the 10-day period, it is now well settled that where a defendant is in custody, so that he has no personal access to the proper clerk's office, his notice of appeal will be deemed to have been constructively delivered within the prescribed time if he places the notice in the hands of the proper prison officials within such time that it can be mailed to the clerk's office and reach that office before the 10-day period has elapsed. People v. Slobodion, 30 Cal.2d 362, 181 P. 2d 868.

In an attempt to bring himself within this rule the defendant has filed affidavits with this court in which it is averred that, after the rendition of judgment on October 18, 1957, he was sent to the Reception Center at Vacaville, where he was received on October 21, 1957; that on October 23, 1957, he delivered a handwritten notice of appeal to the proper prison officials and was told that notices of appeal had to be

typed before being placed in the mail;[1] that on October 25, 1957, this notice of appeal was returned to him with the statement that it could not be typed; that on October 27, 1957, he delivered another handwritten notice of appeal to the proper inmate clerk.

The Superintendent of Vacaville avers that the prison records show that defendant delivered his notice of appeal to the proper prison officials "on or before Monday, October 28, 1957," and that it was mailed on the 28th to the proper clerk's office;[2] that the records of the prison do not show the precise date on which the notice was delivered to the prison officials, but that he has been informed by defendant that it was on the 27th, a Sunday; that under procedures then in effect at Vacaville such notices were normally processed and mailed the same day they were received by the prison officials if delivered on any week day; that because the facility operates with a reduced staff on Saturdays and Sundays, such notices were not processed on such days and, if received after 4:30 p. m. on Fridays, were not mailed until the next Monday. It is also averred that in October, 1957, the Reception Guidance Center was just being moved to Vacaville so that "procedures were not very well established."

[3, 4] It is our opinion that defendant has brought himself within the spirit of the rule of the Slobodion case. Under the most limited interpretation of the affidavits, it is apparent that the notice of appeal was properly delivered by defendant on October 27th. Had it been mailed that day it would have reached the county clerk's office in San Francisco on October 28th. Had this been done, the notice of appeal would have been filed in time. According to Howard's affidavit, which is not contradicted, he properly delivered a handwritten notice on October 23rd, was told that it had to be typed, and on the 25th was told that it could not be typed. There is, of course, no legal requirement that notices of appeal must be typed, and, in fact, the notice of appeal that was ultimately mailed was in handwriting. Had the notice of appeal been mailed on the 23rd or 24th, it would, obviously, have reached the clerk's office in San Francisco well before the 28th.

[5] A prison must, of course, have rules and regulations governing the conduct of inmates. But such rules and regulations cannot be used to impair an inmate's important and constitutional right to appeal. In People v. Tenney, 162 Cal. App.2d 458, 328 P.2d 254, 255 (petition for hearing denied) it was stated: "It is now well settled that, if the defendant is in custody, and makes a good faith effort to file the required notice within the statutory period, but is prevented from doing so by the acts of the prison authorities, the appeal will be considered as having been filed in time. The theory is that, if the notice of appeal is delivered to the prison officials within the statutory period with a request to mail it, such delivery is a constructive delivery to the appropriate county clerk, and the subsequent failure of the prison officials to prepare and mail the notice within time cannot adversely affect the rights of defendant." That case held that if the notice of appeal was delivered to the prison officials on the 9th day after rendition of judgment, mailing time between Vacaville and San Francisco being one day, it was filed in time. This principle was reaffirmed in People v. Griffin, 162 Cal.App.2d 712, 328 P.2d 502 (petition for hearing denied).

The attorney general argues that these cases should be overruled. Attention is

1. The Associate Superintendent of the Reception Center avers that the rules of the institution then in effect required that notices of appeal be typed before being mailed, and that typing work for the inmates was normally done at the typing pool staffed by inmate clerks.

2. The notice of appeal, received in the clerk's office on October 29th, was in handwriting, and had been mailed on the 28th, which was a Monday.

called to the fact that, according to the affidavits of the prison officials, the notice was delivered to them on October 27th, and, although if then mailed it would have been received in time on the 28th, the 27th was a Sunday, and, under prison procedures, no mail is processed if received after 4:30 p. m. on Friday, until the following Monday. Thus, so it is urged, the defendant was negligent in not delivering his notice before 4:30 p. m. on Friday, October 25th, and the delay was chargeable to him and not to the prison officials. Aside from the fact that defendant avers that he first delivered the notice for mailing on October 23rd, and assuming that it was not delivered for mailing until Sunday the 27th, the argument of respondent misinterprets the basic theory of the Slobodion case, and of those cases following it. Those cases recognize that a person in custody is hampered in protecting his legal and constitutional rights. As long as he acts promptly and the delay in mailing is not his fault, the notice will be deemed to have been constructively delivered. The rule is not predicated upon a showing that the prison officials were fraudulent or negligent in not mailing the notice sooner. As long as the defendant has not caused the delay and has acted within time, the notice will be deemed to have been constructively delivered whatever was the cause of the delay. However reasonable it may be to adopt a rule that notices of appeal must be typed, or a rule that no mail will be processed from Friday after 4:30 p. m. until Monday, such rules cannot be used to cut down the defendant's very limited time in which to appeal. As long as he acts promptly and in time, the prison rules cannot be used to deprive the defendant of his constitutional right of appeal. Thus, the rule of the Tenney and Griffin cases is sound and is reaffirmed. Under that rule the notice of appeal here involved was filed in time.

We turn to a consideration of the appeal on its merits. On the evening of July 12, 1957, the home of the Wolfsohns on Florence Street in San Francisco was burglarized. Among the property taken, most of which was subsequently found in the possession of defendant and identified by the Wolfsohns or others, were certain cultured pearls, a matching cigarette case and compact, gold earrings, a suit of clothes and a dress.

On the evening of July 19, 1957, or the early morning hours of July 20th, the apartment of the Bernsteins on Montgomery Street in San Francisco was burglarized. Among the property taken, all of which was subsequently found in the possession of defendant and identified by the Bernsteins, was a grey cabinet containing a strong box filled with papers, and a woman's raincoat. The Bernsteins also identified a tan corduroy jacket found by them in their apartment after the burglary and which did not belong to them.

There were no eyewitnesses to the above crimes. No one saw defendant make the unlawful entries, nor did anyone see him near or about the burglarized premises on the nights in question. The evidence first connecting defendant with these crimes came from one Marlene, a 21 year old married woman, who had been living with defendant as his mistress for some time prior to the burglaries. She testified that on the evening of July 12, 1957, defendant, accompanied by a man named Paul, came to the apartment she occupied with defendant sometime between 10 and 11 p. m.; that they were then carrying certain items of property which they proceeded to divide; that among the property were the matching compact and cigarette case, the pearls, the gold earrings and the dress, all later identified by the Wolfsohns. Marlene also stated that defendant had the suit stolen from the Wolfsohns and identified by them which, defendant took to a tailor for alterations and from whom it was later recovered.

Marlene also testified that around 5 a. m. of July 20, 1957, defendant returned to their apartment carrying a grey cabinet wrapped in a woman's raincoat. These items were later identified by the Bernsteins as articles stolen from their apartment. Marlene also testified that defendant then told her he had

stolen the property "up on Telegraph Hill" from a house where he had seen a boy sleeping with the covers over his face and where the occupants must have had a party because the place was messed up. Mrs. Bernstein testified that her son frequently slept with the covers over his head, and that on July 19, 1957, there had been a wedding and reception at their home.

Marlene also testified that defendant searched the grey cabinet, and, finding that the strong box it contained had nothing of value in it, grew angry and stated that he was going to return to the apartment where he had gotten it in order to pick up a purse he had seen there; that he then left and later returned without his coat, telling Marlene that his coat caught in a door and that he had left it there. Marlene identified the tan corduroy coat found by the Bernsteins as the coat defendant was wearing that night. The coat was also identified as belonging to defendant by several independent witnesses.

Marlene also testified that about two weeks after defendant was arrested he telephoned to her. Marlene was then staying at the home of her father. Her father listened in on the conversation. Marlene testified that the conversation was as follows: "He said, 'Why do you want to do this to me?' * * * He said—He says, 'Don't you know I can get five to life for this?' And I said, 'Well, you did it.' And he said: 'Sure, I did it.' And he said, 'Did you go before the Grand Jury last night?' I said, 'I did.' And he said, 'Well, don't you know I am out on bail and,' he said, 'I'm going to kill you.'"

The father of Marlene, who had answered the telephone and then listened in on the same phone while defendant was talking, testified that he heard the conversation and that he had taken notes of it. Using the notes to refresh his recollection, he recounted the conversation as follows: "Well, this is what he said. He said, 'Why do you want to do this to me? Don't you know I can get five to life?' 'Well, you know,'—this is what she said—'Well, you know you did it.' He said, 'Sure, I did,' and, he said, 'Don't you know I'm out on bail and you better not come out of the house, because I'm going to kill you.'"

A police officer at the City Hall testified that at the time in question he had permitted defendant to make a telephone call and saw him do it, but did not hear the conversation. Defendant, on cross-examination, admitted telephoning to Marlene on the day in question, admitted some of the conversation as testified to by Marlene and her father, but denied admitting that he had committed the crimes, and denied making the threat to kill Marlene.

The police found defendant in possession of the stolen property and arrested him as the result of Marlene coming to them and complaining about how defendant had treated her. She testified that she had lived with defendant since May of 1957; that she grew to dislike the relationship because she did not like the idea of defendant having committed the crimes here involved, and because defendant refused to "let her go" and "kept beating her." Defendant, also, she said, had committed sodomy upon her. Defendant kept insisting that she become a prostitute. At first she refused, but finally consented on condition he let her go out alone for a few hours. Defendant agreed. Marlene then voluntarily came to the police department and reported some of the facts to Officer Marionetti. On cross-examination of this officer by the defense, the following occurred, the first question being by defense counsel:

"Q. Am I—And as I understand it, you handled the complaint of Mrs. Garcia. Well, isn't it true that the only thing she told you at the Central Station was that she had been living with Howard; that they had a quarrel; that he wouldn't let her into the—let her in to get her things and she merely wanted some officer to go with her and get her own things and move them out of the place? A. Oh, no, she told me a lot more than that.

"Q. Well, what did she tell you? A. Well, she told me that the man had forced his attentions on her that particular night.

"Miss Schnacke [the Prosecuting Attorney]: Would you describe—You used a rather delicate phrase, officer. Relate what she told you the Defendant had done to her.

"The Witness: Well, she told me the Defendant had committed an immoral act, sodomy was one, and when we arrived at the scene there was blood on the mattress and everything. And she stated the man had struck her and blacked her—hit her about the face.

"Mr. McNamara: Q. Now, these things were mentioned at the Central Police Station, Officer? A. Yes, they were.

"Q. Well, did she tell you she had been living with the man for several weeks? A. Yes, she told me longer than that. She stated—

"Q. Well, you went there, then, I take it, to give her some protection and to allow her to get her personal things, is that right? A. No, not necessarily. She also revealed the man had committed burglaries. She didn't know where. She didn't give the exact places, but she stated it was in the Telegraph Hill area and Nob Hill area. Received stolen property—He had stolen property, rather, on the premises."

On redirect, this officer testified that, from his observation, Marlene appeared to have been beaten.

After the officer had been told that defendant had beaten Marlene, had tried to force her into prostitution, had committed sodomy on her person, had committed robberies and that some of the stolen property was in their apartment, and after Marlene had asked for protection while she removed her possessions from the apartment, Officer Marionetti and another officer accompanied her to the apartment she occupied with defendant. Upon arrival Marlene attempted to open the door with her key, but the door was apparently bolted on the inside. Marlene then found an open window through which she climbed. She then let the officers in the front door, which she opened. Officer Marionetti observed, in the front part of the apartment, the grey cabinet stolen from the Bernsteins. The officers then searched the apartment and found other stolen property and also found the defendant who was hiding in one of the rear rooms. Defendant told the officers a story about just having disposed of some narcotics. After questioning the defendant, and after finding some of the property stolen from the two homes here involved, defendant was arrested and booked on suspicion of burglary.

Defendant, at the trial, denied any connection with either of the crimes. He admitted that he had been living with Marlene, and testified that on July 12, 1957, he and Marlene were out together until after midnight, but he could not remember where. He denied seeing a man by the name of "Paul" that night, and denied knowing such a person. He testified that some of the stolen property belonged to Marlene and that some of the rest of it he had either purchased from a man named "Les," or "Les" had left it in the apartment. He denied that he had ever possessed the tan corduroy coat found at the Bernsteins. He denied most of the telephone conversation testified to by Marlene and her father. On cross-examination he admitted having committed the unnatural sex acts of which Marlene complained, testifying that she had consented thereto.

No attack is made on the sufficiency of the evidence. The appellant first complains that the prosecutor committed prejudicial error in questioning him about a prior felony conviction. The examination on this point was as follows: "Q. Incidentally, you have been previously convicted of a felony, haven't you, Mr. Howard? A. Have I?

"Q. Haven't you? I am asking you. A. No.

"Q. No? Weren't you, in 1953, convicted of forging a government check? A. That was no felony. I was a minor during that time.

"Q. In 1953? You were born in 1934, weren't you? A. Correct.

"Q. And 1953, you would have been 19? A. No, I had just—

"Q. Or, 18, going on 19— A. During that time, when that check was cashed—

"The Court: Wait a minute, wait a minute. Wait until the question is finished.

"Miss Schnacke: Q. You were 18, going on 19, weren't you, in June of '53? A. Correct.

"Q. And you went to a Federal prison at El Reno, Oklahoma, is that correct? A. Correct.

"Q. For the crime? A. Correct.

"Q. And you did 18 months there? A. But, not for forgery.

"Q. Well, it was a felony conviction, wasn't it? A. Well, time when the check was cashed, I was 17 years old.

"Q. At that time, you were convicted and you were 18 and you did go to a Federal prison and do 18 months, which I think even Mr. McNamara will stipulate was a felony. Isn't that right? A. To my knowledge, I don't know it was a felony."

[6] No objection was made at the trial to these questions, but it now is contended that once the defendant denied committing a felony the only way he could be impeached was by the introduction of the record of his conviction. The point is without merit. Under section 2051 of the Code of Civil Procedure the defendant may be impeached by showing that he has been convicted of a felony by "examination of the witness, or the record of the judgment." Thus the section recognizes that the defendant may be impeached by questions as well as by introduction of the record. In asking the questions the prosecutor should not inquire into the details and circumstances of the offense (People v. Chin Hane, 108 Cal. 597, 41 P. 697; People v. Darcy, 101 Cal. App.2d 665, 226 P.2d 53) nor should he constantly reiterate questions concerning the denied felony, but if the witness equivocates, the prosecutor may properly ask such questions as may be reasonably necessary to develop the fact of the conviction. People v. Chenault, 74 Cal.App.2d 487, 169 P.2d 29.

The cross-examination here involved was well within permitted limits. The witness equivocated and bickered about his age. The further questions were necessary in order to show that the offense was "punishable * * * for a term exceeding one year" and so was a felony under federal law. 18 U.S.C.A. § 1.

[7] It should also be noted that the defense did not interpose an objection to the questions. Such an objection is normally required before the error can be raised on appeal (see cases collected 3 Cal.Jur.2d 634, § 156) unless it is so flagrant that prejudice necessarily resulted. People v. Wynn, 44 Cal.App.2d 723, 112 P.2d 979. Certainly, no such error appears here.

The next contention of defendant is that several references by the prosecuting attorney to defendant having committed unnatural sexual acts with Marlene constituted prejudicial error.

As already pointed out, in cross-examining Officer Marionetti defense counsel pressed the witness for details of the conversation he had with Marlene when she first came to the police station. The officer replied that Marlene, among other things, told him that defendant had "forced his attentions on her." The prosecutor interrupted the examination and asked the witness to relate the facts as to what Marlene had stated defendant had done. Marionetti replied: "Well, she told me the Defendant had committed an immoral act, sodomy was one."

During the cross-examination of defendant, the prosecutor asked defendant if he had heard the officer testify of Marlene's complaints. The defendant stated that he had heard the testimony, whereupon the prosecutor asked: "Did you commit those acts?" to which defendant replied: "Yes, I did and if I am guilty of it, she is as guilty as I am."

Then in his opening argument to the jury the prosecutor made the following statement:

"He admitted committing improper sexual acts upon her. He seems to think it is all right, because his testimony was that that was all right with her. Maybe Mr. Howard doesn't know it, but he admitted the commission of a serious felony on the witness stand and he admits having done that, because the law provides it doesn't make any difference whether the person is a willing victim or not. You do not commit acts such as Mr. Howard was talking about and he knew what he was talking about, the act of sodomy she told the police officer about, either willing or unwilling victim.

"Mrs. Garcia told you that—The officer told you, rather, that Mrs. Garcia said she was an unwilling victim and that was her original complaint when she came down to complain to him about that. She told him about the stolen property. She told him about how he had been beating her up and he wouldn't let her out of the premises."

[8, 9] So far as the examination of Officer Marionetti is concerned there was certainly no error. It is settled law that where a conversation is inquired into it is not error to elicit the entire conversation even though, in this fashion, such conversation incidentally reveals the commission of another offense. 18 Cal.Jur.2d 585, § 137; People v. Masters, 133 Cal.App. 167, 23 P. 2d 774. It was the defendant's counsel who first asked for this conversation and he, therefore, cannot complain that the full conversation was brought out.

[10] As to the cross-examination of defendant, and the argument to the jury, a different problem is presented. It is clearly the law that evidence of the commission of prior, independent, unrelated offenses, having no tendency to prove any material fact in the prosecution's case, may not be admitted. See cases collected 18 Cal.Jur. 2d 583, § 136; People v. Albertson, 23 Cal. 2d 550, 145 P.2d 7; People v. Channell, 136 Cal.App.2d 99, 288 P.2d 326; People v. Baylor, 47 Cal.App.2d 34, 117 P.2d 425. However, the converse of the rule is also true, that is, "whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion." People v. Lyon, 135 Cal.App. 2d 558, 578, 288 P.2d 57, 70.

[11, 12] The evidence here involved falls within the exception. During the trial many articles of property were introduced into evidence. The prosecution contended that such articles had been stolen, and that they had been found in defendant's possession. The manner in which that property came into possession of the police was before the jury. The jury had been properly told that Marlene had complained to the police about defendant's conduct toward her, had told them of the alleged thefts, and had led the officers to the apartment she occupied with defendant, and admitted them. The officers found the property and arrested defendant. They had neither a search nor an arrest warrant. One of the reasons the police went to the apartment with Marlene was because she had complained of defendant's felonious sexual conduct toward her. Thus, this fact was relevant to explain the entry on the premises and defendant's subsequent arrest without warrants. Evidence to explain the arrest of the defendant and the circumstances surrounding it, even if other prior crimes are disclosed, is admissible. People v. Brite, 9 Cal.2d 666, 72 P.2d 122; People v. Craig, 152 Cal. 42, 91 P. 997. Since the validity of the arrest and entry were relevant, the defendant's prior misconduct was also relevant. If relevant, the reference to it in the argument was also proper.

[13] It should also be noted that defense counsel made no objections to any of this evidence, or to the argument. While this fact is not conclusive (People v. Newson, 37 Cal.2d 34, 230 P.2d 618; People v. Dabb, 32 Cal.2d 491, 197 P.2d 1; People v. Hampton, 47 Cal.2d 239, 302 P.2d 300) it is worth noting on the issue of whether prejudicial error resulted.

[14–17] The last major contention of defendant is that the items of property

found in the apartment were not admissible in evidence because they were secured as a result of an illegal search and seizure, it being urged that Marlene had no legal right to admit the officers to the apartment.

It is of course, the law that evidence secured in an illegal search is not admissible. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513. However, it is also the law that if the defendant or someone with apparent authority, consents to the entry, and the entry is made in good faith, it is not unlawful. Thus, defendant's mother can give consent to the entry (People v. Michael, 45 Cal.2d 751, 290 P.2d 852); as can the owner of a house in which defendant rents a room (People v. Gorg, 45 Cal.2d 776, 291 P.2d 469; People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513); or the wife of defendant (People v. Dominguez, 144 Cal.App.2d 63, 300 P.2d 194). In People v. Silva, 140 Cal.App.2d 791, 295 P.2d 942, it was held that the brother of defendant's mistress, who lived at the house, could grant consent to an entry. Under these cases, anyone in joint occupancy of the house has authority to permit an entry without a warrant. In the present case, Marlene had told the officers that she was living at the premises with defendant and had been so living for several months. This is admitted by defendant. Marlene told the officers that defendant had beaten her, proposed that she enter a life of prostitution, committed a felonious act upon her, and had stolen property at the apartment. She asked protection while she removed her belongings. She led the officers to the apartment, and, after finding the front door bolted, climbed through the window and admitted the officers. There was no evidence that any duress was practiced upon her—in fact, it was at her insistence that the officers were there. Under such circumstances the entry was lawful. Once in the apartment some of the stolen property was in plain sight. This aroused the reasonable suspicions of the officers, a further search was made, and other property and the defendant were found. Thus, the search was legal. People v. Roberts, 47 Cal.2d 374, 303 P.2d 721. The information from Marlene that defendant had committed a felony, the corroboration of part of her story from the bruises on her body, and the discovery of the stolen property in defendant's apartment justified the arrest without a warrant. People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ.

167 Cal.App.2d 270

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Willie JACKSON, Danny Hool and Robert Horton, Defendants, Robert Horton, Appellant.

Cr. 6347.

District Court of Appeal, Second District, Division 2, California.

Jan. 21, 1959.

Prosecution for burglary. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment of conviction and denied defendant's motion for new trial. Defendant appealed and filed motion for mandate of dismissal. The District Court of Appeal, Ashburn, J., held that record established that defendant's waiver of jury trial was clear and unambiguous, that there was no indication that there was any lack of understanding on defendant's part in reference to such waiver, and that evidence sustained conviction.

Motion dismissed. Judgment and order denying new trial affirmed.

1. Criminal Law ⇐260(11)

Upon appeal from a criminal conviction, all evidence and all inferences tending to support finding of guilt are to be accepted as true and sufficiency of evidence tested upon that assumption; the question of reasonable doubt is for trial court, not appellate tribunal.

2. Burglary ⇐41(1)

Evidence sustained conviction for burglary. West's Ann.Pen.Code, § 459.

3. Jury ⇐29(6)

In prosecution for burglary, record established that defendant's waiver of jury trial was clear and unambiguous and that there was no indication of any lack of understanding on defendant's part. West's Ann.Const. art. 1, § 7.

4. Criminal Law ⇐792(3)

In prosecution for burglary, trial judge's expression of law as to aiders and abetters was proper. West's Ann.Pen.Code § 459.

Ernest L. Graves, Wilmington, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

ASHBURN, Justice.

Appellant Horton, who was represented by counsel throughout the trial and motion for new trial, appeared originally in propria persona upon this appeal, presenting a brief which is built upon the assumption that he is entitled to a re-weighing of the evidence by this court and that it should recognize as pertinent asserted facts which find no reflection in the transcript; a further assumption is that appellant's own evidence and inferences favorable to innocence should be accepted in preference to the proof showing guilt. In this appellant is fundamentally mistaken.

[1, 2] Upon appeal all evidence and all inferences tending to support the finding of guilt are to be accepted as true and the sufficiency of the evidence tested upon that assumption; the question of reasonable doubt is for the trial court, not the appellate tribunal. People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778; People v. Poindexter, 51 Cal.2d 142, 330 P.2d 763. Thus viewed the evidence leaves no doubt about the necessity of affirmance.

The charge upon which appellant was convicted was burglary (Pen.Code, § 459) committed by him, Danny Hool and Willie Jackson, through entry into the residence of Andrew Coleman with intent to commit theft. Convicted of burglary in the first degree the crime was reduced to second degree upon request of the prosecutor. Appellant Horton was also charged with prior felonies, namely, burglary in Texas in 1939 and robbery in California in 1946; the court made no finding thereon. Defendant was sentenced for the term prescribed by law.

On the morning of December 12, 1957, the front doorbell of the residence of Andrew Coleman, at 200 West 54th Street, in the City of Los Angeles, rang three times. Mr. Coleman, 86 years of age, was alone in the house and not fully dressed. He went to the door, looked through the venetian blinds and saw no one. Turning to go back to the bedroom he was confronted by defendant Hool who waved a gun (or what appeared to be one) at him and said, "Give up." "Don't say a G—— d—— word." Coleman said, "Who is you? Why you come in?" and drew his cane back. Hool then turned toward the kitchen. Coleman started for the front door to give an alarm. Before he could do so Hool returned with Horton. They tripped Coleman, had him down on his back, one held his feet and the other beat him with his fists in the mouth and elsewhere on the face, knocking out two teeth; they also tried to choke him. While one of them sat on him and held him down the other said, "You hold him down, I'm going to see what I can pick up." Soon this defendant returned, saying he had picked up what he could get and called the other one off. Coleman saw them no more. While these things were going on Coleman called his next door neighbor and she heard his voice, "Mrs. Jones, Mrs. Jones." She was already on

the alert, for her dog was barking and she was looking out the window. When Mrs. Jones heard Coleman's voice it looked to her like he was being beaten but she could not see clearly. However, there was such "a fuss" she could not stand it and started to get help from another neighbor. Seeing two men across the street in an automobile and another getting into it, she told them someone had beaten the old man and asked them to come over and see what they were doing to him. As the three men (Echols, Hicks and Graves) approached, they saw two men, Horton and Hool, come from the rear of Coleman's house. Graves yelled, "You live back there?" One of them said "Yes" and both kept going. Echols and Hicks started after them and they began to run; one of them went "through some houses" but Horton ran until he reached a Mercury automobile (later identified as that of Jackson), put something into it and took something out, and then continued to run up Broadway. Echols and Hicks caught him and one of them held him until the other brought the police. Meantime, Graves, inside the Coleman home, was keeping the police informed. There he saw Mr. Coleman who was bleeding from the mouth and had blood all over the chest and stomach of his underwear. As Coleman expressed it, "The law taken me to the doctor" and the hospital. Before his arrest Graves asked Horton where he was going and he said "I'm going to get a job." Also, "You know me"; but he was a stranger to Graves. Coleman, Mrs Jones, Echols, Hicks and Graves positively identified appellant Horton as a participant in the incidents above related.

Mrs. Mary Edwards, the daughter of Coleman, lived with him but was absent on the morning of the 12th of December. Upon her return she saw her injured father and made an examination to see if her money, some $54 to $60, was gone. She kept it in a canvas bag in a locked trunk in her room at the back of the house. The money was there two or three days before the 12th. On this occasion she found the lock broken and twisted, torn off and hanging on the trunk which was open. The bag was there but the money was gone.

Horton's story as given to the police officers and repeated on the witness stand was that he was with one Appleberry at a certain coffee shop when Hool and Jackson drove up and asked him to go with them to help unstop a sink, which they had been trying to do all morning without success. He agreed to do so. They drove in Jackson's Mercury to 54th Street between Main and Broadway, parked and walked between houses to the rear of the Coleman home. A dog was barking. Hool and Jackson entered the enclosed porch of the Coleman home, told Horton to wait outside which he did. Soon he heard "Oh! Oh!"; Hool ran out the back door, grabbed him, said "Let's get out of here." Appellant ran for the Mercury automobile but it was gone. He was stopped by two men who took him into custody. He says that he at no time entered the Coleman house or porch. In effect he said he had no intent to commit theft there and did not know that Hool and Jackson had that in mind. Appellant's brief assumes that the court can and should accept his testimony in preference to that of the prosecution witnesses. The trial judge rejected most of it and that fact ends the inquiry into credibility of witnesses. Moreover, appellant's testimony was impeached by his admission that he had been convicted of burglary in 1939 and robbery in 1946. There is no merit whatever in appellant's claim that the evidence should be resolved in his favor in this court.

[3] Appellant's other point on appeal is that he did not waive a jury in the manner required by § 7 of Article I of the Constitution, i. e., "by the consent of both parties, expressed in open court by the defendant and his counsel, * * *." The transcript shows the contrary. Appellant, Hool and Jackson were tried jointly. At the beginning of the trial respective counsel made motions for trial without a jury: "Mr. Martin: May the Court please, on behalf of the defendant Danny Hool, we wish to waive our right to a trial by jury

and try the matter before the Court. Mr. Wilson: The same motion will be presented on behalf of the defendant Jackson and the defendant Horton." Jackson then formally waived a jury in person and through counsel. Hool did the same thing. Appellant was present throughout. Then the following occurred:

"Mr. Finnerty: Robert Horton is your true name?

"Defendant Horton: It is.

"Mr. Finnerty: On Count II, the burglary count, you are entitled to a jury trial. Your attorney, Mr. Wilson, has said you want to waive your right to a trial by jury and be tried by the Judge without a jury. Is that what you want?

"Defendant Horton: That is.

"Mr. Finnerty: Mr. Wilson, do you join?

"Mr. Wilson: I join.

"Mr. Finnerty: The People join.

"The Court: The Court accepts the waiver."

The clerk's transcript also shows that "the defendant(s) personally and all counsel waive jury trial." The waiver at bar was clear and unambiguous, made by both defendant and attorney, and there is no indication that there was any lack of understanding on appellant's part. The law requires no more than this. People v. Bastio, 55 Cal.App.2d 615, 618, 131 P.2d 614; People v. Beckworth, 151 Cal.App.2d 842, 843, 312 P.2d 270; People v. Huerta, 148 Cal. App.2d 272, 274, 306 P.2d 505.

This claim of non-waiver of a jury is incorporated in a document entitled "Motion for Mandate of Dismissal" which was served with appellant's opening brief and is physically attached thereto. It concludes with the following: "The defendant moves that the Honorable Court vacate and set aside the verdict and sentence against this defendant on the above grounds." Manifestly, the motion does not lie.

[4] Through counsel recently appointed by the court appellant has filed a supplemental brief urging error in denial of his motion for new trial. Though it is said that the trial judge at that point discounted the testimony of the victim, who had positively identified appellant as one of those who assaulted him in his house, and mistakenly concluded that he could not grant a new trial, we do not find this to be a correct interpretation of the record. This is also true of the claim that the judge expressed and followed a mistaken view of the law as to aiders and abettors. There was no error in the denial of a new trial.

Motion dismissed. Judgment and order denying new trial affirmed.

FOX, P. J., and HERNDON, J., concur.

167 Cal.App.2d 3

Lillian PIERCE, Plaintiff and Respondent,

v.

J. C. PENNEY COMPANY, a corporation, Defendant and Appellant.

Civ. 23171.

District Court of Appeal, Second District, Division 2, California.

Jan. 8, 1959.

Rehearing Denied Feb. 2, 1959.

Hearing Denied March 4, 1959.

Action for personal injuries sustained in fall on stairs in defendant's store. From a judgment of the Superior Court of Los Angeles County, Lloyd S. Nix, J., defendant appealed. The District Court of Appeal, Herndon, J., held that even though defendant's store manager had theretofore denied that he had directed, after accident giving rise to action, that abrasive stripping be applied to steps on which plaintiff had slipped, and even though section manager of store had testified that steps had not been slippery, it had been error to overrule objection to questioning section manager as to whether abrasive strips had been added to steps shortly after accident; and held that in view of fact that trial judge had theretofore been fully apprised of

respective contentions of parties with respect to admissibility of evidence in question, objection that evidence sought to be adduced by question would be "immaterial" had been sufficient to preserve for review ruling on objection to question.

Reversed.

1. Negligence ⇐131
Witnesses ⇐331½

As a general rule, evidence of repairs or alterations or precautions taken after an accident is not admissible, but in appropriate circumstances evidence of subsequent precautions or repairs may properly be admitted if it tends to impeach testimony of witness. West's Ann.Code Civ.Proc. §§ 1847, 2051, 2052.

2. Witnesses ⇐331½

Impeachment by evidence of precautions taken after an accident may be proper where witness himself authorized, recommended, approved, directed, or supervised the making, or himself made, subsequent repairs, alterations or changes of procedure; but fact that after accident some unidentified person other than the witness directed or authorized alterations affords no basis for utilization of that method of impeaching witness who testified that condition existing before change was safe or free from defect. West's Ann.Code Civ. Proc. §§ 1847, 2051, 2052.

3. Witnesses ⇐406

Impeachment by contradiction may be accomplished either by eliciting a contradictory fact on cross-examination or by calling other witnesses in rebuttal; and contradictory evidence may be either direct or circumstantial but it must be competent evidence.

4. Appeal and Error ⇐231(5)
Negligence ⇐131

Even though defendant's store manager had theretofore denied that he had directed, after accident giving rise to action, that abrasive stripping be applied to steps on which plaintiff had slipped, and even though section manager of store had testified that steps had not been slippery, it was error to overrule objection to questioning of section manager as to whether abrasive strips had been added to steps shortly after accident; and in view of fact that trial judge had theretofore been fully apprised of respective contentions of parties with respect to admissibility of evidence in question, objection that evidence sought to be adduced by question would be "immaterial" was sufficient to preserve for review ruling on objection to question. West's Ann.Code Civ.Proc. § 2055.

Schell, Delamer & Loring, Los Angeles, and Patrick M. Hyde, for appellant.

Fleming & Anderson and Clifford R. Anderson, Jr., Pasadena, for respondent.

HERNDON, Justice.

Appeal from a judgment awarding plaintiff damages for personal injuries suffered in a fall on stairs in defendant's store. Defendant's sole contention is that the trial court committed prejudicial error in admitting evidence that subsequent to the accident the terrazzo stairs on which plaintiff fell were changed by the installation of adhesive or abrasive strips across the surface of the steps. Plaintiff's position is that (1) the evidence was admissible for the purpose of impeaching defendant's witness, and (2) assuming there was error, the form of objection made by defendant in the trial court was not sufficient to preserve the right to a review of the ruling in question.

The facts are not in dispute: On October 12, 1956, plaintiff was a patron in defendant's Westchester store in Los Angeles. After making a purchase, plaintiff slipped and fell down a stairway suffering serious injuries. The steps on which she fell were constructed of terrazzo, a form of concrete composed of marble chips and cement which is ground down and polished to a smooth surface.

Plaintiff testified that the steps "felt sort of slick." Referring to the terrazzo surface of the stairway landing, she said: "* * * it seemed kind of slick under my feet * * *." After plaintiff had

completed her testimony, Mr. Scheufele, defendant's store manager, was called for examination under section 2055 Code of Civil Procedure. Plaintiff's counsel asked Mr. Scheufele whether he had noticed prior to the time of the accident "* * * that these steps were very slippery, very hard surface and shiny?" The witness answered in the negative. Counsel then inquired: "Well, isn't it true, Mr. Scheufele, that shortly after this accident occurred that you directed that stripping be—directed that an abrasive stripping be applied to these steps?" Defendant objected to this question on the ground that it violated the rule of law which renders inadmissible any evidence of changes made or precautions taken after the occurrence of an accident.[1] The court overruled the objection, pointing out that if the witness answered the question in the affirmative, the answer would be admissible as being "in the nature of impeachment" and that plaintiff could then ask what was done. But the witness answered the question in the negative, and stated that he neither directed that such abrasive stripping be applied nor supervised the installation of such stripping. The court thereafter sustained defendant's objections to three different questions designed to elicit testimony from Mr. Scheufele that such abrasive stripping had been installed subsequent to the accident.

Defendant called as its own witness a Mr. Lammers, section manager of the store, who went to the scene of plaintiff's fall immediately after it occurred, and inspected the steps. He testified that there was no foreign substance on the steps and that they were not slippery. The transcript of plaintiff's cross-examination of the witness Lammers reads as follows:

"By Mr. Anderson: Q. Mr. Lammers, you testified that in your opinion the steps were not slippery; is that correct? A. Yes.

"Q. Well, isn't it a fact, Mr. Lammers, that adhesive strips were added shortly after the accident to these steps?

"Mr. Birnie: I object to that, your Honor, as being immaterial.

"The Court: Overruled.

"The Witness: Will you repeat the question. (Question read.)

"The Witness: Yes."

In the course of his argument to the jury, counsel for plaintiff stated: "And Mr. Lammers, the last man up, said, 'No, it is not slippery, it is not slippery,' but his testimony is to be disbelieved by you because afterwards there was a change made." The jury was instructed to the effect that the evidence of the subsequent alteration was not to be considered as evidence of negligence on the part of defendant, but was admitted "for the purpose of impeaching the witness giving the testimony."

[1-4] Thus, there is presented to us the clear-cut question of law whether evidence of precautions taken or changes made after the happening of an accident is admissible to impeach a non-expert witness who testified concerning his observations as to the appearance or condition of the premises at the time of the accident, but who had nothing whatsoever to do with the making of the changes or the taking of the precautions thereafter.

"The general rule which is supported by the overwhelming preponderance of authority is that evidence of repairs or alterations or of precautions taken after an accident is not admissible either to prove antecedent negligence, or as an admission of negligence. Early cases in several

1. Counsel in this case anticipated the issue of law here involved, and made it a subject of discussion with the judge in chambers prior to the beginning of the trial. In the course of this conference in chambers, the respective positions of the parties were fully stated and there was a discussion of the decisions in Daggett v. Atchison, T. & S. F. Ry. Co., 48 Cal.2d 655, 313 P.2d 557; Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850, and Hatfield v. Levy Brothers, 18 Cal.2d 798, 117 P.2d 841.

states, notably, California, Georgia, Illinois, Indiana, Minnesota, New York, Pennsylvania, Utah and Washington held to the contrary, but these cases were overruled by later ones in all of these jurisdictions. In Kansas alone is the admissibility of such evidence settled." Annotation: "Admissibility of evidence of repairs, change of conditions, or precautions taken after accident", 170 A.L.R. 7, 8, 9; See also 20 Am.Jur. 267–268, § 282; 31 C.J.S. Evidence § 291, p. 1054.

California's adherence to the prevailing general rule and the considerations of policy which underlie it are indicated by the following from Daggett v. Atchison, T. & S. F. Ry. Co., 48 Cal.2d 655, 660–661, 313 P.2d 557, 560: "It is the general rule in this state that evidence of precautions taken and repairs made after the happening of the accident is not admissible to show a negligent condition at the time of the accident. Helling v. Schindler, 145 Cal. 303, 78 P. 710; Church v. Headrick & Brown, 101 Cal.App.2d 396, 413, 225 P.2d 558. The reason for the rule was well stated in Sappenfield v. Main St. etc. R. R. Co., 91 Cal. 48, 62, 27 P. 590: 'It would be unjust to hold that because the employer seeks by all the aid he gets from the light of experience to make the implement free from danger he is therefore to be charged with negligence in the use of all prior appliances, even though they were adopted with the best light then at his control. * * * He may have exercised all the care which the law requires, and yet in the light of a new experience, after an unexpected accident has occurred, he may adopt additional safeguards. To hold that the adoption of such new appliances which experience has demonstrated are more efficient than those previously in use, or which invention has developed from observing the defects in those originally adopted, shall be an admission that he was negligent prior thereto would prevent the very conduct in employers which they should be urged to follow.'"

It is well recognized by all the authorities that there are certain valid exceptions to the general rule above stated. McCormick, Evidence, 544, § 252; Annotation: "Evidence of precautions after accident", 170 A.L.R. 36. An exception to the general rule of inadmissibility recognized in California is that in appropriate circumstances evidence of subsequent precautions or repairs may properly be admitted when it tends to impeach the testimony of a witness. Daggett v. Atchison, T. & S. F. Ry. Co., supra, 48 Cal.2d 655, 661, 313 P.2d 557; Hatfield v. Levy Brothers, 18 Cal.2d 798, 809–810, 117 P.2d 841; Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 543–544, 55 P.2d 850.

As justification for the ruling presently under review, respondent seeks to invoke the last mentioned exception to the general rule, that is to say, she contends that in the instant case the evidence of subsequent changes or precautions tended to impeach the testimony of the witness Lammers.

The generally recognized grounds of impeachment and the methods by which a witness may be impeached are well known. Code Civ.Proc. §§ 1847, 2051 and 2052; see Witkin, California Evidence, 685, § 640; McCormick, Evidence, 62, § 33 et seq.; 3 Wigmore, Evidence, 362, § 874 et seq. The instant case requires a consideration of only two of the recognized methods of impeachment since no other has been invoked, either in the arguments of respondent or in any of the decisions cited by her: (1) by proof that at some other time the witness has made statements or has conducted himself in a manner evincing a belief inconsistent with the fact or belief asserted on the witness stand; (2) by contradictory evidence. We are unable to perceive how any other method or form of impeachment could possibly be involved or be asserted to be applicable here. Accordingly, let us separately consider these two recognized methods of impeachment and inquire whether either of them was properly utilized by respondent when she offered the evidence in question for the purpose of impeaching the witness Lammers.

(1) *Impeachment by evidence of previous conduct inconsistent with the fact or*

belief asserted by the witness on the stand. Impeachment by evidence of precautions taken after an accident has been held proper in cases where the witness *himself* authorized, recommended, approved, directed, or supervised the making, or himself made the subsequent repair, alteration or change of procedure. It is readily apparent that the trier of the facts might reasonably consider such *conduct* on the part of the witness to be inconsistent with his *testimony* that in his opinion, or according to his observation, the condition existing before the change was safe or free from defect. As we shall demonstrate shortly, this was the nature of the impeaching evidence held admissible in the cases relied upon by respondent. Hatfield v. Levy Brothers, supra, 18 Cal.2d 798, 809–810, 117 P.2d 841; Inyo Chemical Co. v. City of Los Angeles, supra, 5 Cal.2d 525, 543–544, 55 P.2d 850; Daggett v. Atchison, T. & S. F. Ry. Co., supra, 48 Cal.2d 655, 313 P.2d 557, with respect to one of the two witnesses involved in Daggett.

But, manifestly, the fact that after the accident some unidentified person *other than the witness* directed or authorized alterations affords no basis for the utilization of the method of impeachment now under consideration. The witness Lammers had absolutely nothing to do with installing or ordering the installation of the abrasive strips. There was no evidence of conduct on his part which was in the slightest degree inconsistent with any observation or belief to which he testified.

Although it seems clearly to beg the question, the following statement from respondent's brief confirms our observations in regard to the matter presently under discussion: "The purpose of impeachment in the instant case was *not to show prior inconsistent acts or statements,* but rather to impeach his testimony." (Emphasis added.) And the following expressions of respondent's counsel in the course of a discussion in chambers of the trial judge are illuminating: "He [Lammers] has testified that in his opinion it wasn't slippery. Now, if that is a fact that that is his opinion, then whether or not his opinion is entitled to any weight I think that we are entitled to show for impeachment purposes that *his opinion was not substantiated by others and therefore is of little weight.* Now, this is a common method of impeachment, and if you will look at the Inyo case, Inyo v. City of Los Angeles, I think that's exactly what happened in that case." (Emphasis added.)

That the last quoted statement of respondent's counsel betrays a misconception of the basis for the ruling in the Inyo case is apparent from the following language of that decision holding that the trial court did not commit reversible error in connection with plaintiff's cross-examination of defendant's witness Van Norman (5 Cal.2d 525, at page 543, 55 P.2d 850, at page 858): "This witness was employed in the construction of the aqueduct and *was in charge of maintenance and operation.* On direct examination he testified to his inspection in 1921 of the territory surrounding the canyon where the break subsequently occurred, and declared that it was his opinion at that time that no overhead or underground drainage was necessary. On cross-examination he was asked whether he had authorized the construction of a large number of spillways after the break, and defendant's objection to the question was overruled. Defendant points to the settled rule that changes made or precautions taken after an accident are not admissible to show negligence at the time of the accident. Counsel for plaintiff, however, made it clear that this questioning was not directed to the issue of negligence, but was for the purpose of weakening the testimony of defendant's *expert* witness by showing that he had subsequently changed his opinion as to the necessity of drainage." (Emphasis added.)

(2) *Impeachment by contradictory evidence.* As Wigmore[2] and McCormick[3] have pointed out, impeachment by contra-

2. 3 Wigmore, Evidence, 652, § 1000.

3. McCormick, Evidence, 100, § 47.

diction may be accomplished either by eliciting a contradictory fact on cross-examination or by calling other witnesses in rebuttal. The contradictory evidence may be either direct or circumstantial. But all the authorities seem to take for granted the truism that the contradictory evidence must be *competent* evidence.

Applying these principles specifically to the instant problem, the fact that abrasive strips were applied to the steps after the accident can be regarded as admissible to contradict the observation of the witness Lammers only if we accept the premise that proof of this fact constitutes competent evidence tending to prove that before the abrasive strips were applied, the steps were slippery, that is to say, unsafe.

But the authorities agree that, absent special circumstances justifying an exception, evidence of subsequent precautions is not competent to prove lack of safety in the antecedent condition. While Wigmore seems to rest the exclusionary rule largely on the ground of lack of *relevancy,*[4] McCormick treats it as a rule of *privilege,* emphasizing "* * * the very urgent policy against discouraging the taking of safety measures."[5] The language of Sappenfield v. Main St. etc. R. R. Co., 91 Cal. 48, 27 P. 590, quoted with approval in Daggett v. Atchison, T. & S. F. Ry. Co., 48 Cal. 2d 655, 660–661, 313 P.2d 557, seems to ground the exclusionary rule upon considerations of policy as well as upon lack of probative value or materiality. And Witkin[6] puts the matter as follows:

"(1) *Rule and Theory of Exclusion.* In a negligence case the question at issue is whether the defendant exercised due care at the time of the injury to plaintiff, in the light of existing knowledge or notice of the circumstances. When an accident occurs, new knowledge is gained of possible risks, and the defendant may, to avoid future harm, make repairs or improvements or practice additional safety measures. Taking such subsequent precautions in the light of knowledge later acquired may not be relevant on the issue of negligence at the earlier time; and, even if its relevancy is conceded, the effect of allowing the evidence would be to discourage persons from engaging in such highly beneficial activity. Accordingly, either on grounds of irrelevancy or public policy, the evidence is *excluded* on the issue of negligence. (Helling v. Schindler, 1904, 145 Cal. 303, 312, 78 P. 710; Gorman v. Sacramento, 1928, 92 Cal. App. 656, 268 P. 1083; Unif. Rule 51; 2 Wigmore, § 283; 9 Hastings L.J. 316; 170 A.L.R. 7.)"

It seems perfectly obvious that to affirm the admissibility of the evidence of subsequent changes and precautions to impeach (contradict) testimony of the character given by the witness Lammers in this case would be completely to nullify the general rule and reduce it to nothing more than an empty shell. If the present ruling were to be sustained, then the clearest dictates of logic would require a holding in the next case that the same impeaching (contradictory) type of evidence here elicited on cross-examination may properly be elicited from witnesses called in rebuttal. Such a holding would mean that whenever a defendant in this type of case calls any witness to testify to any observation tending to prove the safety of, or the lack of danger or defectiveness in, his premises at the time of an accident, the door is automatically opened to plaintiff to prove (by way of impeachment) every subsequent repair made or precaution taken. Indeed the defendant could not avoid this result merely by refraining from calling any witness for the purpose of proving the safety of his premises, because plaintiff could call his employees for cross-examination under section 2055, Code of Civil Procedure, and thereafter impeach them in the same manner.

4. 2 Wigmore, Evidence, 151 § 283.

5. McCormick, Evidence, 543 § 252; 159, § 77.

6. Witkin, California Evidence, 187, § 167.

As we have seen, the general rule is almost universally followed. We regard it as sound and salutary. We decline to nullify it by giving our sanction to any such exception as the instant case would require us to embrace. If the exclusionary rule is to be abolished, it ought to be done forthrightly rather than by the slow and painful "whittling" process of extending and attempting to justify illogical exceptions. We are in accord with the view expressed by McCormick in the following passage:

> "As suggested above, the extrinsic policy of encouraging remedial safety measures is the predominant reason for holding evidence of such measures to be privileged. It is apparent that the free admission of such evidence for purposes other than as admissions of negligence is likely to defeat this paramount policy. It is submitted that before admitting the evidence for any of these other purposes, the court should be satisfied that the issue on which it is offered is of substantial importance and is actually, and not merely formally in dispute, that the plaintiff cannot establish the fact to be inferred conveniently by other proof, and consequently that the need for the evidence outweighs the danger of its misuse." McCormick, Evidence, 545, § 252.

We have shown that respondent's position is not sustained by the decision in Inyo Chemical Co. v. City of Los Angeles, supra, 5 Cal.2d 525, 55 P.2d 850. There sanction was given to the impeachment of the opinion of an expert witness by proof of conduct on his part which could be construed as indicating that he entertained a different opinion at another time. Likewise, in Hatfield v. Levy Brothers, supra, 18 Cal.2d 798, 117 P.2d 841, it was the *act of the witness* in ordering discontinuance of the practice of waxing certain floors which was regarded as having a tendency to impeach his testimony that there was nothing wrong with the floor. Similarly, in Daggett v. Atchison, T. & S. F. Ry. Co., supra, 48 Cal.2d 655, 313 P.2d 557, 560, one of the witnesses sought to be impeached was an *expert* witness who had voiced a rather extravagant opinion that the signal in place at the time of the accident "was the safest type of a signal." It was there held proper to impeach such an opinion by showing that the defendant had acceded to a request of the Public Utilities Commission in replacing a single wigwag signal with flashing light signals of a different type.

The second of the witnesses in Daggett, supra, was the motorman who was operating the train at the time of the accident. During the course of an intensive and comprehensive examination by plaintiff's counsel the witness was understood to testify that the railroad speed limit was 90 miles per hour *at the time of the trial.* Daggett, supra, 48 Cal.2d at pages 659–660, 313 P. 2d 557. Counsel for plaintiff was then permitted to question the witness and establish that in fact the speed limit *at the time of trial* had been lowered from 90 to 50 miles per hour. In Daggett, this questioning was held proper as impeachment in the form of contradiction by showing that "* * * the facts testified to by such witnesses were not the true facts. * * *" Daggett, supra, 48 Cal.2d at page 665, 313 P.2d at page 563. In the instant case Mr. Lammers never suggested that repairs had not been made; he merely testified that he had not ordered or installed the adhesive strips, and the question asked of him by plaintiff's counsel would not show that the witnesses had testified incorrectly.

The holding in Daggett, supra, with respect to the latitude properly allowed in the cross-examination of an expert witness stands upon much the same footing as the holding in the more recent case of Laird v. T. W. Mather, Inc., 51 Cal.2d 210, 331 P.2d 617, 622, 623. In the last cited case, defendant's expert witness volunteered the broad statement that in his opinion the stairway in question conformed to standard engineering practice "anywhere in the world." The Supreme Court held that "The trial court did not err in permitting the plaintiff to inquire into the basis for this opinion nor to counter the effect of the wit-

ness' broad statement by attempting to show that it was not correct." Thus, it is clear that the facts involved in the Laird and Daggett cases were entirely different from those here presented.

Finally, we must reject respondent's argument that the form of objection made by appellant in the trial court was insufficient to preserve its right to a review of the ruling. Prior to the time when appellant's objection to the particular question was interposed, there had been a thorough discussion of the matter both in chambers and at the bench. Thus, the trial judge had been fully apprised of the respective contentions of the parties with respect to the admissibility of the evidence in question and the specific grounds of the objection.

Reversed.

FOX, P. J., and ASHBURN, J., concur.

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Henry Victor PREWITT, Defendant and Respondent.*

Cr. 6393.

District Court of Appeal, Second District, Division 1, California.

Jan. 12, 1959.

Hearing Granted March 11, 1959.

Proceeding on motion by defendant to dismiss indictment on ground that he had been indicted without reasonable or probable cause. From an order of the Superior Court, Los Angeles County, Mark Brandler, J., setting aside the indictment, the state appealed. The District Court of Appeal, White, P. J., held that where police officer, who had on three previous occasions received information by telephone from an unknown person whose voice he recognized, and on each occasion information proved to be reliable, officer, who received a telephone call from such unknown person informing officer that bookmaking was being conducted in a certain apartment, had reasonable cause for believing that a felony was being committed although officer did not know informant but only recognized his voice as that of a person from whom he had received such prior reliable information, and arrest made in reliance on such information was valid, and evidence procured in course of search was sufficient to sustain indictment.

Order reversed and defendant's motion to augment the record denied.

* Opinion vacated 341 P.2d 1.

1. Arrest ⇐63(4)
Indictment and Information ⇐10.2(2)

Where police officer, who had on three previous occasions received information by telephone from an unknown person whose voice he recognized, and on each occasion information proved to be reliable, officer, who received a telephone call from such unknown person informing officer that bookmaking was being conducted in a certain apartment, had reasonable cause for believing that a felony was being committed although officer did not know the informant but only recognized his voice as that of person from whom he had received such prior reliable information, arrest made in reliance on such information was valid and evidence procured in course of search was sufficient to sustain indictment. West's Ann.Pen.Code, §§ 337a, subds. 1, 2, 995.

2. Arrest ⇐63(4)

"Reasonable cause" as basis for an arrest is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that person in question is guilty of a crime.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

3. Arrest ⇐63(4)

"Probable cause" as a basis for an arrest is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

4. Arrest ⇐63(4)

In considering the question of reasonable or probable cause upon part of an officer to make an arrest, court is only to look at the facts and circumstances presented to the officer at the time he acted.

5. Arrest ⇐63(4)

A reliable informant is a person who has in the past led the police to valid suspects.

6. Arrest ⇐63(4)

Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt.

7. Criminal Law ⇐386

Officer's recognition of informant's voice is competent evidence and a circumstance to be considered in the matter of identification.

8. Indictment and Information ⇐17

An indictment is but an accusation, presented by grand jury to a competent court, charging a person with a public offense.

9. Indictment and Information ⇐10.2(4)

Duty of determining whether an indictment should be found is lodged exclusively in grand jury and not in the courts.

10. Indictment and Information ⇐10.2(1)

When an indictment does not rest upon arbitrary action, and some ground is revealed by the evidence adduced affording some rational ground for possibility that person named in indictment is guilty, courts will not act to prevent a trial of the accused.

11. Judgment ⇐751

Dismissal, after preliminary examination, of complaint filed in municipal court charging defendant with bookmaking was not res judicata as to subsequent indictment by grand jury with respect to subsequent indictment by county grand jury. West's Ann.Pen.Code, § 337a.

12. Criminal Law ⇐1110(1)

On appeal by state from order sustaining a motion to set aside indictment returned by county grand jury charging defendant with bookmaking, record of municipal court dismissing, after preliminary examination, complaint against defendant on same charge was not germane to the issues presented on appeal and defendant was not entitled to augment the record by adding minutes of municipal court. West's Ann.Pen.Code, § 337a.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Lewis Watnick, Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

Albert Jack Chotiner, Russell E. Parsons, Beverly Hills, for respondent.

WHITE, Presiding Justice.

In an indictment returned by the Grand Jury of Los Angeles County, defendant was accused in Count I of violating subdivision 1, Section 337a of the Penal Code in that he unlawfully engaged in poolselling and bookmaking on horse races. Count II alleged the violation of subdivision 2 of the aforesaid section of the Penal Code, in that defendant occupied an apartment for the purpose of recording bets on horse races. Upon his arraignment, defendant made a motion under Section 995 of the Penal Code to set aside the indictment on the ground that he had been indicted without reasonable or probable cause. The motion was granted and the case dismissed. From the order setting aside the indictment, the People prosecute this appeal.

[1] We regard the following as a fair epitome of the evidence presented to the Grand Jury and upon which the indictment herein was returned. Joseph S. Deiro testified he was a police officer of the city of Los Angeles, attached to the Administrative Vice Division. That in January or February of 1958 he received a telephone call and talked to a man with whom he had spoken on the telephone before. The officer recognized the voice of his caller and had previously had telephone conversations with him, although he did not know the person's name, nor had he ever known it, but he had talked to him on three previous occasions. We deem it unnecessary to detail the three previous conversations had by the officer with this unknown person. Insofar as here pertinent and as affecting the reliability of information given to Officer Deiro, we quote the following from his testimony before the Grand Jury:

"Q. (By Mr. Ritzi, Deputy District Attorney): So, in other words, in four separate cases, (presumably including the instant one) this informant whom you don't know but whose voice you recognize over the telephone has given you information that has resulted in arrests, is that correct? A. That is correct.

"Q. All right. Now, let me ask you this, sir: At the time that you received the telephone call in the latter part of January or the early part of February of this year, did you feel that that was reasonable for believing a person subsequently arrested to have committed a felony? A. Yes, sir.

"Q. And did you feel that this person had committed a felony? A. Yes, sir.

"Q. I see, and is that what you relied on, sir? A. Yes, sir.

"Q. All right. And you felt that was a charge made on reasonable cause, is that correct, sir? A. That is correct."

With regard to the arrest of defendant herein, Officer Deiro testified that in the aforesaid telephone call received in the latter part of January or early part of February, 1958, his informant advised him that bookmaking was being conducted in Apartment 401 at 248 South Western Avenue, in the city of Los Angeles, that this was what is called a "back office", wherein a person on the telephone was calling "relay spots" and "taking off" bets from the relay spots and permanently recording them at this so-called back office. On February 20, 1958 the officer went to the aforesaid premises where there was located a four-story, multiple unit apartment house; it is a large brick building with entrances on Western Avenue. At approximately 1:25 p. m., Officer Deiro and his partners, Sergeant May and Sergeant Bennett, went to this location. Sergeant May was directed to go to the door of Apartment 401 and to stand by there until Officer Deiro arrived. Officer Deiro and Sergeant Bennett then went to the manager's apartment which was located on the second floor. The officer contacted a Mr. Hooker, identified himself and advised him that he (the officer) was about to make an arrest in Apartment 401. The officer asked Hooker if he had a key to this apartment so that they could enter without damaging the door and Mr. Hooker gave him the key to Apartment 401. The officer then went up to the fourth floor and after arriving at Apartment 401, they inserted the key into the lock, turned the key, and opened the door slowly. The door opened approximately two inches where it was restrained by a night latch. The officer "then forced the latch and entered the apartment", and immediately entered the room to his right where he observed a male Caucasian standing in the middle of the room. This person was defendant Henry Victor Prewitt.

As Officer Deiro entered this room, he observed to his left on a table a professional type bookmaking rack, a photograph of which was marked Grand Jury Exhibit 1, and in the photograph is a table with a rack on it, a phone and a television set, together with numerous "betting markers". This was the condition of the premises at the time Officer Deiro entered, with the excep-

tion of the bundles which appeared on the table. Those bundles were found in a metal box and placed upon the table for the purposes of identification in the photograph. Other than that, the rack with the professional type betting markers, the telephone and the scratch sheet were at this location as "this picture signifies".

In regard to "these" other bundles of professional betting markers, this particular box was to the right of the chair or between the chair and the television set; was opened up and was plainly visible at the time of entry.

Upon entering, Officer Deiro identified himself to Mr. Prewitt and placed him under arrest for suspicion of bookmaking. He asked the defendant, "How long have you been making book here?" and he stated, "Just a little while". He then stated, "I don't want to answer any more questions until I see an attorney as they might incriminate me". The officer asked him if he had a federal wage and tax stamp and the defendant stated, "No". He was asked why he registered at this location under the name of Roy Rose, but did not answer, and when asked where he lived, he stated at 729 Verdugo Road in Glendale.

Officer Deiro had been on the vice squad for approximately three years and during that time had made approximately two to three hundred bookmaking arrests. He is familiar with the way bookmaking is carried on in the city of Los Angeles.

The officer described the aforesaid term "back office" as follows: It would have either one, two or more front offices. In this front office they would hire a person to answer the phone. The bookmaker or agent would give the telephone number of the front office, or relay spot, to the bettor and the bettor would call this number, giving an identification code; the person at the relay spot will accept the wager and make a temporary recordation of it. Just prior to post time of each race, the back office will call the front office, or relay spot, and will accept all the wagers that the person in the front office has accepted to that time. The back office will then make a permanent recordation of these wagers and the clerk in the front office will then erase the recordation from the front office. This operation is used so as not to lose the records of wagers for that day inasmuch as many relay spots are "taken" by the police department. The type of operation shown by Grand Jury Exhibit I was a "back office" to a relay spot or a group of relay spots, in the opinion of the officer.

Officer Deiro searched Mr. Prewitt and found a key, which was marked Grand Jury Exhibit No. II, in his pocket with some other keys. His key, Exhibit II, was tried in the door of Apartment 401 and it locked and unlocked the same.

Grand Jury Exhibit III appears to be a rack that is commonly referred to as a professional type betting marker. The bookmaker at the back office will insert cards into these slots (indicating) with the identification of the bettors and the agents, and upon receiving the information from the relay spot will pick out the card pertaining to that particular bettor, record the bets, and insert it back into the slot. Exhibit III was found by the officer on the table to his left as he entered the premises. It was opened up and about three-quarters filled with betting markers.

In the photograph (presumably Exhibit I) there appears to be some bundles. Those bundles were betting markers for the prior day's bettings. Officer Deiro had with him nine bundles, each of the bundles wrapped in a National Daily Reporter. All of these bundles were marked as Grand Jury Exhibit IV.

The National Daily Reporter is a publication which is published daily except Sunday which lists the horses, jockeys, probable odds, post positions, and handicaps of horses of various tracks throughout the United States for that day. "Scratch sheet" is the common name used for this publication in bookmaking circles.

Each of "these bundles" contains professional type betting markers and from these bundles, which are Grand Jury Exhibit No. IV, the officer tallied the betting that was

taking place. There would be "hundreds and hundreds" of bets recorded every day and on the majority of days the amount of the bets would range in excess of $5,000. The officer described and explained the use of other bookmaking paraphernalia found in the room and which testimony need not be here narrated.

Defendant told the officer that he had rented this apartment some two and a half years ago.

Police Officer Jerry L. May, also attached to the Administrative Vice Division, identified Grand Jury Exhibit IX as a little black address book which he took off of the person of defendant Prewitt. The latter told him that it was his personal notebook and, among other things, stated that it was his personal book and that he had written all the names and addresses in the book. The officer also identified Grand Jury Exhibit X which had two handwriting cards. At the time, Officer May requested that the defendant make the cards out. He refused to do so, stating that he felt that this would be detrimental to whether he would be found guilty or not in the bookmaking case. He was then asked to just fill out the pertinent information and he refused to fill out the capitals and the small letters of the alphabet, and the numbers. He was of the opinion if he filled this portion in this would be incriminating to himself. The defendant wrote on the front of both cards "the information is from one to ten". He filled them in in his handwriting on the two cards and all of the handwriting on the two cards except the name "J. L. May" and the inked notations are in his handwriting.

The officer was present with Officer Deiro when the arrest was made at 248 South Western Avenue, Apartment 401.

Lawrence W. Sloan is an Examiner of Questionable Documents employed by the Los Angeles Police Department. After testifying to his qualifications, which include studies and testimony before other courts and grand juries approximately nine hundred fifty or sixty times, he was shown Grand Jury Exhibit No. X, which appears to be two handwriting cards and two professional type betting markers which are a part of Grand Jury Exhibit V and a small black notebook which is Grand Jury Exhibit No. IX together with a group of five ABC type betting markers which compose Grand Jury Exhibit No. VIII. The witness testified that he had examined them before on the 17th of March, 1958; that the main examination of the writing on these various exhibits was to determine whether or not Exhibits V and VIII were written by the same person who wrote the penciled writing on the two handwriting cards, Exhibit X, on lines one through fifteen, and the penciled writing appearing in Exhibit IX. As a result of that examination, it was the opinion of the witness that the penciled writings appearing on the two yellow pieces of paper marked Exhibit V, the penciled writing appearing upon the five pieces of paper marked Exhibit VIII were written by the same person responsible for the penciled writings found in Exhibit IX and on the two handwriting exemplar cards, Exhibit X. The witness further testified as to a portion of Exhibit VIII, which was bound by an elastic band, that they appear to be a portion of approximately 100 such instruments that he examined beginning March 17, 1958. He had the opportunity to glance over them and without going particularly through each one he was fairly certain that they are the same group and in all probability were written by the same person responsible for the writing on Exhibits IX and X.

The primary question presented to us on this appeal is whether a police officer has reasonable cause to believe that a felony is being committed in an apartment at a designated address, when prior to the arrest of the person at such place, the officer received information by telephone from a person, who on three previous occasions gave information to said officer by telephone, which information on each occasion proved to be reliable, *although the officer did not know the informant, but recognized his voice* as that of the person from whom the officer had received such prior information. It is conceded that the question is one of first

impression. It is, however, the contention of the People that such information was received from a reliable informant, and established reasonable cause for the arrest of defendant in the case at bar. That therefore, the search and seizure being incident thereto, was valid.

[2, 3] Reasonable cause has been defined by our Supreme Court as such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime (People v. Kilvington, 104 Cal. 86, 92, 37 P. 799). Probable cause has been defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true (People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122; Bompensiero v. Superior Court, 44 Cal.2d 178, 184, 281 P.2d 250; United States v. Bell, D.C., 48 F.Supp. 986; Cook v. Singer Sewing Machine Co., 138 Cal.App. 418, 422, 32 P.2d 430). "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374.

[4] In considering the question of reasonable or probable cause upon the part of the officer to arrest respondent, we are to look only at the facts and circumstances presented to the officer at the time he acted.

Applying the foregoing rules to the facts of the case now engaging our attention, we think it must be held that Officer Deiro had reasonable cause to believe that respondent may have been engaged in the commission of a felony.

[5, 6] It is true, as urged by respondent, that the Supreme Court in the case of Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36, 38, in discussing the subject of search and seizure without benefit of a warrant, said: "Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency, see People v. Kilvington, 104 Cal. 86, 92–93, 37 P. 799, 43 Am.St.Rep. 73, an arrest may not be based solely on such information, (citing cases), and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. See, People v. Boyles, supra, 45 Cal.2d 652, 656, 290 P.2d 535." However, in the cited case it was held (46 Cal.2d at page 295, 294 P.2d at page 38) that evidence to justify the conclusion that reliance on the information was reasonable may be supplied by past experience with the informer. The Willson case is dissimilar to the case at bar in that in the former the San Diego police had had no previous experience with the unknown informer, while in the instant case there was presented to the grand jury evidence of Officer Deiro's successful past experience with the informer. A reliable informant has been defined as a person whose information has in the past led the police to valid suspects (People v. Dewson, 150 Cal. App.2d 119, 128, 310 P.2d 162). As was said in People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535, 537: "* * * reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt."

In the case of People v. Penson, 148 Cal. App.2d 537, 539, 307 P.2d 24, 25, it was held that a valid arrest may be made solely by reason of information communicated by a reliable informant as above defined herein. In the case just cited, the court stated: "* * * The officers' appraisal of the informant's reliability was based upon the truthfulness of prior reports from this person which they had verified upon investigation." And in Trowbridge v. Superior Court, 144 Cal.App.2d 13, 23, 300 P.2d 222, 229, this court said: "* * * that it is not the number of informers involved but the reliability of the informant and reasonableness of the information supplied which should count the most with the officer in making up his mind what to do." Under the facts and circumstances here present we entertain no doubt that the reliability of the informant was established.

[7] That the officer's recognition of the informant's voice is competent evidence and a circumstance to be considered in the matter of identification is firmly established. "Identity of a person is permitted by evidence solely of recognition of a voice" (People v. Glab, 15 Cal.App.2d 120, 123, 59 P.2d 195, 197). "It is universally recognized that the voice as well as the physical appearance of a person, is a means by which identification is made possible * * * Therefore testimony relating to the identity of the voice is competent, its probative value being a question of fact for the jury" (People v. Mullins, 145 Cal.App.2d 667, 670, 303 P.2d 58, 60).

The apprehension of respondent that to justify his arrest would open the door to police officers to utilize fictitious informants in order to perpetrate illegal searches and seizures is answered by the court in Lorenzen v. Superior Court, 150 Cal.App.2d 506, at page 510, 310 P.2d 180, at page 183, wherein it is stated: "An additional contention made by petitioner is answered in People v. Garnett, supra, 148 Cal.App. 2d 280, at page 284, 306 P.2d 571, at page 574: 'Appellant assumes that police officers would, to suit their convenience, make use of fictitious informants as bases for illegal searches and seizures. Such assumption is unauthorized and is contrary to statutory presumptions that official duty has been regularly performed and that the law has been obeyed. * * * When an officer has in good faith testified that he had acted upon the information of an unnamed person and that such informant was reliable, he has thereby established a firm basis for his search of a suspect's premises. Pen. Code, sec. 836. * * * So long as the good faith of the arresting officer with respect to the reliability of his informant satisfies the scrutiny of the trial judge, he is in substantially the same position as if he had come with a warrant of arrest.'" See also, People v. Boyd, 162 Cal.App.2d 332, 327 P.2d 913.

Respondent relies heavily upon the case of Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39. To us it appears that this case does not aid him. In the Priestly case, an "information" charged defendant with possession of narcotics. At the preliminary examination, an officer testified that acting solely on the information from two informers, he and another officer went to defendant's apartment and knocked on the door. After some ten minutes defendant opened the door, whereupon the officers placed him under arrest and searched his person and the apartment. They found narcotics upon his person and in a dresser drawer. The arrest and search were made without a warrant. Defendant contended "this testimony was not competent since he objected to it, demanding that the identity of the informers be disclosed or the officer's testimony be struck." The Supreme Court held that the communications of the informers was material to the issue of reasonable cause to make the arrest and search. Defendant's motion that the identity of the informant be disclosed or the officer's testimony be struck was denied by the magistrate and he was held to answer. When arraigned in the superior court defendant moved to set aside the "information" on the ground that the evidence against him was obtained by illegal search and seizure. Upon the denial of his motion defendant sought a writ of prohibition to restrain the superior court from further proceedings on the "information". The writ was granted.

In the case now before us, it is not an "information" but an "indictment" which accuses respondent Prewitt of the offense of bookmaking. The latter moved to set aside the "indictment" under Section 995 of the Penal Code and his motion was granted.

In the Priestly case, supra, what the Supreme Court held was, as stated by respondent, "* * * that it was error to deny the defendant the right to learn who the informant was". Since we are here concerned with an "indictment", and not an "information", we consider as pertinent to the question confronting us, the following language of Mr. Justice Spence in his dissenting opinion in the Priestly case, supra, 50 Cal.2d at page 824, 330 P.2d at page 47: "If the above-mentioned testimony had been

introduced before a grand jury and petitioner had thereafter been charged by indictment, *there would be no question concerning the jurisdiction of the superior court to proceed with the trial of petitioner. In that case, petitioner could not have complained because he had not been present when the testimony was taken before the grand jury and, of course, he would have had no opportunity to cross-examine the witnesses or to demand the disclosure of the names of any informers.*" (Emphasis added.)

[8, 9] As was said in Lorenson v. Superior Court, 35 Cal.2d 49, 55, 216 P.2d 859, 863, "An indictment is but an accusation, presented by the grand jury to a competent court, charging a person with a public offense. (Cases cited.) *The duty of determining whether or not an indictment should be found is lodged exclusively in the grand jury and not in the courts.* The Legislature has stated that duty as follows: 'The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, *in their judgment,* warrant a conviction by a trial jury.' Pen.Code, sec. 921; emphasis added. A court may not substitute its judgment as to the weight of the evidence for that of the grand jury. 'If there is some evidence to support the indictment, the courts will not inquire into its sufficiency [cases cited].'" (Emphasis added.)

[10] It has been held that when an indictment does not rest upon arbitrary action, and some rational ground is revealed by the evidence adduced affording some rational ground for the possibility that the person named in the indictment is guilty, the courts will not act to prevent a trial of the accused (Mold v. Superior Court, 35 Cal.2d 73, 75, 216 P.2d 874).

We are not here concerned with an appeal from a judgment of conviction following a trial. We of course do not know what evidence may be presented at the trial, if one is held—whether the officer will then know the identity of his informant and disclose or refuse to disclose the same, but we do hold that upon return of the indictment herein the superior court had jurisdiction to proceed with a trial thereon, and the ultimate decision on the admissibility of the officer's testimony can be made at the trial on the basis of all of the evidence bearing on the issue.

Motion to Augment the Record

[11, 12] Respondent has filed a motion to augment the record herein by adding thereto the minutes of the Municipal Court of Los Angeles Judicial District in Case No. 143900 entitled People of the State of California v. Henry Victor Prewitt, and to further add to the record on appeal a certified copy of the complaint filed in the aforesaid court on March 3, 1958, wherein respondent was accused of violating Section 337a of the Penal Code. The motion is accompanied by an affidavit of Russell E. Parsons, Esq., one of counsel for respondent, wherein it is set forth that the defendant named in the municipal court action is respondent herein, and that the charge contained in the indictment in the instant case is the identical charge contained in the aforesaid complaint filed in the municipal court. That after a preliminary examination, at which time substantially the same evidence was presented to the judge presiding at said preliminary examination, "said case was dismissed by reason of the fact that the evidence had been unlawfully obtained, in violation of the rules laid down in the case of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513."

We are satisfied that respondent's contention that the doctrine of res judicata is applicable to the instant proceeding cannot be sustained and that the records of the municipal court are not germane to the issues presented on this appeal. While it is true, as urged by respondent, that the doctrine has been applied to criminal cases in this state, it was always under different circumstances (People v. Joseph, 153 Cal.App.2d 548, 551, 552, 314 P.2d 1004, and cases therein cited). In effect, respondent argues that after an accused is discharged at the preliminary examination, unless new and different evi-

dence is offered before a grand jury or another committing magistrate, the decision of the magistrate becomes, as it were, the law of the case and is res judicata. The same contention was advanced in the case of People v. Joseph, supra, 153 Cal.App.2d at pages 550, 551, 314 P.2d at pages 1005, 1006, and rejected. The factual background present in the case just cited is strikingly similar to that in the case at bar and we are persuaded that the holding in that case is determinative of respondent's contention herein. In the Joseph case, supra, following the dismissal of two complaints filed against the accused, the same evidence was presented to the grand jury and an indictment was returned. In that case this court said (153 Cal.App.2d at page 551, 314 P.2d at page 1006): "* * * We are satisfied that the doctrine of res judicata applies to prevent the relitigation of issues determined by a *final* judgment in a prior action between the same parties. In the case now engaging our attention, however, appellant's argument for application of the doctrine of res judicata fails for two reasons. First, the orders of dismissal entered by the municipal court judges were not appealable (Pen.Code, secs. 1237, 1238). Secondly, in an unbroken line of decisions in this state it has been held that the results of proceedings prior to trial in criminal actions are not res judicata." (Citing cases.) See also People v. Beltran, 94 Cal.App.2d 197, 202–205, 210 P.2d 238.

Respondent relies heavily upon the case of Coffey v. United States, 116 U.S. 436, 6 S.Ct. 437, 441, 29 L.Ed. 684, which was a case involving a judgment of acquittal in a criminal prosecution for a violation of Internal Revenue laws, and the court held it was conclusive in favor of the defendant as claimant of the property involved in a subsequent suit in rem, when, as against him, the existence of the same act or fact involved in a criminal prosecution is in issue as a cause for the forfeiture of such property. That case, however, in our opinion, does not aid respondent, because therein it was held that, "(T)he judgment of a *court of concurrent jurisdiction,* directly upon the point, is, as a plea, in bar, or as evidence, conclusive, between the same parties, upon the same matter directly in question in another court; *and the judgment of a court of exclusive jurisdiction, directly upon the point,* is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case the court is the same court, and had jurisdiction, and the judgment was directly on the point now involved, and between the same parties." (Emphasis added.) In the case here under consideration we do not have a prior *judgment* by a court of concurrent jurisdiction. As was said in People v. Brite, supra, 9 Cal.2d 666, 683, 684, 72 P.2d 122, 131: "A justice of the peace, when acting as a court, is given the power of trying causes and rendering judgments of imprisonment upon conviction, but, when acting as a magistrate in the preliminary examination of a person accused by deposition of a public offense, he has no such power. The full limit of his power is, after examination, to hold the accused to answer *at trial,* unless from the examination it appears that no offense has been committed or there is not sufficient cause to believe the defendant guilty of a public offense, in which event the magistrate must order the accused discharged." (Emphasis included.)

An examination of other cases cited by respondent reveals nothing in conflict with what we have herein stated.

The motion to augment the record is denied. The order from which this appeal was taken is reversed.

FOURT and LILLIE, JJ., concur.

167 Cal.App.2d 39

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas Julius TOPHIA, Defendant and Appellant.

Cr. 6318.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1959.

Prosecution for assault with a deadly weapon and murder. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment of conviction of manslaughter and order denying motion for new trial and defendant appealed. The District Court of Appeal, Lillie, J., held that under record disclosing that defendant was carrying a loaded revolver which he used, in a crowded tavern, as a bludgeon in self-defense and gun fired sending bullet through tavern wall and killing deceased, there was no inconsistency in verdicts exonerating defendant on count charging assault with a deadly weapon, but finding defendant guilty of manslaughter.

Affirmed.

1. Criminal Law ⇐878(3)

In order for statute providing that an acquittal on one or more counts shall not be deemed an acquittal of any other count where prosecution has charged two or more offenses or the same offense in different counts to control, there cannot exist in the findings supporting verdicts any real factual inconsistency. West's Ann.Pen.Code, § 954.

2. Homicide ⇐34

"Manslaughter" is the unlawful killing of a human being without malice, and to be involuntary it must have been done in commission of an unlawful act not amounting to a felony, or in commission of a lawful act which might produce death, in an unlawful manner or without due caution or circumspection. West's Ann.Pen.Code, § 192, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Manslaughter".

3. Homicide ⇐34

Where deadly force is threatened and deadly force is used by way of self-defense, requirement of involuntary manslaughter statute that killing be in commission of lawful act which might produce death is met. West's Ann.Pen.Code, § 192, subd. 2.

4. Homicide ⇐34

Where defendant in crowded tavern was advanced upon by party carrying a knife and defendant used loaded gun as a bludgeon to strike advancing party, in using loaded gun as a defense weapon defendant acted "without due caution and circumspection" within manslaughter statute defining as involuntary manslaughter the killing of another while doing a lawful act without due caution or circumspection. West's Ann.Pen.Code, § 192, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Without Due Caution or Circumspection".

5. Homicide ⇐16

A loaded gun is so dangerous an instrument that a high degree of caution and circumspection is required of person handling it, and degree of care is even greater where weapon is handled in a crowded place, even though person carrying gun has no intention of using it. West's Ann. Pen.Code, § 192, subd. 2.

6. Homicide ⇐16, 268

A "deadly weapon" is one likely to produce death or great bodily injury, but deadly character of weapon may depend upon manner in which it is used and in that case the determination of a weapon's character as deadly or not is one for the jury under proper instructions. West's Ann.Pen.Code, § 245.

See publication Words and Phrases, for other judicial constructions and definitions of "Deadly Weapon".

7. Homicide ⇐268

In prosecution for murder, question of whether or not defendant's use of loaded gun not as a firearm but as a club or bludgeon in self-defense constituted use of a deadly weapon was for the jury. West's Ann.Pen.Code, § 245.

8. Assault and Battery ⇐50, 51

Where defendant, in order to protect himself from person advancing upon him, pulled out loaded gun which he used as a club, defendant upon pulling out gun had the "present ability" to commit a violent injury on person within assault statute, and when defendant used butt of gun to strike advancing person, a wrongful act committed by means of physical force against person of another occurred within battery statute. West's Ann.Pen.Code, §§ 17, 192, subd. 2, 240–243.

See publication Words and Phrases, for other judicial constructions and definitions of "Present Ability".

9. Homicide ⇐276

In prosecution for murder question of whether defendant in using loaded gun as a club to strike advancing person acted in self-defense presented a factual question for jury.

10. Criminal Law ⇐878(4)

In prosecution for assault with a deadly weapon and for murder, where record disclosed that defendant carrying loaded gun in crowded tavern, pulled the gun out in order to use the same as a club upon person advancing toward defendant, and upon striking such person with butt of gun, gun fired and bullet passed through wall of tavern and across street, where it killed deceased, there was no inconsistency in verdicts which acquitted defendant of assault with a deadly weapon but found defendant guilty of manslaughter. West's Ann.Pen. Code, §§ 187, 245.

Ellery E. Cuff, Public Defender, Richard F. Bird, James P. Nunnelley, Deputy Public Defenders, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was acquitted of assault with a deadly weapon upon James Wallis and convicted of manslaughter upon a charge of murder of Lela Glenn, for which he was sentenced to the state prison. It is from the judgment of conviction and order denying motion for new trial, defendant appeals.

The information charged defendant in two counts, the first alleging assault with a deadly weapon upon one Wallis, a felony, in violation of section 245, Penal Code; and the second, the murder of one Lela Glenn, as defined in section 187. Acquitting him on the first count, the jury on the second count found defendant guilty of manslaughter, a lesser but necessarily included offense in that of murder.

Appellant's sole ground for reversal is the insufficiency of the evidence to sustain the conviction of manslaughter. He argues that since the jury acquitted him on count one charging assault with a deadly weapon, the two verdicts are inconsistent in that the verdict of not guilty nullified the element of assault necessary to sustain the guilty verdict on the manslaughter charge; and in view of this inconsistency, the conviction of manslaughter, if it is to stand, must be sustained by sufficient evidence apart from that bearing upon the charge of assault with a deadly weapon. He claims such evidence does not exist in the record before us.

Respondent contends that the verdicts are not inconsistent, and even viewed from appellant's position, the evidence is sufficient to support the conviction of manslaughter.

The record discloses that on a Sunday evening Lela Glenn was killed by a gunshot while praying in Mount Calvary Holiness Church. The bullet killing her was fired from a beer tavern across the street, and was discharged from a revolver in defendant's possession when he used it to strike Wallis on the side of the head.

Defendant had acquired the gun three weeks before as security on a loan. Two

days before the homicide, the owner told defendant he could not pay him the money and authorized him to dispose of the gun to satisfy the debt. On Sunday, November 10, 1957, defendant decided to sell it, and being familiar with the kind of persons who frequent Bob's Place, a beer tavern, he went there between 12 and 1:30 p. m. for the purpose of finding someone to buy the gun.

When defendant first acquired the gun, he noticed it was loaded but did not touch it except to carry it home in a paper sack, in which it remained until he removed it to his pocket, on Sunday, and later to his belt, concealed by his coat, where he kept it until it was fired.

Defendant had known Mr. and Mrs. James Wallis for some years. At approximately 4 p. m., Mrs. Wallis entered the tavern. When her husband came in around 5:30, he approached his wife who was dancing with Sam Johnson, "snatched" her from him and "flung" her into defendant's arms. Defendant told him to let her alone and Wallis retaliated that it was none of his business. Words were exchanged among the four and Wallis left, saying he would be back. In about 35 minutes he returned and sat at the counter in the rear. The tavern was crowded. As defendant and a third man started to leave, Sam Johnson and Mrs. Wallis followed them. Wallis intercepted defendant approximately 5 feet from the door and said: "I told you that were my wife I were talking to." An argument ensued wherein defendant and Wallis called each other a "damn fool." Defendant testified Wallis approached him, opening a knife. Defendant said, "Negro, I will blow your brains out," and drew the gun from his belt, holding it by the handle. As Wallis came nearer, defendant swung the gun, hitting him on the left side of the head with the butt. As it struck Wallis it discharged, the bullet going through the boarded window of the tavern in a straight line across the street, through a wooden screen shielding the open doorway of the church, and entered Mrs. Glenn's head, killing her. Only one shot was fired. Immediately thereafter, defendant walked out of the tavern, backing out of the door, pointing the gun at the people inside. Outside, he threw the gun over a fence and was arrested a short time thereafter.

Defendant had been in the army and was familiar with army firearms, revolvers and pistols. He knew the gun was loaded but at no time opened it, took out the bullets, examined it, or tested it. He had no license to carry it.

At the trial, defendant testified he took the gun into Bob's Place for the sole purpose of selling it; he used it on Wallis only to defend himself against a deadly attack and neither cocked the gun, put his finger on the trigger, nor intended to fire it or use it other than as a club.

Appellant claims that since the jury, in acquitting him on count one, found the assault with a deadly weapon on Wallis did not occur, and since at the same time in convicting him of manslaughter the jury must have found that the assault did occur, the two findings are necessarily factually inconsistent. To remedy the situation appellant would have this court ignore the evidence he believes was rejected by the jury in finding him not guilty on count one and reverse the manslaughter conviction on the ground that the remaining evidence is insufficient to support it. He cites a variety of cases in which the reviewing court in one way or another refused to permit concurrent inconsistent decisions of fact and inconsistent verdicts to stand. In support of his argument he invokes the general principles underlying the doctrines of double jeopardy and res judicata.

Respondent cites section 954, Penal Code, which permits the prosecution to charge two or more different offenses, or the same offense in different counts; and which provides that "(a)n acquittal of one or more counts shall not be deemed an acquittal of any other count." It relies upon this section; People v. Ranney, 123 Cal. App. 403, 11 P.2d 405 and People v. Derenzo, 46 Cal.App.2d 411, 115 P.2d 858, in-

volving various counts based upon separate transactions; and a line of cases beginning with People v. Amick, 20 Cal.2d 247, 125 P.2d 25, holding generally that under section 954, Penal Code, "an apparent inconsistency of verdicts arising from different interpretations of the same facts afford no basis for reversal of a conviction."

[1] It is obvious from the authorities cited that for section 954 to control in a situation such as the one at bar, there can exist in the findings supporting the verdicts no *real* factual inconsistency. In the cases in which the court has found a factual inconsistency, rules apart from that laid down in section 954 appear to have been applied. An example is found in the case of In re Johnston, 3 Cal.2d 32, 43 P. 2d 541, involving a conspiracy situation. Respondent therein argued that section 954 controlled. The court rejecting this contention and citing People v. Koehn, 207 Cal. 605, 279 P. 646, stated at page 36 of 3 Cal.2d at page 543 of 43 P.2d: "The section was manifestly adopted for the purpose of enabling the prosecutor to designate or name the offenses by two or more names or designations and of making it impossible for the defendant to escape by reason of an error in designation of the crime. The proviso was written into the section for the purpose of declaring the law that a verdict apparently inconsistent shall afford no basis for reversal where the evidence is sufficient to support the conclusion that defendant is guilty of the offense of which he stands convicted."

Appellant relies mainly upon People v. Novo, 12 Cal.App.2d 525, 55 P.2d 915, 56 P.2d 560, and People v. Bales, 74 Cal.App. 2d 732, 169 P.2d 262, holding that when two findings of fact are in irreconciliable conflict the one less favorable to defendant must be set aside. In People v. Novo, supra [12 Cal.App.2d 525, 55 P.2d 916], defendant was originally charged with burglary and assault with intent to commit rape and was convicted of both second degree burglary and the assault. Since a necessary element of first degree burglary was "an assault on any person" and he was exonerated of first degree burglary by the conviction of second degree burglary, and since the same assault was involved in the second count, the court held the conviction on the latter could not stand. In People v. Bales, supra, the court held a conviction of forcible rape to be inconsistent with an acquittal of kidnapping, in which a verdict of "not guilty" nullified the element of fact (force) necessary to sustain the verdict of guilt.

In determining whether the verdicts are inconsistent, in that the findings upon which they are based are in irreconciliable conflict as in the Bales and Novo cases; and if so, whether apart from the evidence rejected by the jury in acquitting defendant of assault with a deadly weapon, there was sufficient evidence to sustain the conviction of manslaughter, we resort to the entire record before us. Defendant herein was charged with two separate offenses involving two separate victims, there being no reason apparent on the face of the information why he could not be convicted on both counts. Defendant was acquitted of assault with a deadly weapon and convicted of involuntary manslaughter.

The "assault" element of the offense of assault with a deadly weapon as defined by section 245, Penal Code, consists of "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" (Sec. 240, Penal Code); and the weapon in such a felony assault must be a "deadly" one. Sec. 245, Penal Code.

[2] Manslaughter is the unlawful killing of a human being without malice and to be involuntary it must have been done "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection" (Sec. 192, subd. 2, Penal Code).

In acquitting defendant on the felony charge of assault with a deadly weapon, the jury could have found that he did or

did not use a deadly weapon but that there was no assault, he having acted in self-defense; or the jury could have found that defendant did not act in self-defense, there being an assault, but that he did not use, as to Wallis, a "deadly weapon."

Regardless of its finding in connection with the kind of weapon used, if the jury predicated its acquittal upon the finding defendant acted in self-defense and hence there was no assault, inherent therein is also the finding that the act of defendant in defending himself was lawful. If, therefore, there is sufficient evidence in the record to justify a further finding that the act was such as might have produced death and that defendant acted "without due caution and circumspection," the conviction of involuntary manslaughter under section 192, subd. 2, Penal Code, must be upheld.

[3] Where deadly force is threatened, such as in the case at bar, wherein Wallis, with an open knife, advanced toward defendant threatening to cut his throat; and deadly force is used by way of self-defense as here, where defendant used the butt of a heavy, loaded revolver as a bludgeoning weapon; the requirement under section 192, subd. 2, Penal Code, of "a lawful act which might produce death" is met.

[4, 5] That defendant in using the loaded gun as a defense weapon, acted "without due caution and circumspection" is clear from the record, under the general rules governing the sufficiency of evidence to support a conviction. People v. Newland, 15 Cal.2d 678, 681–682, 104 P.2d 778. It has repeatedly been held that a homicide resulting from the negligent handling of firearms may be manslaughter (People v. Carmen, 36 Cal.2d 768, 776, 228 P.2d 281). It is universally accepted that a loaded gun is so dangerous an instrument that a high degree of caution and circumspection is required of the person handling it. People v. Freudenberg, 121 Cal.App.2d 564, 263 P.2d 875, 885. "From the time of the common law, firearms were recognized as a dangerous instrumentality because of their great potential harm and in the interest of the preservation of human life and safety, a high degree of care was demanded of those who use them. (Citations.)" People v. Freudenberg, 121 Cal.App.2d at page 580, 263 P.2d at page 885, supra. The degree of care is even greater where the weapon is handled in a crowded place (People v. Sidwell, 29 Cal.App. 12, 21, 154 P. 290). This is true even though the person carrying the gun has no intention of using it (People v. Carmen, 36 Cal.2d 768, 228 P.2d 281). In the Carmen case, the court said at page 776 of 36 Cal.2d, at page 286 of 228 P.2d: "Accepting defendant's testimony that he stumbled, and the gun went off, and that he did not intend to shoot or injure anyone, yet he was carrying the gun with a cartridge in the firing chamber, with the gun pointed forward, approaching a car occupied by persons, the jury would have been justified in concluding that he did not act with 'due caution and circumspection.'"

Knowing the gun to be loaded, defendant herein intentionally took it out of a place of comparative safety (a paper sack), putting it in his belt where it would be easily available to his use, and carried it into a crowded beer tavern, one of the most likely places in which an altercation could start. The defendant stayed approximately five hours in the tavern, a place which became increasingly crowded, and in which people were drinking. Defendant was familiar with Bob's Place and the type of people frequenting it and went there purposefully to seek out the type of persons who would be interested in buying a firearm. Defendant, after a preliminary verbal skirmish with Wallis, did later actually become engaged in an altercation with him, at which time the tavern was crowded with people. Defendant had often been to Bob's Place and knew its location and proximity to occupied premises. Under these circumstances, a man carrying a heavy, loaded revolver, which he knew or should have known was ready to fire, into a crowded beer tavern across from an occupied church, created a high risk of death to persons in and out of the tavern, who were within firing range. His subsequent use of the loaded gun which he had made easily

available to himself, even in self-defense and as a bludgeon rather than a firearm, in the crowded room, created even a greater risk of death or injury to innocent persons. Clearly these circumstances justified any finding of the jury that the defendant's acts were committed "without due 'caution and circumspection'." People v. Penny, 44 Cal. 2d 861, 285 P.2d 926, 931.

Defendant, having been in the army, was familiar with firearms and had the gun three weeks but at no time inspected it, tested it, or removed the bullets. He did, however, know it was loaded. He denied it was cocked but the jury could well have believed otherwise. To have fired, it must either have been cocked or defective. He had never examined the gun.

If, on the other hand, the jury found there was no self-defense and an assault existed but the use of the gun on Wallis in the manner indicated by the record was not such as to constitute it a "deadly weapon" within the meaning of section 245, Penal Code, the record likewise supports the conviction, on the theory the killing occurred in the commission of an unlawful act, not amounting to a felony.

[6] A deadly weapon is one likely to produce death or great bodily injury. People v. Fuqua, 58 Cal. 245, 247. However, the deadly character of the weapon may depend on the manner in which it is used, in which case the determination is one for the jury under proper instructions (People v. Fuqua, 58 Cal. 245; People v. Simpson, 134 Cal.App. 646, 651, 25 P.2d 1008).

[7] Defendant did not use the gun as a firearm but as a club or bludgeon. Whether it constituted a deadly weapon as to Wallis was for the determination of the jury. If the jury under the instructions given did not believe the revolver, as used in connection with Wallis, constituted a deadly weapon as to him then, if the evidence is sufficient to support a finding of unlawful assault, the killing of Mrs. Glenn constituted involuntary manslaughter. Sec. 192, subd. 2, Penal Code.

An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" (Penal Code, Sec. 240), and constitutes a misdemeanor (Sec. 17, 241, Penal Code). A battery, also a misdemeanor (Penal Code, Sec. 17, 243), is a wilful and unlawful use of force or violence on the person of another. Penal Code, Sec. 242.

[8] The "present ability" existed when defendant pulled out a heavy weapon in the course of his altercation with Wallis; and the attempt to commit a "violent injury," "any wrongful act committed by means of physical force against the person of another" (People v. Bradbury, 151 Cal. 675, 676, 91 P. 497; People v. McCoy, 25 Cal.2d 177, 191, 153 P.2d 315), occurred when defendant used the butt of the gun to strike Wallis, a successful attempt to use "physical force" on Wallis. And as to the "unlawfulness" of the assault, if defendant did not act in self-defense his acts with respect to Wallis were unlawful (People v. Lynch, 101 Cal. 229, 35 P. 860; Penal Code, section 693) not amounting to a felony. This applies also to the battery (Penal Code, Sec. 692) and his wilful use of force on Wallis satisfies every element of battery.

[9, 10] As to whether defendant acted in self-defense, the issue was a factual one for the jury. Two witnesses testified defendant and Wallis swore at each other and then defendant said, "Negro, I will blow your brains out," and drew his gun. Under the rules set out in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, we believe the evidence was sufficient to support a finding that defendant drew and used the gun not in self-defense but in the course of a deliberate assault on Wallis. Of all those who testified, only the defendant claimed Wallis advanced on him with a knife just before the time defendant drew his gun. The only witnesses to the altercation testified they saw no knife in Wallis' possession, and no knife was offered in evidence. The jury might well have rejected defendant's testimony and concluded he struck Wallis under no circumstance of self-defense. Since,

then, the killing of Mrs. Glenn occurred in the course of this assault, an unlawful act not amounting to a felony, the conclusion of involuntary manslaughter follows (Sec. 192, subd. 2, Penal Code; People v. Le Grant, 76 Cal.App.2d 148, 172 P.2d 554.)

A careful examination of the record convinces us that there exists no inconsistency in the verdicts, the evidence is sufficient to support the conviction of manslaughter and the jury was justified in returning such a verdict.

For the foregoing reasons the judgment and order denying motion for new trial are and each is affirmed.

WHITE, P. J., and FOURT, J., concur.

VINNELL COMPANY, Inc., a corporation, Plaintiff and Respondent,

v.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation, et al., Defendants.

Pacific Electric Railway Company, a corporation, Appellant.*

No. 23260.

District Court of Appeal, Second District, Division 3, California.

Jan. 19, 1959.

Hearing Granted March 18, 1959.

Proceeding to determine whether railroad was entitled to be indemnified by contractor, which performed work for flood control district, for injuries sustained by railroad's employee and whether railroad was entitled to recover from contractor for damage to railroad's property. The Superior Court of Los Angeles County, Emil Gumpert, J., rendered judgment for contractor, and railroad appealed. The District Court of Appeal, Patrosso, J. pro tem., held that where railroad granted, without charge, an easement to flood control district to construct storm drain below surface of its property, granted contractor license to go on railroad's property and derived no benefit other than that received by every real property owner within district, and license agreement required contractor to indemnify railroad against all claims resulting directly or indirectly from performance of any work upon property, contractor was liable for railroad's property damage and injuries suffered by railroad employee resulting from negligence of railroad's employees, who, after contractor began work, lined switch in such fashion as to direct train along a track that terminated at an excavation.

Reversed and trial court directed to enter judgment in favor of railroad.

* Opinion vacated 340 P.2d 604.

1. Contracts ⇦114, 189

Except in cases where public interest or some statutory privilege is involved, a party to a contract may absolve himself from liability for his future negligence but such contracts are not looked upon with favor, and where instrument purporting to exculpate one of parties from its future negligence is prepared entirely by party relying on its terms, words clearly and explicitly expressing that such was the intention of the parties are required.

2. Contracts ⇦114

Where it is clear intention of parties to agreement that one party thereto will be absolved from liability for his future negligence, agreement will be enforced.

3. Contracts ⇦169

In ascertaining intention of parties to a contract, resort is to be had to circumstances under which it was made, including situation of subject of instrument and of parties to it. West's Ann.Code Civ.Proc. § 1860; West's Ann.Civ.Code, § 1647.

4. Contracts ⇦189

In determining whether contract absolves party from liability for his own future negligence, inquiry in each case is whether language of particular instrument

when viewed in light of circumstances under which it was executed and situation of the parties is such as to manifest that parties intended that result. West's Ann.Code Civ.Proc. § 1860; West's Ann.Civ.Code, § 1647.

5. Indemnity ⇐8
Railroads ⇐73(4)

Where railroad granted, without charge, an easement to flood control district to construct drain below surface of its property, granted contractor license to go on railroad's property and derived no benefit other than that received by every real property owner within district, and license agreement required contractor to indemnify railroad against all claims resulting directly or indirectly from performance of any work upon property, contractor was liable for railroad's property damage and injuries suffered by railroad employee resulting from negligence of railroad's employees, who, after contractor began work, lined switch in such fashion as to direct train along track that terminated at excavation. West's Ann. Code Civ.Proc. § 1860; West's Ann.Civ. Code, § 1647.

6. Contracts ⇐147(2), 155

Agreement absolving railroad from its own future negligence would be strictly construed against railroad which prepared it and all ambiguities would be resolved in favor of other party thereto but where meaning was clear and intention of parties apparent such rule did not operate to change nature of contract or obligation assumed by parties thereunder and agreement would be interpreted according to intention of parties as expressed in instrument. West's Ann.Code Civ.Proc. § 1860; West's Ann. Civ.Code, § 1647.

E. D. Yeomans, Edward A. Hume, and James W. Obrien, Los Angeles, for appellant.

Thelen, Marrin, Johnson & Bridges; Callaway, Kirtland & Packard, and Wallace C. Reed, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

This action was submitted to the trial court upon an agreed statement of facts from which the following appears:

The Los Angeles County Flood Control District undertook the project of constructing a storm drain system to service a portion of the city of Long Beach, the terminal end of which was to lie underneath the Fairbanks Yard of the defendant and cross-complainant Pacific Electric Railway Company, hereinafter referred to as "railroad," and its outlet to be at the Los Angeles County Flood Control channel which borders the westerly side of the railway yard.

On or about the 21st day of October 1954 the plaintiff and cross-defendant Vinnell Company, hereinafter referred to as "Vinnell" or "contractor," entered into a contract with the flood control district by the terms of which Vinnell agreed to construct, among other things, that portion of the storm drain project which was to lie below the surface of the railroad's Fairbanks Yard and to terminate at the Los Angeles Flood Control channel.

On or about the 28th day of December 1954 the flood control district entered into an agreement with the railroad whereby the railroad gave the flood control district the right to enter upon the Fairbanks Yard to construct a storm drain below the surface of the railroad tracks and an easement was granted to the flood control district for the use of the railroad's land for the described project. This right of entry and easement was granted by the railroad to the flood control district without charge.

On or about April 26, 1955, Vinnell and the railroad entered into an agreement whereby the railroad granted Vinnell the right to enter upon its Fairbanks Yard for the purpose of constructing the described storm drain. This agreement, after reciting that the railroad had entered into an agreement permitting the district to construct and maintain a storm drain under railroad's tracks located at its Fairbanks Yard and that Vinnell had entered into a

contract with the district covering the work to be performed in connection with construction of said storm drain, in consequence of which it would be necessary for Vinnell, its agents and employees and subcontractors and the agents and employees of such subcontractors, to enter upon railroad's property and the premises adjacent thereto, provides that the railroad in consideration of the faithful performance of the promises and covenants contained in the agreement grants permission to Vinnell to enter upon its property. Among other things, Vinnell covenants and agrees to procure, in advance of performing any work upon the railroad's premises, contractors' public liability insurance with a limit of liability of not less than $200,000 for all damages arising out of bodily injuries to or death of any one person with a total limit of not less than $400,000 for all damages arising out of bodily injuries to or death of two or more persons in any one accident or occurrence. Also contractors' property damage liability insurance with a limit of not less than $50,000 for all damages arising out of injuries to or destruction of property in any one accident or occurrence with a total limit of not less than $100,000 for all damages arising out of injury to or destruction of property during the policy period and also "without limitation as to the generality of the foregoing * * * Public Liability and Property Damage Insurance in amounts not less than $200,000/400,000 Public Liability and $50,000/100,000 Property Damage Insurance, insuring the contractual liability of Contractor under the provisions of Section 8 hereof." Section 8 of the agreement last referred to reads as follows:

"8. Contractor hereby releases and agrees to indemnify and save Railroad harmless from and against any and all injuries to and deaths of persons, claims, demands, cost, loss, damage and liability, howsoever same may be caused, resulting directly or indirectly from the performance of any or all work to be done upon the property and beneath the tracks of Railroad and upon the premises adjacent thereto under said agreement between District and Contractor, also from all injuries to and deaths of persons, claims, demands, cost, loss, damage and liability, howsoever same may be caused, either directly or indirectly, made or suffered by said Contractor, Contractor's agents, employes and subcontractors, and the agents and employees of such subcontractors, while engaged in the performance of said work."

This agreement was prepared by the railroad and submitted to Vinnell on April 18, 1955. At no time prior to the accident in question were the provisions of section 8 of said agreement discussed by the parties thereto. The agreement was executed by Vinnell with no modifications being made in the agreement and returned to the railroad on April 26, 1955. Thereafter, Vinnell entered upon the railroad's Fairbanks Yard and commenced its operations under its contract with the flood control district.

The nature of the construction by Vinnell was such that the railroad took up its tracks in stages and constructed detours, after which Vinnell excavated the required ditch and laid the storm drain conduits. The railroad's employees engaged in operating a frieght train through the yard mistakenly lined a switch in such fashion as to direct a railroad train along a track that had been terminated at the excavation rather than along a track that had been used as a detour. It is admitted by the railroad that such action on the part of the railroad's employees amounted to negligence. As a result the locomotive and train ran off the end of the track and into the excavation in which work was proceeding, damaging Vinnell's work in progress in the agreed sum of $1,591.55. The railroad's property was damaged in the agreed sum of $2,872.19. An employee of railroad suffered personal injuries as a result of this accident and has made a claim for damages against both Vinnell and the railroad.

The question presented is whether the provisions of section 8 of the agreement above quoted operate to exculpate the railroad from liability for its own negligent

actions and whether by reason thereof Vinnell is required to indemnify the railroad for the damage to its locomotive and hold the railroad harmless from liability to its employee for his injuries suffered as a result of the accident in question.

The trial court held that by their agreement the parties did not intend that Vinnell should indemnify the railroad against liability for damage caused by the railroad's sole negligence or release the railroad from liability to Vinnell for damages sustained by it as a result of the railroad's negligence. From the ensuing judgment so declaring railroad appeals.

[1, 2] It was settled at a relatively early date in this state that except in cases where the public interest or some statutory provision was involved a party to a contract may absolve himself from liability for his future negligence. Stephens v. Southern Pac. Co., 1895, 109 Cal. 86, 41 P. 783, 29 L.R.A. 751. However, such contracts are not looked upon with favor by the courts and "where the language of an instrument purporting to exculpate one of the parties for its future negligence was prepared entirely by the party relying on its terms, words clearly and explicitly expressing that this was the intent of the parties are required." Basin Oil Co. of California v. Baash-Ross Tool Co., 1954, 125 Cal.App.2d 578, 595, 271 P.2d 122, 132. Nonetheless, "[w]here such is the clear intention of the parties the agreement will be enforced." Rice v. Pennsylvania R. Co., 2 Cir., 1953, 202 F.2d 861, 863.

[3, 4] That the language of the agreement here is sufficiently comprehensive to indemnify the railroad against loss or damage occasioned by its own negligence was directly held in Southern Pac. Co. v. Fellows, 1937, 22 Cal.App.2d 87, 71 P.2d 75. In ascertaining the intention of the parties to a contract resort is to be had to "the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it." Code Civ.Proc. § 1860; Civ.Code, § 1647. Thus, the inquiry in each case is whether the language of the particular instrument when viewed in the light of the circumstances under which it was executed and the situation of the parties is such as to manifest that the parties intended this result. Basin Oil Co. of California v. Baash-Ross Tool Co., supra; Sproul v. Cuddy, 1955, 131 Cal.App.2d 85, 280 P.2d 158.

[5] Construed in the light of the foregoing principles we are of the view that the language of the contract here in question clearly evidences the intention of the parties that Vinnell is required to indemnify the railroad against any loss or damage sustained by it as the result of the negligence of its agents and employees resulting directly or indirectly from the performance of any work done by Vinnell upon the railroad's property.

First, let us look at the situation of the parties at the time the agreement was executed. The railroad had granted, without charge, an easement to the flood control district to construct a storm drain below the surface of its property and railroad tracks, following which it, by the agreement in question, granted Vinnell a license to go upon its property in order to perform the necessary work required to construct the storm drain under Vinnell's contract with the district. The railroad derived no benefit from the construction of the terminal end of the flood control project beneath the surface of its property other than the incidental benefit which every owner of real property within the flood control district receives as the result of the construction of flood control projects therein. Thus, without any commensurate benefit to itself, the railroad granted Vinnell a license to go upon its property and conduct operations thereon which, to say the least, could reasonably be anticipated by the parties as creating a hazard to the railroad's operations. Under the circumstances, it is only reasonable to assume that the parties intended that the railroad should be protected against such hazards, for unless the purpose of the execution of the agreement by the railroad and Vinnell

was to afford protection to the former there was no occasion for its execution for no benefits were thereby conferred upon the railroad as it would remain liable for the negligence of its agents and employees.

In the light of this situation we direct our attention to the provisions of the license agreement. In the first place, as previously noted, Vinnell was required to procure and maintain in full force and effect contractors' public liability insurance for all damages arising out of bodily injuries to or death of any person and contractors' property damage liability insurance for all damages arising out of injuries to or destruction of property. It is apparent that the liability which Vinnell was required to insure against by this provision was for loss or damages to persons and property occasioned by the acts of its agents and employees and necessarily included loss or damage so occasioned to the railroad's property and employees. If the parties contemplated that this was the extent of Vinnell's liability to the railroad the agreement could well have stopped here. Additionally, however, Vinnell was required to procure and maintain in full force and effect public liability and property damage insurance "insuring the contractual liability of Contractor under the provisions of Section 8 hereof," which is the indemnity provision which we have hereinabove quoted at length.

Here we have a clear recognition by the parties that the contractual liability assumed by Vinnell under the provisions of section 8 comprehends something other and in addition to liability for loss or damage resulting from the acts of Vinnell, its agents and employees and for which in any event it would be responsible even though there were no express agreement to that effect. And what could this be other than for loss or damage resulting from the acts or conduct of the railroad's employees or agents for which it might be responsible?

As pointed out in City of Cleveland, Ohio v. Baltimore & O. R. Co., 6 Cir., 1934, 71 F.2d 89, to hold, as respondent contends and the trial court determined, that the provisions of the agreement above referred to were intended to indemnify the railroad only against the acts of Vinnell and its agents is to render the same meaningless. The railroad needed no protection against the negligence of Vinnell or its employees for it could in no event be responsible therefor. Vinnell was not engaged in performing any work for the railroad and it and its employees were in no sense the agents or employees of the railroad.

The case last cited in its factual aspect is strikingly similar to the case at bar. There the railroad company had granted an easement to the city of Cleveland to construct a sewer under the railroad's right of way under an agreement which among other things contained a provision reading as follows (at page 90): " 'To indemnify and save the Railroad free and harmless from any and all damages to person or persons (including employees of the Railroad) or property (including that belonging to or in the custody of the Railroad), by reason of or in any way connected with the erection, construction, reconstruction, maintenance, alteration and/or repair of said sewer at such crossing, with the Railroad track by the City and/or its contractors, agents, employees or the sub-contractors thereof.' "

As the result of the railroad's negligence an injury was caused to an employee of the contractor performing the work of constructing the sewer for the city. The injured employee commenced an action against the railroad which was settled by the payment of $8,000 by the railroad, which thereupon instituted an action against the city for reimbursement under the terms of the indemnity clause of the contract quoted above. In affirming judgment in favor of the railroad the court said (at page 91): "Contracts must be construed with reference to the situation and surroundings of the parties. The sewer was appellant's project. It desired the easement and appellee was willing to grant it but upon the express provision that the work should be at the sole cost and expense

of appellant. Appellee naturally desired that it should itself protect and support its track during the construction work and agreed to do so and to furnish the labor, material and work necessary thereto but upon the condition that the cost should be paid by appellant. * * * Further than the privilege of connecting with the sewer the agreement conferred no benefit upon appellee. Under such circumstances it was but natural that appellee should demand protection from the consequences of its own acts in doing its part of the work. It had the right to require such an obligation. * *

"To hold that the agreement indemnifies against the acts of appellant and its agents only is to destroy its value. Appellee needed no protection against the misconduct of appellant or those acting for it for the law could not hold appellee responsible therefor, since appellant, its contractors and employees were in no sense the agents of appellee."

In Rice v. Pennsylvania R. Co., supra, 2 Cir., 1953, 202 F.2d 861, the action was brought by the owner of a scow for damages resulting from the negligent manner in which it had been loaded, the loading having been done by the United States Government under a contract with a purchaser of the cargo. The contract of purchase contained among other provisions, the following (at page 862): "The contractor [purchaser] agrees to keep and hold the Government safe and harmless from any and all claims of whatsoever nature or kind for damages for injuries to person or property, occurring during the removal of the said material." The trial court held that the provision did not protect the government from damage caused by its own negligence. The court of appeals reversed and, in the course of its opinion, said (at page 862): "With the generally accepted rule that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms, we are in complete accord. * * * In the case at bar, however, the damage was caused by negligence in the way the scrap iron was dropped on the deck of the scow; and the covenantor agreed to save the covenantee harmless from claims of damages 'for injuries to person or property occurring during the removal' of the scrap. The scrap was in the possession of the United States and it had agreed to load it. No one else had anything to do with the loading. It is impossible to conceive how any valid claim could arise against the Government for injuries 'occurring during the removal' unless its employees were negligent. Consequently we see no way to interpret the covenant otherwise than as an unequivocal expression of intent to indemnify the United States against the negligence of its own employees. Where such is the clear intention of the parties the agreement will be enforced." Citing among other cases, Southern Pac. Co. v. Fellows, supra, 22 Cal.App.2d 87, 71 P.2d 75.

We see no merit in respondent's contention that to construe the agreement here as indemnifying the railroad against loss or damage occasioned by its own negligence would result in requiring Vinnell to indemnify the railroad for damages resulting from "an accident hundreds of miles from the work site between two of its trains occasioned solely by the negligent rerouting of the trains by the railroad itself." Obviously such an accident could not reasonably be said to result directly or indirectly from the performance of any work by the contractor upon the railroad's premises; and we do not understand the respondent to contend that the damage here was unrelated to a condition created by Vinnell upon the railroad's premises.

None of the California cases relied upon by the respondent is factually in point with the instant case. In the first of these, Pacific Indemnity Co. v. California Electric Works, 29 Cal.App.2d 260, 262, 84 P. 2d 313, the facts were these: The Standard Oil Company was engaged in constructing a building in the city of San Diego at a total cost of $30,000. In connection therewith, they entered into a

contract with the defendant Electric Works for the furnishing of material and labor in the sum of approximately $3,700. This contract contained an indemnification provision somewhat similar to that here involved. An employee of Electric Works was injured on the job and brought suit against the Standard Oil Company in which he recovered a judgment of $5,594.03. Pacific Indemnity Co. had insured Standard Oil on the construction of the building and thereafter it and the oil company instituted an action claiming indemnification under the terms of the contract. At the outset of its opinion the court, after observing (29 Cal.App.2d at page 272, 84 P.2d at page 320) that "[t]he language used in the contract would seem to be sufficiently broad to indemnify the Standard Oil Company against its own negligence if there exists no extrinsic ambiguity therein,"[1] proceeded to say (29 Cal.App.2d at page 273, 84 P.2d at page 320): "The rule, therefore, is that if there is any reasonable room for doubt as to what the contract means or as to what the exact words thereof apply to, then parol evidence is properly admitted. In the instant case we think there is ample room for doubt as to whether or not the contract was meant to apply to the indemnity of the Standard Oil Company against its own wrong." The court then proceeded to hold that the trial court did not err "in the admission of evidence to explain what the parties intended by what they said in the contract," and concluded as follows (29 Cal.App.2d at page 275, 84 P.2d at page 321): "As we understand the record, the appellants [plaintiffs] have no complaint as to the finding of the trial court herein, if it was proper to admit evidence other than the contract itself. That is to say, when the evidence was admitted, it was legally susceptible of the interpretation placed on it by the learned trial judge," to the effect that the provisions of the contract did not operate to indemnify the Standard Oil Company from liability for damage occasioned by its own negligence.

The opinion does not disclose what the extrinsic evidence therein referred to consisted of and the decision would seem to stand for no more than that the language of the contract there involved when construed in the light of the extrinsic evidence did not evidence an intent upon the part of the Electric Works to indemnify the Standard Oil Company from damage occasioned or loss sustained by it as the result of its own negligence.

In Basin Oil Co. of California v. Baash-Ross Tool Co., supra, 125 Cal.App.2d 578, 271 P.2d 122, the plaintiff instituted the action to recover damages sustained by it as a result of defective suspension plugs manufactured and sold to it by the defendant. The latter sought to escape liability for its negligence in the manufacture of the plugs by reason of provisions contained in the invoices, sent by the defendant to the plaintiff following the deliveries of the plugs, reading in part as follows (125 Cal.App.2d at page 589, 271 P.2d at page 128): "All goods and materials are carefully tested and inspected before leaving point of manufacture, but as it is impossible to always detect imperfections, the only guarantee that is given by us, or for which we are in any way liable, is to replace such goods as prove defective when used for the purpose for which manufactured, f. o. b. at point of delivery to carrier of goods being replaced, or allow credit for such goods at our option. All replaced goods are to be returned to us transportation prepaid. Under no circumstances are we responsible for any damages beyond the price of the goods. No damages or charges of any kind, either for labor, expenses or otherwise, suffered or incurred by the cus-

1. While this case was decided more than a year after the decision in Southern Pac. Co. v. Fellows, supra, 22 Cal.App.2d 87, 71 P.2d 75, seemingly the latter case was not called to the court's attention for it is not mentioned in the opinion and it is stated therein that (29 Cal.App.2d at page 275, 84 P.2d at page 321) "[i]n California, so far as we are aware, the question has not been directly passed upon."

tomer in repairing or replacing defective goods, or occasioned by them will be allowed."

Speaking of the effect of the foregoing language the court said (125 Cal.App.2d at page 596, 271 P.2d at page 132): "Examined in their entire context, it is patent from an analytical reading of the documents in question that they go no further than to limit Baash-Ross's liability for breach of warranty. Their language indicates that it is fundamental that reasonable care in relation to the manufacture of the product will be used. But a seller's obligation to a buyer for breach of a warranty is one of strict and absolute liability. (Citations.) Where a breach of warranty is established, liability is imposed entirely independent of the question of negligence on the part of the seller. (Citations.) The sense of the conditions on the documents indicates a dominant purpose to escape from the full consequences of such strict liability. The language quoted plainly shows that Baash-Ross, asseverating that it would carefully test and inspect its products, was seeking exculpation not from its own affirmative negligence as a manufacturer and supplier of goods but from liability that might be fastened upon it from sales of goods which might prove defective despite its exercise of reasonable care. In short, its liability was limited in the event of a breach of any warranty upon which the sales were made and not in the event of a breach of its duty of care to its customers."

It is at once apparent from a reading of the terms of the contract there involved that it differs materially from that with which we are here concerned. As the court in its opinion points out, the language of the agreement, far from indicating an intent that the defendant was to be absolved from liability for its own negligence, affirmatively asserted that it had exercised due care and inspection in the manufacture of the products which produced the damage.

In Sproul v. Cuddy, supra, 131 Cal.App. 2d 85, 280 P.2d 158, the defendant leased an invalid walker to the plaintiff which toppled over throwing plaintiff to the floor and injuring her. The lease agreement provided as did the invoices in the Basin Oil Company case that the defendant had used great care to have all of its equipment in good order and repair but gave no warranty express or implied as to the condition or quality thereof and would in no way be responsible for damages resulting from the use thereof. Speaking of the language of the contract there involved, the court said (131 Cal.App.2d at page 95, 280 P.2d at page 164): "Measured by the above criteria, it is at once apparent that not only does Exhibit 'A' contain no reference to negligence, nor any clear and explicit indication that defendants were attempting to relieve themselves of their duty of using due care with reference to their rental of the 'invalid walker,' but the exact contrary appears from the opening asseveration that the licensor 'uses great care to have all its equipment in good order and repair.' This statement, even if attenuated so as to relate to reasonable care rather than 'great care,' permeates the entire limitation notice and is the pre-condition for the operation of the comprehensive exculpatory declarations which follow. It qualifies and limits, at least to the extent there announced, the ensuing language. Such an interpretation is plainly dictated by the principles to which we have hitherto adverted. It seems also to give all the language used a harmonious construction and avoids perverting the notice into nothing more than a semantic trap for the unwary." And continuing at page 96 of 131 Cal.App.2d, at page 164 of 280 P.2d, the court said: "Similarly, here, it cannot be reasonably contended that a party who announces that he uses great care to have his rental equipment in good order and repair was attempting to exculpate himself from liability if the facts should show that he used no care whatsoever, or indeed, was grossly negligent."

It will be noted that in each of the foregoing authorities upon which respondent relies the contract in which the claimed covenant of indemnification appeared was

one under which the party claiming indemnification derived a direct benefit and the covenant was merely incidental to the principal object of the contract. Here, on the contrary, as we have previously pointed out, the appellant derived no benefit whatsoever from the work performed by the respondent under its contract with the flood control district, and the sole purpose of the agreement between the parties was to afford protection to the railroad from loss or damage howsoever caused resulting directly or indirectly from the performance of the work by the contractor upon its premises pursuant to Vinnell's contract with the flood control district. Moreover, the language of the agreements involved in the Basin Oil case and in the Sproul case was, to say the least, equivocal and in nowise comparable to that found in the agreement here.

City of Oakland v. Oakland Unified School Dist., 141 Cal.App.2d 733, 297 P.2d 752 also relied upon by the respondent, is even less in point. There the plaintiff had leased to the defendant the arena of its municipal auditorium building in which to hold a music festival. The lease contained a provision reading as follows (141 Cal.App. 2d at page 735, 297 P.2d at page 753): " 'That the lessee will hold the lessor free from any liability or claim for damages or suit for or by reason of any injuries to any person or property, of any kind whatsoever, from any cause whatsoever arising out of the use and occupation of *the premises* by the lessee; and the lessee hereby covenants and agrees to indemnify and save harmless the lessor from all liability or damage on account of or by reason of any such injuries or damages.' (Emphasis added.)"

A patron who had attended a performance in the auditorium after leaving it and while walking on a walkway in front of and adjoining the auditorium building stepped in a hole and sustained injuries. The court after stating that there was no question "but that the indemnity provision is a valid one" held that it did not operate to indemnify the plaintiff from liability for the reason that the damage sustained by the patron did not occur upon the *leased premises*.

[6] While it is true that the agreement here, having been prepared by the appellant, is to be strictly construed against it and all ambiguities are to be resolved in favor of the respondent, where the meaning is clear and the intention of the parties apparent this salutary rule cannot operate to change the nature of the contract or the obligations assumed by the parties thereunder. It must still be interpreted according to the intention of the parties as expressed in the instrument. Baine v. Continental Assur. Co., 1942, 21 Cal.2d 1, 5, 129 P.2d 396, 142 A.L.R. 1253.

We find it unnecessary to review the other authorities from other jurisdictions cited by the respective parties. Admittedly, they are not entirely harmonious but the decision in each case must of necessity depend in large measure not only upon the language of the particular instrument involved but as well upon the situation of the parties and the purposes and objects thereof.

For the reasons hereinabove set forth we are of the view that the parties to the agreement here intended that the appellant should be indemnified against loss and damage resulting directly or indirectly from the performance of work by the respondent upon the appellant's premises, including such as may have been occasioned by the negligence of appellant's agents and employees.

The judgment is reversed and the trial court is directed to amend its findings of fact and conclusions of law and enter judgment in favor of the appellant in accordance with the views herein expressed.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 69

ALVAK ENTERPRISES, a corporation, Plaintiff and Respondent,

v.

Philip C. PHILLIPS and Edith Phillips, Defendants and Appellants.

Philip C. PHILLIPS, Edith Phillips and Milton Niemetz, Cross-complainants and Appellants,

v.

ALVAK ENTERPRISES, a corporation, Alfred Spivak et al., Cross-defendants and Respondents.

Civ. 5911.

District Court of Appeal, Fourth District, California.

Jan. 9, 1959.

Rehearing Denied Feb. 2, 1959.

Hearing Denied March 4, 1959.

Proceeding for stay of dissolution of corporation and for purchase of stock of persons seeking dissolution. The Superior Court, Riverside County, Hilton H. McCabe, J., entered order staying dissolution and directing sale of stock, and the person seeking dissolution appealed. The District Court of Appeal, Coughlin, J. pro tem., held that where the three directors adopted resolution authorizing president to apply to corporation commissioner for a permit to issue 50 shares of capital stock to president who was a director, and 50 shares to another director on certain terms and president moved for stay of proceedings, instituted by such director and his wife, who was the third director, to dissolve corporation and for purchase of such director's stock, and thereafter permit was granted and stock was issued, the procedure of filing additional affidavits relating to granting of permit and issuance of stock, after service of copies thereof upon the opposing counsel, without obtaining prior permission to do so based on notice and motion, although irregular, was not prejudicial.

Order affirmed.

1. Appeal and Error ⇐931(5)

On appeal from order staying proceedings to dissolve corporation and directing sale of stock, it would be presumed that trial court accepted the evidence which would support its order. West's Ann. Corp.Code, § 4658.

2. Motions ⇐19

The purpose of statute requiring the moving party, in his notice of motion, to designate the papers upon which he will rely, and to accompany such notice with copies thereof unless previously served on the opposing party is to enable the party served with notice to prepare a defense to the proposed motion if he so desires. West's Ann.Code Civ.Proc. § 1010.

3. Motions ⇐30

An affidavit filed with court after submission, without notice to opposing party, cannot be considered in support of motion even though court granted permission to file the same. West's Ann.Code Civ.Proc. § 1010.

4. Motions ⇐30

Affidavits filed after submission upon consent obtained at the hearing of motion properly may be considered by the court.

5. Trial ⇐70

A trial court may set aside an order of submission and permit introduction of additional evidence relevant to a pending issue of fact, either upon request or upon its own motion.

6. Motions ⇐30

When additional evidence in support of motion is to be produced by affidavits, the proper method for the presentation thereof is upon notice and motion requesting permission to file the same, and if such affidavits are filed without permission they may be disregarded. West's Ann.Code Civ. Proc. § 1010.

7. Corporations ⇐607

The sections of the Corporations Code providing for a stay of proceedings to dissolve a corporation and the purchase of the shares held by those seeking its dissolution are mandatory, and when the prescribed conditions are met the court must recognize the right thus clearly given and must stay the proceeding and proceed to

ascertain and fix the value of the shares. West's Ann.Corp.Code, § 4658 et seq.

8. Corporations ⇐614(8)

Where three directors adopted resolution authorizing president, who was a director, to apply to corporation commissioner for a permit to issue 50 shares of capital stock to president and 50 shares to another on certain terms and president moved for stay of proceedings, instituted by such director and his wife, who was the third director, to dissolve corporation and for purchase of such director's stock, and thereafter permit was granted and stock was issued, the procedure of filing additional affidavits relating to granting of permit and issuance of stock, after service of copies thereof upon the opposing counsel, without obtaining prior permission to do so based on notice and motion, although irregular, was not prejudicial. West's Ann. Code Civ.Proc. § 1010; West's Ann.Corp. Code, § 4658 et seq.

Thompson & Colegate, Riverside, Joseph Henry Wolf, Los Angeles, and F. Gillar Boyd, Jr., Palm Springs, for appellants.

Shaw & Barnett, by William W. Shaw, Riverside, for respondents.

COUGHLIN, Justice pro tem.

The plaintiff Alvak Enterprises, a California corporation, brought this action to enjoin the defendants Philip C. Phillips and Edith Phillips from interfering with the operation of a hotel owned by the corporation. The defendants answered and eventually, as directors, filed a second amended cross-complaint seeking dissolution of the corporation; a Milton Niemetz joined with them as cross-complainants; the corporation and its president, Alfred Spivak, were named as cross-defendants. Thereupon, Mr. Spivak, as owner of 50 per cent of the shares of the corporation, by notice and motion, initiated proceedings under section 4658 of the Corporations Code to avoid dissolution of the corporation by the purchase of the remaining 50 per cent of said shares which he alleged were owned by the cross-complainants. His notice recited that the motion would be based on "all the papers, records and files in the action". Prior to this time motions with respect to a preliminary injunction and for the appointment of a receiver had been heard by the court. Voluminous affidavits had been filed in connection with these hearings. In addition, the original complaint, an answer thereto, the original cross-complaint, an amended cross-complaint and a second amended cross-complaint with an answer thereto, all verified, were on file in the action. There was a great deal of conflicting evidentiary matter thus presented to the court on the motion to stay proceedings and avoid a dissolution under section 4658 et seq. of the Corporations Code.

[1] On appeal it will be presumed that the trial court accepted the evidence which will support its order. Reviewing the record pursuant to this rule, the following is a fair statement of the facts: In 1957, Mr. Spivak, who was president of the plaintiff corporation, which then was dormant, engaged in negotiations with Mr. Phillips culminating in an agreement resulting in the purchase of a hotel; the vesting of title thereto in the corporation which had been reactivated; a reorganization of the board of directors by the election of Mr. and Mrs. Phillips as directors; and the election of Mr. Phillips as secretary-treasurer. Pursuant to their agreement, Mr. Spivak and Mr. Phillips made the financial arrangements incident to the purchase of the hotel and, in return, each of them was to receive 50 shares of the capital stock of the corporation for a cash consideration of $400 per share or, in lieu of cash, the cancellation of promissory notes which the corporation had executed in their favor covering money advanced in connection with the purchase of the hotel. The board of directors adopted a resolution authorizing the president to make application to the Corporation Commissioner for a permit to issue such shares of stock to Mr. Spivak and Mr. Phillips upon the terms indicated, and instructing

the President and Secretary to issue such shares, for the consideration stated, upon the granting of such a permit. However, no permit had been obtained and no shares of stock had been issued up to November 8, 1957, when the motion to stay dissolution of the corporation and proceed under section 4658 of the Corporations Code was taken under submission. Thereafter, the Corporation Commissioner granted the requested permit and thereupon 50 shares of the corporation's capital stock were issued to Mr. Spivak, and 50 shares to Mr. Phillips; certificates of stock evidencing these shares were placed in escrow in accord with the terms of the permit.

On November 21, 1957, an affidavit setting forth a copy of the permit, and on November 25, 1957, a further affidavit relating the facts with respect to the issuance of shares of stock pursuant thereto were filed with the trial court. Copies of these affidavits were served upon the attorneys for the defendants and cross-complainants. On December 23, 1957, the court made its order granting the motion. In the meantime no objection to the filing or consideration of these affidavits, nor any reply thereto had been made. The order granting the motion recited that the "affidavit filed on November 25, 1957, is hereby incorporated within the papers and pleadings considered by the court * * *" The court found that Mr. Spivak was the holder of 50 per cent of the shares of the corporation and that Mr. and Mrs. Phillips were the holders of the remaining 50 per cent; appointed a commissioner to appraise the fair value of the Phillips shares; and ordered Spivak to post a bond as required by law. A notice of appeal from this order was filed by the "defendants and cross-complainants".

Appellants contend that the provisions of section 4658 of the Corporations Code cannot be invoked if the subject corporation has no stock issued and outstanding; that at the time the motion was submitted the evidence did not establish the existence of any such stock; that the subsequently filed affidavits establishing the issuance of stock should not have been considered by the court; and, consequently, the order should be reversed.

Respondents contend that the affidavits in question were properly considered; that, in any event, the evidence established that Mr. and Mrs. Phillips had subscribed to stock of the corporation; that section 4658 applies to subscribed stock, as well as to issued stock; and, therefore, the order should be affirmed.

[2–6] Section 1010 of the Code of Civil Procedure provides that a notice of motion shall state "the grounds upon which it will be made, and the papers, if any, upon which it is to be based" and requires that a copy of any such paper shall accompany the notice, if not previously served on the party to be notified. The obvious purpose of the statute is to enable the party served with notice to prepare a defense to the proposed motion if he so desires (Broderick v. Cochran, 18 Cal.App. 202, 204, 122 P. 972). As a consequence, an affidavit filed with the court after submission, without notice to the opposing party, cannot be considered in support of the motion even though the court granted permission to file the same (Forrest v. Knox, 21 Cal.App. 363, 131 P. 894). Nevertheless, the rule prescribed by said section 1010, requiring the moving party, in his notice of motion, to designate the papers upon which he will rely, and to accompany such notice with copies thereof unless previously served on the opposing party, is not without exception. Affidavits filed after submission upon consent obtained at the hearing of the motion properly may be considered by the court (Salsberry v. Julian, 98 Cal.App. 638, 643, 277 P. 516). Under well-settled principles, a trial court may set aside an order of submission and permit the introduction of additional evidence relevant to a pending issue of fact (Badover v. Guaranty Trust & Savings Bank, 186 Cal. 775, 777, 200 P. 638; Land v. Johnston, 156 Cal. 253, 257, 104 P. 449; Broder v. Superior Court, 103 Cal. 121, 37 P. 143), either upon request or upon its own motion (Rutledge v.

Barger, 82 Cal.App. 356, 360, 255 P.2d 537; In re Estate of Hunsicker, 65 Cal. App. 114, 118, 223 P. 411); and in some instances it is error to refuse to do so (Sulloway v. Sulloway, 160 Cal. 508, 514, 117 P. 522; Metropolis Trust & Savings Bank v. Monnier, 169 Cal. 592, 599, 147 P. 265.) That the issue of fact to be decided arises out of the hearing of a motion, based on affidavits, rather than out of a trial, does not foreclose the application of the foregoing general principles. However, when additional evidence is to be produced by affidavits, orderly procedure dictates that the proper method for the presentation thereof is upon notice and motion requesting permission to file the same (Hecq v. Conner, 203 Cal. 504, 506, 265 P. 180.) If such affidavits are filed without permission they may be disregarded. (State ex rel. King v. Second Judicial District Court, 25 Mont. 202, 64 P. 352; Jacoby v. Mitchell, 19 Neb. 537, 26 N.W. 255.)

The procedure followed in the case at bar, of filing additional affidavits after service of copies thereof upon the opposing counsel, without obtaining prior permission to do so based on notice and motion, although irregular, was not prejudicial under the circumstances.

[7, 8] The sections of the Corporations Code providing for a stay of proceedings to dissolve a corporation and the purchase of the shares held by those seeking its dissolution are mandatory, and "when the prescribed conditions are met the court must recognize the right thus clearly given and must stay the proceeding and proceed to ascertain and fix the value of the shares" in question. Merlino v. Fresno Macaroni Mfg. Co., 64 Cal.App.2d 462, 464, 148 P.2d 884, 885. "Under section 4–½, article 6 of the Constitution, the appellate courts cannot set aside a judgment rendered in the Superior Court for any error * * * in procedure, unless the court, upon examining the record, shall be of the opinion that the particular error complained of has resulted in a miscarriage of justice." Parker v. Swett, 188 Cal. 474, 484, 205 P. 1065, 1069. "The burden rests upon the party complaining not only to show error but also to show that the error is sufficiently prejudicial to justify a reversal." Coleman v. Farwell, 206 Cal. 740, 741, 276 P. 335, 336. Copies of the supplemental affidavits filed in this case admittedly were served upon appellants' attorneys; they had notice of the contents thereof; the first supplemental affidavit was filed on November 21, 1957, and the second on November 25, 1957; the court did not render its decision until December 13, 1957, at which time it made its order that the affidavit of November 25, 1957, should be incorporated within the papers considered on the motion. In the meantime appellants took no countermeasures; no motion to strike or other objection was made, and no reply affidavits were filed. Appellants cannot dispute the fact that the corporation's board of directors adopted a resolution authorizing and directing Mr. Spivak, as its president, to apply for a permit to issue the shares of stock in question; Mr. and Mrs. Phillips, as directors, voted for this resolution, which could not have been adopted without their approval; they consistently have contended in their pleadings in this case that Spivak was derelict in the discharge of his duty because he had not diligently prosecuted said application; the permit was granted after the motion under consideration had been submitted for decision; shortly thereafter, in accordance with a resolution previously adopted by the same board of directors, 50 shares of stock were issued to Mr. Spivak and 50 shares to Mr. Phillips. Appellants contend that they were deprived of the opportunity to present to the court "such points as" the permit was void, the stock had been improperly issued in the wrong amount or wrong number of shares, "and so on". This contention is purely academic. A further hearing would produce the same result. The only directors of the corporation were Mr. Spivak, Mr. Phillips and Mrs. Phillips; all of them wanted 50 shares of stock issued to Mr. Spivak and 50 shares to Mr. Phillips. No shares of

stock were to be issued to Mr. Niemetz. Mrs. Phillips participated by virtue of her community property interest in the shares issued to Mr. Phillips. All of these facts appeared from the evidence before the court at the time the motion was submitted. The affidavits subsequently filed were proof only of events subsequently occurring, i. e., actual issuance of the stock, which the appellants wanted to take place. We find no miscarriage of justice in the procedure followed by the trial court.

The foregoing conclusion renders unnecessary a consideration of the other contentions made by appellants.

The order is affirmed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.

167 Cal.App.2d 158

John G. OPPENHEIMER, Plaintiff and Appellant,

v.

W. D. TAMBLYN, R. C. Briggs, W. S. Vance and R. Arnebergh, Defendants.

R. Arnebergh, Respondent.

Civ. 23167.

District Court of Appeal, Second District, Division 3, California.

Jan. 15, 1959.

Action for malicious prosecution. The Superior Court of Los Angeles County, Leon T. David, J., sustained demurrer without leave to amend complaint, and plaintiff appealed from the judgment dismissing the action. The District Court of Appeal, Shinn, P. J., held that even though the allegation in amended complaint that criminal prosecution against plaintiff was dismissed after trial thereof and that plaintiff's bail was exonerated was insufficient allegation that such prosecution terminated favorably to plaintiff, demurrer should not have been sustained without leave to amend and plaintiff should have been given leave to file a second amended complaint, where it did not appear that plaintiff could not have amended his complaint to allege the fact, if it be a fact, that evidence was introduced at the trial, that he was placed in jeopardy and that the case was dismissed for insufficient evidence.

Reversed.

1. Malicious Prosecution ⇐51

In malicious prosecution action, allegation in complaint that criminal prosecution against plaintiff was dismissed after a trial thereof and that plaintiff's bail was exonerated was insufficient allegation that such prosecution terminated favorably to plaintiff.

2. Malicious Prosecution ⇐16

The elements of a cause of action for malicious prosecution are: (1) a judicial proceeding favorably terminated; (2) want of probable cause; and (3) malice.

3. Malicious Prosecution ⇐51

Where the complaint alleges no facts from which it can be concluded that the prior proceedings terminated favorably to the plaintiff, the complaint fails to state a cause of action for malicious prosecution.

4. Malicious Prosecution ⇐35(1)

If dismissal of criminal proceeding is of such a nature as to indicate innocence of accused, there is a favorable termination sufficient to satisfy rule requiring favorable termination in order to entitle accused to maintain malicious prosecution action; if, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, there is not a "favorable termination."

See publication Words and Phrases, for other judicial constructions and definitions of "Favorable Termination"

5. Pleading ⇐254

In malicious prosecution action, even though the allegation in amended complaint that criminal prosecution against plaintiff was dismissed after trial thereof and that plaintiff's bail was exonerated was insufficient allegation that such prosecution terminated favorably to plaintiff, demurrer should not have been sustained without leave to amend and plaintiff should have been given leave to file a second amended complaint, where it did not appear that plaintiff could not have amended his complaint to allege the fact, if it be a fact, that evidence was introduced at the trial, that he was placed in jeopardy and that the case was dismissed for insufficient evidence.

6. Criminal Law ⇐633(1)

A "trial" of a criminal prosecution may consist of a determination of issues of fact or of law.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

7. Malicious Prosecution ⇐35(1)

Dismissal of charge against accused would have been tantamount to an acquittal and would have satisfied rule requiring favorable termination in order to entitle accused to maintain malicious prosecution action if, at the close of People's evidence, the court was convinced that it was insufficient to establish defendant's guilt and the dismissal was ordered on that ground.

8. Malicious Prosecution ⇐35(1)

A dismissal of information by committing magistrate because of insufficiency of evidence to warrant holding accused for trial constitutes "favorable termination" within ruling requiring favorable termination in order to entitle accused to maintain malicious prosecution action.

9. Pleading ⇐225(1)

It is error to sustain a demurrer without leave to amend unless it is clear that a complaint cannot be amended to state a cause of action.

10. Pleading ⇐216(1)

On demurrer to malicious prosecution complaint alleging that defendant had filed a complaint and had instituted a criminal prosecution against plaintiff for misdemeanor or offense of operating vehicle on highway in unsafe condition in violation of state law, trial court should not have judicially noticed that defendant was city attorney and should not have ruled that defendant instituted the criminal prosecution against plaintiff in defendant's official capacity and should not have determined that defendant was immune from liability for malicious prosecution, where it did not appear on face of malicious prosecution complaint that defendant had initiated the prosecution in his official capacity. West's Ann.Veh.Code, § 679; West's Ann.Pen.Code, § 740; West's Ann.Gov.Code, § 72193; St.1933, p. 2743, § 42.

11. Criminal Law ⇐88

The jurisdiction of municipal courts in misdemeanor cases arising out of violations of state law, as distinct from violations of city charter or city ordinance, is not limited to cases which had been instituted by complaint issued by the city attorney. West's Ann.Pen.Code, § 740; West's Ann.Gov. Code, § 72193.

John G. Oppenheimer, in pro. per., for appellant.

Roger Arnebergh, City Atty., and William B. Burge, Deputy City Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

Action against W. D. Tamblyn and others for malicious prosecution. Following the sustaining of a demurrer interposed by defendant Roger Arnebergh with leave to amend, plaintiff filed an amended complaint against Arnebergh only. Arnebergh demurred to the amended complaint. The court sustained his demurrer without leave to amend and entered judgment in his favor. Plaintiff appeals from the judgment dismissing the action as to Arnebergh.

The amended complaint alleges: On or about February 15, 1955, defendant maliciously and without probable cause "filed a complaint and instituted a criminal pros-

ecution in Los Angeles, California, against the plaintiff herein, charging that plaintiff had purportedly violated section 679 of the California Vehicle Code, in said city." Defendant "acted with oppression, fraud and malice" toward plaintiff. Plaintiff posted bail and paid $50 for the services of an attorney in defending against the charge. Plaintiff also alleges: "[A]fter a trial thereof, it was dismissed, and plaintiff's bail was exonerated in December, 1955." The prayer is for recovery of the attorney's fee and substantial general and exemplary damages.

[1] The first question to be considered is whether the amended complaint states the substance of a cause of action for malicious prosecution.

[2–4] The elements of a cause of action for malicious prosecution are: (1) A judicial proceeding favorably terminated; (2) want of probable cause; and (3) mallice. Jaffe v. Stone, 18 Cal.2d 146, 114 P. 2d 335, 135 A.L.R. 775. Where the complaint alleges no facts from which it can be concluded that the prior proceedings terminated favorably to the plaintiff, it fails to state a cause of action. Roos v. Harris, 203 Cal. 201, 263 P. 225; Prentice v. Bertken, 50 Cal.App.2d 344, 123 P.2d 96; Barrier v. Alexander, 100 Cal.App.2d 497, 224 P.2d 436. And, as the Supreme Court said in Jaffe v. Stone, supra, 18 Cal.2d 146, at page 150, 114 P.2d 335, at page 338: "It is not enough, however, merely to show that the proceeding was dismissed. The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort * * *. [I]f the criminal proceeding goes to trial, it is ordinarily necessary, as a foundation for a malicious prosecution suit, that the plaintiff should have been acquitted. (Citations.) The same fundamental theory is applied in testing a dismissal or other termination without a complete trial on the merits. If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination."

Oppenheimer v. Tamblyn, 162 Cal.App.2d 293, 327 P.2d 574, 575, was an appeal by plaintiff from a judgment of dismissal based upon an order sustaining, without leave to amend, the demurrer of defendant Wayne S. Vance to the original complaint in the present action. Plaintiff alleged therein that: "After due proceedings had in said criminal prosecution, it was dismissed." We held this allegation deficient as a pleading of favorable termination but we also held that although the complaint was subject to demurrer the court erred in sustaining the demurrer without leave to amend as it did not appear that the complaint could not have been amended to allege the fact that the charges against plaintiff had been dismissed on some ground which established or tended to indicate his innocence.

[5, 6] Plaintiff's allegation that the prior criminal prosecution was dismissed after a trial is little better than his superseded allegation that it was dismissed after "due proceedings." The amended complaint was vulnerable to demurrer for uncertainty. But it does not follow that the demurrer should have been sustained without leave to amend. A trial may consist of a determination of issues of fact or of law. It does not appear that there was not a trial of the factual issues.

[7–9] Dismissal of the charge against Oppenheimer would have been tantamount to an acquittal and would have satisfied the requirement of a favorable termination if, at the close of the People's evidence, the court was convinced that it was insufficient to establish defendant's guilt and the dismissal was ordered on that ground.[1] This

1. Upon the oral argument appellant stated "* * * After trial of said action it was dismissed for lack of sufficient evidence and plaintiff's bail was exonerated in December 1955" etc.

conclusion is consistent with the rule that a dismissal of an information by a committing magistrate because of the insufficiency of the evidence to warrant holding the accused for trial constitutes a favorable termination. Jaffe v. Stone, 18 Cal.2d 146, 151, 158, 114 P.2d 335, supra, and cases cited. It does not appear that plaintiff could not have amended his complaint to allege the fact, if it be a fact, that evidence was introduced at the trial, that he was placed in jeopardy, and that the case was dismissed for insufficient evidence. Since it is error to sustain a demurrer without leave to amend unless it is clear that a complaint cannot be amended to state a cause of action (39 Cal.Jur.2d 244), plaintiff should have been given leave to file a second amended complaint.

[10] The second question requiring discussion is whether the court erred in taking judicial notice that defendant is the City Attorney of the City of Los Angeles, in ruling that defendant instituted proceedings against plaintiff in his official capacity, and in determining that he is immune from liability for malicious prosecution.

A violation of Vehicle Code, section 679 (operating a vehicle upon a highway in an unsafe condition) is a misdemeanor. Defendant argues that it is the function of the city attorney to initiate misdemeanor proceedings, and that since it is alleged that he filed a complaint charging plaintiff with a misdemeanor, he could only have done so while acting in that capacity. We are not persuaded by this reasoning.

[11] Except as otherwise provided by law, all public offenses triable in inferior courts must be prosecuted by written complaint under oath subscribed by the complainant. Pen.Code § 740. It is the duty of the City Attorney of Los Angeles to draw complaints and to prosecute all misdemeanors committed within the city and within the jurisdiction of the municipal court of the district in which the city is located. Los Angeles City Charter § 42(8), Stats.1933, p. 2743; Gov.Code § 72193. But the jurisdiction of municipal courts in misdemeanor cases arising out of violations of state law, as distinct from violations of city charter or city ordinance, is not limited to cases which have been instituted by a complaint issued by the city attorney. People v. Barnhart, 37 Cal.App.2d Supp. 748, 94 P.2d 411.

Furthermore, it does not appear upon the face of plaintiff's amended complaint that defendant initiated the misdemeanor prosecution in his official capacity on the basis of information received by him in the course of his official duties. For aught that appears, defendant might have himself been the complaining witness and have verified the complaint and thus initiated proceedings against Oppenheimer as a private citizen. Defendant urges the contrary in reliance upon Norton v. Hoffmann, 34 Cal.App.2d 189, 93 P.2d 250. But that case is not in point. Chesebro and Hoffmann were sued for the malicious prosecution of an attorney who was charged with practicing law without a license; the complaint alleged that Chesebro was City Attorney of the City of Los Angeles and that Hoffmann was his deputy. The question arising upon their demurrer was whether the acts committed by them were within the scope of their official duties as prosecuting officers of the city and it was held that they were. The plaintiff contended that they were acting in their official capacities and it was alleged that they prosecuted the case. The court said, at pages 194–195 of 34 Cal.App. 2d, at page 253 of 93 P.2d: "It would appear from the complaint that what they did was under color of what was treated as authority derived from the public offices which they held." Such a conclusion does not follow from the amended complaint in the present case. It did not allege that Arnebergh prosecuted the case against plaintiff.

It should be a simple matter to obtain a determination upon a motion for summary judgment whether plaintiff can show that the dismissal amounted to an acquittal and that Arnebergh instituted the prosecution, if at all, in any capacity other than as city attorney. This would determine

whether plaintiff is prosecuting the present action in good faith or is merely trifling with the court.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

167 Cal.App.2d 164

Ruby Jane McCARTY, also known as Ruby J. Hitchcock, Plaintiff and Appellant,

v.

MACY & CO., a partnership, W. H. Macy, also known as Wilmer Henry Macy, Annie Holben Macy, also known as Anna Holben Macy, Irl G. Maxwell and Lois A. Maxwell, individually and as partners associated in business under the common name and style of Macy & Co., Defendants and Respondents.

Earl Fred TAYLOR, Plaintiff and Appellant,

v.

MACY & CO., a partnership, et al., Defendants and Respondents.

Ruth WILSON, Plaintiff and Appellant,

v.

MACY & CO., a partnership, et al., Defendants and Respondents.

John P. EDGAR and Elaine W. Edgar, Plaintiffs and Appellants,

v.

MACY & CO., a partnership, et al., Defendants and Respondents.

Civ. 9547–9550.

District Court of Appeal, Third District, California.

Jan. 15, 1959.

Actions by owners and occupants of homes in close proximity to a grain mill to enjoin operation of mill on ground that noise and dust therefrom constituted an abatable nuisance. The actions were consolidated for trial. From adverse judgment of the Superior Court, Tehama County, Albert F. Ross, J., the owners and occupants appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence sustained finding that there was not sufficient noise and dust from plant to interfere with rest and peace of mind of persons of normal health, condition and sensibilities and that plaintiffs' real property had not depreciated materially, if at all, in rental or sale value or otherwise, insofar as their right to injunctive relief was concerned.

Judgments affirmed.

1. Nuisance ⇐33

In actions by owners and occupants of homes in close proximity to a grain mill to enjoin operation of mill on ground that noise and dust therefrom constituted an abatable nuisance, evidence sustained finding that there was not sufficient noise and dust from plant to interfere with rest and peace of mind of persons of normal health, condition and sensibilities and that plaintiffs' real property had not depreciated materially, if at all, in rental or sale value or otherwise, insofar as their right to injunctive relief was concerned.

2. Appeal and Error ⇐996

When two or more inferences can reasonably be deduced from the facts, reviewing court is without power to substitute its deductions for those of the trial court.

3. Appeal and Error ⇐1012(1)

Weight and effect of evidence is a matter for trial court to determine.

4. Nuisance ⇐55

In action by owners and occupants of homes in close proximity to a grain mill to enjoin operation of mill on ground that noise and dust therefrom constituted an abatable nuisance and to recover damages, wherein owners and occupants amended their complaints by abandoning claim for money damages by striking those portions relating to alleged damages, owners and occupants by amendment eliminated from

the action question as to what damages they actually suffered, if any, and they were not entitled to a full and express finding as to whether they suffered damage.

5. Nuisance ⇐35

When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical, unsubstantial right and court may be guided by consideration of relative convenience of the parties and if it appears that benefit to plaintiff from granting a writ will be slight compared to injury of defendant, relief may be denied and the plaintiff left to pursuit of his remedy at law.

Rawlins Coffman, Red Bluff, for appellants.

Stanley Pugh of Pugh & Webster, Red Bluff, for respondents.

WARNE, Justice pro tem.

[1] A general statement of the facts of these cases may be found in McCarty v. Macy & Co., 153 Cal.App.2d 837, 315 P.2d 383, 384, and are as follows:

"For many years respondents have operated a grain mill in Red Bluff. The old plant was destroyed by fire in October, 1951, and was replaced by a new one which opened for operation in 1953. Appellants are the owners and occupants of homes in close proximity to respondents' mill. Four separate actions were filed by appellants in which they sought to enjoin the operation of the mill on the ground that the noise and dust therefrom constitute an abatable nuisance and to recover damages. The four cases were consolidated for trial, and apparently by stipulation of the parties the issue as to whether appellants were entitled to damages was expressly reserved for separate trial before a jury, and the court proceeded to try the equitable issue presented by the pleadings. At the conclusion of the trial the court adopted findings of fact and conclusions of law in each case, finding in substance that there was some noise and dust from the plant but not sufficient to interfere with the rest or peace of mind of persons of normal health, condition and sensibilities; that appellants' properties had not substantially depreciated in value as a result of respondents' operation; and that the issue of damages having been reserved for determination by the jury at a separate trial the court made no determination on that issue. On the basis of the facts found the court concluded that the plaintiffs had plain, speedy and adequate remedies at law; that there had not been shown sufficient cause for injunctive or other equitable relief; that such relief should be denied and that the several plaintiffs should be allowed to pursue their remedies at law if so advised. The court stated that immediately following the conclusion of trial of issues of law or abandonment of such issues, then judgment would be entered denying equitable relief."

Following the determination of the former appeal, appellants in the four companion cases moved the court for leave to amend their complaints by abandoning the claim for money damages set forth therein by striking therefrom those portions relating to alleged damages. The motions were granted and judgments were then entered denying appellants' injunctions or other equitable relief.

[2, 3] Appellants contend that the findings are unsupported by and are contrary to the evidence. There is no merit in this contention. The record shows that twelve disinterested witnesses testified for respondents. Eleven of them were people either residing or working in the immediate vicinity of the respondents' plant. All of them testified that little or no dust or noise or other disturbance emanated from respondents' plant at any time. Their testimony was in direct contradiction to that of the appellants and their witnesses. When two or more in-

ferences can reasonably be deduced from the facts the reviewing court is without power to substitute its deductions for those of the trial court. The weight and effect of the evidence was a matter for the trial court to determine. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183.

[4] Appellants contend that under the pleadings they were entitled to a full and express finding as to whether they suffered damage. We do not agree with appellants for the reason that appellants have eliminated from this action the question as to what damages they actually suffered, if any. As hereinabove stated, the trial court found, in substance, that there was some noise and dust from the plant, but not sufficient to interfere with rest or peace of mind of persons of normal health, condition and sensibilities and with reference to the appellants' real property specifically found "that plaintiffs' said real property has not depreciated materially, *if at all,* in rental or sale value or otherwise. It is true that there are numerous residences in the vicinity of defendants' plant, but it is also true that both said plant and plaintiffs' home and premises are located immediately adjacent to the railroad right of way of Southern Pacific Company, and that the area in which defendants' said plant and plaintiffs' home are located is to a large extent used for commercial and business purposes and has been so used continuously for many years." (Italics ours.) We are of the opinion that the findings are amply sufficient on the issue of damages in so far as appellants' rights to injunctive relief are concerned.

[5] The following excerpt taken from the case of Frost v. City of Los Angeles, 181 Cal. 22, 31–32, 183 P. 342, 346, 6 A.L.R. 468, is applicable to the instant case:

> "* * * 'When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical unsubstantial right.' 2 Beach on Injunctions, § 1067. 'The court may properly be guided by the consideration of the relative convenience of the parties; and if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared to the injury to the defendant, the relief may be denied, and the plaintiff left to the pursuit of his remedy at law.' [Citing cases.]"

The trial court having found that there was some noise and dust from the plant, but not sufficient to interfere with rest or peace of mind of persons of normal health, condition and sensibilities, and that appellants' real property has not depreciated materially, if at all, in rental or sale value or otherwise it is obvious that any benefit resulting to the appellants from the granting of the writ would be slight as compared to the injury to the respondents. Consequently, appellants should be left to pursuit of their remedy at law. Further, as stated by the Supreme Court in the case of Anderson v. Souza, 38 Cal.2d 825, 843–844, 243 P.2d 497, 509:

> "* * * 'Contiguous property owners must to a reasonable degree yield their desired privacy to the general welfare which is contributed to by the operation of legitimate business. Were it not so, railroads could not operate near residences, and factories could not be established without the necessity of purchasing prohibitively large areas of property. That reasonable inconvenience must be suffered by owners whose holdings are contiguous to commercial enterprises is too well decided to require citation of authorities.'"

The judgments are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

167 Cal.App.2d 197

Louis HOZZ and Ettie Hozz, Plaintiffs and Respondents,

v.

Leo C. FELDER and Doris E. Felder, Defendants and Appellants.

Civ. 9351.

District Court of Appeal, Third District, California.

Jan. 19, 1959.

Action to recover value of merchandise allegedly sold to defendants on an open book account. From an order of the Superior Court, Sonoma County, Hilliard Comstock, J., granting plaintiffs' motion for a judgment notwithstanding the verdict and for a new trial, the defendant appealed. The District Court of Appeal, Peek, J., held that where evidence presented was such that jury could have returned various verdicts, all of which would have been supported by substantial evidence, court was without power to order a judgment n. o. v.

Judgment notwithstanding the verdict reversed and order granting a new trial affirmed.

1. Judgment ⇐199(3.9)

Power of court to order a judgment n. o. v. is predicated primarily upon an unlawful denial of a motion for a directed verdict. West's Ann.Code Civ.Proc. § 629.

2. Judgment ⇐199(3.9)

Court should not order a judgment n. o. v. if a motion for a directed verdict could not have been granted. West's Ann. Code Civ.Proc. § 629.

3. Judgment ⇐199(3.9)

Whether a motion for judgment n. o. v. should be granted must be determined in the light of rules relative to a directed verdict. West's Ann.Code Civ.Proc. § 629.

4. Judgment ⇐199(3.5)

Where evidence presented was such that jury could have returned various verdicts, all of which would have been supported by substantial evidence, court was without power to order a judgment n. o. v. West's Ann.Code Civ.Proc. § 629.

5. Judgment ⇐199(1)

Fact that a motion for judgment n. o. v. may be made with the alternative reservation of the right to move for a new trial does not confer upon court right to waive the evidence and resolve conflicts in disposing of motion of judgment n. o. v. West's Ann.Code Civ.Proc. § 629.

6. Trial ⇐139(1)

Evidence that might justify a new trial does not necessarily justify a directed verdict. West's Ann.Code Civ.Proc. § 629.

7. New Trial ⇐71

Where the evidence was in conflict and would have sustained any one of several conclusions, court did not err in granting a new trial absent any showing of an abuse of discretion.

8. Appeal and Error ⇐105

An order denying a motion for nonsuit is not appealable.

9. Appeal and Error ⇐123

Verdict of jury is not appealable.

10. Appeal and Error ⇐113(2)

A judgment on the verdict which has been vacated by subsequent order of court is not appealable.

11. Appeal and Error ⇐109

An order granting a motion for judgment notwithstanding the verdict is not an appealable order.

Lawrence A. Cowen, San Rafael, for appellants.

Geary, Spridgen & Moskowitz, Santa Rosa, for respondents.

PEEK, Justice.

This is an action to recover the value of merchandise allegedly sold by plaintiffs to defendants on an open book account. At the close of plaintiffs' case, defendants' motion for a nonsuit was denied. At the conclusion of the trial, plaintiffs moved for a directed verdict which likewise was de-

nied. Following the entry of judgment on the verdict of the jury in the sum of $4,402.76, plaintiffs moved for a judgment notwithstanding the verdict and for a new trial. The court granted both motions, but by its order granting a new trial provided that it should be effective only if on appeal the judgment notwithstanding the verdict was reversed and the order granting a new trial was not appealed from, or, if appealed from, was affirmed. Thereafter judgment pursuant to said order granting judgment n. o. v. was entered in the sum of $7,977.07 and the defendants now appeal.

By their original complaint plaintiffs alleged that while doing business as the Petaluma Milling Company they sold and delivered feed and dairy supplies to defendants in the sum of $7,870.82, which sum included interest at 6% per annum to February 7, 1955. By their amended complaint said amount was increased to $9,043.63 including interest; and that said sum was now due and unpaid, with interest thereon at the rate of 6% per annum. Defendants answered, denying generally the allegations of the complaint. At the trial there appeared to be no question but that defendants were indebted to plaintiffs. The issue related not so much to the amount of the principal of the debt as it did to the interest, if any, to be charged.

In this regard, from the evidence adduced, the jury could have found that interest had been charged on the account for the period covered in the complaint with the exception of a period of time from May 1, 1947 to December 31, 1948; that there was an oral agreement that no interest was to be charged; that interest was waived for the period of May, 1947 through December, 1948 only; or that any waiver of interest was conditioned upon payment of the balance due and keeping the account current. In regard to this last possibility, it could have been found that the condition failed and that the plaintiffs were thereafter entitled to charge interest for the full period covered by the complaint.

Defendants' first contention is that the trial court erred in granting plaintiffs' motion for judgment notwithstanding the verdict in that the evidence was in conflict and that the trial court in granting the motion weighed the evidence and substituted its own conclusions for those of the jury.

[1–4] It would appear unnecessary to quote the rather lengthy provisions of Section 629 of the Code of Civil Procedure. It is sufficient to note that the power of the court to order a judgment n. o. v. is predicated primarily upon an unlawful denial of a motion for a directed verdict or, stated otherwise, if, under the facts of the case, a motion for a directed verdict could not have been granted, then it follows that the court could not order a judgment n. o. v. Tracey v. L. A. Paving Co., 4 Cal.App.2d 700, 41 P.2d 942. Whether or not a motion for judgment n. o. v. should be granted must be determined in light of the rules relative to a directed verdict, i.e., conceding as true the evidence most favorable to the adverse party and giving to it all reasonable inferences which may be drawn therefrom, it must appear that there is no substantial evidence to support a verdict in his favor. Applying such rule to the evidence presented in the present case, it it quite apparent that the jury could have returned various verdicts, all supported by substantial evidence. Necessarily, therefore, under such circumstances, the court was without power to grant plaintiffs' motion for a directed verdict and thus was equally without power to order a judgment n. o. v.

[5, 6] Additionally, section 629 provides that a motion for a judgment n. o. v. may be made with the alternative reservation of the right to move for a new trial and that the court shall pass upon both. But that is not to say that the court may "weigh the evidence and resolve conflicts, and, as a consequence, substitute its conclusions on the facts for that of the jury" and order judgment n. o. v. Tracey v. L. A. Paving Co., supra, 4 Cal.App.2d at page 706, 41 P.2d at page 945, for as the court also noted in the Tracey case if that were per-

mitted it "would have the effect of depriving the aggrieved litigant of his constitutional right to a trial by jury. Upon such a hearing, unless the court is satisfied that error was committed in denying the motion for directed verdict, its power is limited to granting the motion for a new trial * * *." Of course evidence that might justify a new trial would not necessarily justify a directed verdict.

[7] Defendants' next contention is that the granting of plaintiffs' motion for a new trial upon the grounds of insufficiency of the evidence was error since there was ample evidence to support the verdict of the jury. But such is not the rule. "* * * [I]t is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. [Citing case.] It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party." Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010, 1012.

In the instant case the evidence was definitely conflicting and, as previously noted, would have sustained any one of several conclusions. Under such circumstances, and absent any showing of an abuse of discretion, the order of the trial court granting the new trial must be affirmed.

[8–11] Defendants also contend that plaintiffs failed to prove an open book account and, having so failed, defendants' motion for a nonsuit should have been granted. The bookkeeping system introduced into evidence by defendants was for all practical purposes the same as used in the case of Thompson v. Machado, 78 Cal. App.2d 870, 178 P.2d 838, where the court held that such a system was sufficient proof of an open book account. The denial of defendants' motion for a nonsuit not being an appealable order, the same must be dismissed. Here it also should be noted that defendants' appeal from the verdict of the jury, which is not appealable, must be dismissed as must be their appeal from the judgment on the verdict, since that was vacated by the subsequent order of the court. Further, the order granting the motion for a judgment notwithstanding the verdict, not being an appealable order must likewise be dismissed.

We find nothing in the further contentions made by defendants which warrant further discussion.

The appeal from the order denying defendants' motion for nonsuit, the appeal from the verdict of the jury, the appeal from the judgment on the verdict, and the appeal from the order granting the motion for a judgment notwithstanding the verdict are dismissed. The judgment notwithstanding the verdict is reversed and the order granting a new trial is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

167 Cal.App.2d 101

Henry WILLIAMS and Mildred M. Williams, Plaintiffs and Appellants,

v.

John G. DENVER and Maryesther W. Denver, Defendants and Respondents.

Civ. 5907.

District Court of Appeal, Fourth District, California.

Jan. 12, 1959.

Rehearing Denied Feb. 6, 1959.

Hearing Denied March 11, 1959.

Action for rescission of contract under which defendants were to purchase and operate bail bond business with money advanced by plaintiffs for a compensation of $100 per week plus all expenses and 10% of all premium charges received in such bail bond business and a bail bond business conducted by plaintiffs, which premium was ultimately to be used for purchase by defendants of an

interest in both bail bond businesses, and for declaratory relief respecting ownership of the businesses. From adverse judgment of the Superior Court, Orange County, Claude M. Owens, J., the plaintiffs appealed. The District Court of Appeal, Shepard, J., held that evidence sustained finding that defendants failed to deposit receipts of business operated by them in trustee account as agreed, that they failed to keep accounts as agreed, that plaintiffs failed to pay amounts agreed to be paid to defendants and to furnish defendants with an accounting of premiums, and that an independent agreement separate from original agreement had been negotiated with ultimate purpose of defendants buying both businesses, and that such subsequent agreement had not been completed therefore entitling defendants to return of payments made pursuant thereto.

Judgment affirmed.

1. Contracts ⇐322(3)
Money Received ⇐18(3)

In action for rescission of contract under which defendants were to purchase and operate bail bond business with money advanced by plaintiffs for $100 per week plus all expenses and 10% of all premium charges received in such bail bond business and a bail bond business conducted by plaintiffs which premiums were ultimately to be used for purchase by defendants of an interest in both bail bond businesses, and for declaratory relief respecting ownership of the businesses, evidence sustained finding that defendants failed to deposit receipts of business operated by them in trustee account as agreed, that they failed to keep accounts as agreed, that plaintiffs failed to pay amounts agreed to be paid to defendants and to furnish defendants with an accounting of premiums, and that an independent agreement separate from original agreement had been negotiated with ultimate purpose of defendants buying both businesses and that such subsequent agreement had not been completed, entitling defendants to return of payments made pursuant thereto.

2. Appeal and Error ⇐1010(2)

Party claiming that evidence is insufficient to support the findings must affirmatively show that there is no competent evidence to support the findings and mere recital of evidence favorable to complaining party is of no avail, even though reviewing court may believe that preponderance of evidence is contrary to trial court's finding.

3. Appeal and Error ⇐1008(1, 3)

Where construction of oral contract or of an uncertain written agreement is, with aid of testimony, not unreasonable or inconsistent with the evidence, conclusion of trial court will not be disturbed.

Robert A. Schwamb, Galvin R. Keene, Newport Beach, for appellants.

Arthur M. Bradley, Santa Ana, for respondents.

SHEPARD, Justice.

[1] In May, 1955, Henry and Mildred M. Williams (hereinafter called plaintiffs) made a contract partly in writing and partly oral with John G. and Maryesther Denver (hereinafter called defendants) by which defendants were to purchase and operate a bail bond business, which we will hereinafter call the "Webb" business. The purchase was made with money advanced by plaintiffs. Ostensibly, the business was to be owned by defendants but actually defendants were to act as the agents of plaintiffs, both in the purchase and operation. Plaintiffs were already operating another bail bond business in their own name, so that with the new purchase they became the owners of two bail bond businesses. The one which they operated under their own name we will hereinafter refer to as the "Williams" business.

Defendants agreed to deposit all receipts of the Webb business with Elliott and Murray, as trustees, and all business expenses and disbursements were to be made from such trust account. Defendants were to receive as compensation $100 per week plus all expenses, plus 10% of all premium

charges received in both the Webb and the Williams businesses. One half of this percentage was to be deposited in a special trust savings account, also in the name of Elliott and Murray as trustees, to be held by the trustees for use by defendants in the ultimate intended purchase of an interest in both businesses.

Disputes resulting from alleged failure to pay into the trust fund, failure to pay compensation to defendants, failure on the part of both parties to render accounts, and other dissatisfaction resulted in the filing of this action for rescission, for an accounting, and for declaratory relief respecting the ownership of the businesses. After hearing extensive evidence the trial court rendered judgment denying an accounting and covering other matters not the subject of this appeal, adjudging plaintiffs the owners of both businesses, and decreeing that an independent agreement separate and different from the original agreement had been negotiated with the ultimate purpose of defendants buying both businesses from plaintiffs; that $6,000 had been paid thereon but that this last separate agreement was never completed and, therefore, the $6,000 paid thereon should be returned by plaintiffs to defendants. Plaintiffs have appealed from the portions of the judgment last above noted.

The court found, among other things, that defendants failed to deposit the receipts of the Webb business in the trustee account as agreed; that defendants failed to keep accounts as agreed; that plaintiffs failed to pay the amounts agreed to be paid to defendants and failed to furnish defendants with an accounting of premiums collected in the Williams business. After an examination of the entire record we are satisfied that there is substantial evidence to support these findings. In this connection, it must be particularly noted that plaintiff Henry Williams in his own testimony placed the reason for his failure to pay into the trust account and failure to account on the ground that he had no such obligation, and not on the ground of prior default by defendants.

As a result of these findings the trial court apparently found that the plaintiffs had not come into equity with clean hands and were, therefore, not entitled to an accounting. DeGarmo v. Goldman, 19 Cal.2d 755, 765(6), 123 P.2d 1; Richman v. Bank of Perris, 102 Cal.App. 71, 82, 83(4) (5), 282 P. 801.

[2] Since the plaintiffs have taken the position that the evidence is insufficient to support the findings, the plaintiffs must affirmatively show that there is no competent evidence to support these findings. Their recital of evidence favorable to them is of no avail. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550; Zainudin v. Meizel, 119 Cal.App.2d 265, 270(9), 259 P.2d 460. This is true even though an appellate court should believe that the preponderance of the evidence is contrary to the trial court's findings. Freeland v. Jewel Tea Co., 118 Cal.App.2d 764, 768(2), 258 P.2d 1032.

[3] A second cause of action asks for declaratory relief as to the ownership of the "Webb" business. The court found on sufficient evidence that there had been negotiations and an incomplete effort by defendants to buy the businesses from plaintiffs; that $6,000 had been paid thereon by defendants to plaintiffs and that this sum should be returned because the transaction was never completed; and that the defendants are not the owners of either of the businesses. This order for the return of the $6,000 is based on an action for declaratory relief, which is entirely different from the cause of action in rescission and accounting, and is one in which the court is not mandatorily controlled by the same rules as those involved in an action for rescission and accounting. It must be noted that if this court took the view of the evidence that is taken by plaintiffs then all of the matters subject to this portion of the action were inextricably interwoven and a reversal of any part would compel the reversal of the whole judgment, and the whole matter would have to be sent back for an entirely new trial. American Enterprise, Inc. v. Van Winkle, 39 Cal.2d 210, 217(4), 246 P.2d 935.

However, as we view the evidence, it was entirely reasonable to conclude that the payment of $6,000 was pursuant to separate negotiations by which the parties unsuccessfully sought to bridge over all their troubles with an entirely new contract. We, therefore, cannot disturb the trial court's conclusion.

"When the construction of an oral contract or of an uncertain written agreement is with the aid of testimony not unreasonable or inconsistent with the evidence, the conclusion of the trial court will not be disturbed." In re Estate of Guasti, 117 Cal.App.2d 612, 617(4b), 256 P.2d 629, 633.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

167 Cal.App.2d 238

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edwin B. ROBERTS, Defendant and Appellant.

Cr. 6298.

District Court of Appeal, Second District, Division 2, California.

Jan. 20, 1959.

Rehearing Denied Feb. 16, 1959.

Hearing Denied March 18, 1959.

Defendant was convicted of knowingly issuing a check with insufficient funds, and with intent to defraud, and of grand theft of an automobile. The trial court, Clement D. Nye, J., entered judgment, and defendant appealed from the judgment and from an order denying his motion for new trial. The District Court of Appeal, Herndon, J., held that failure of trial court, on its own motion, to give instruction embodying principle that to justify conviction on circumstantial evidence, facts and circumstances must not only be entirely consistent with theory of guilt, but must be inconsistent with any other rational conclusion, was not prejudicial error, where trial court gave instruction that where evidence is susceptible to two constructions that appear reasonable, jury must adopt construction in favor of defendant's innocence, and instruction that when case rests chiefly on circumstantial evidence, each fact, which is essential to complete chain of circumstances that will establish guilt, must be proved beyond reasonable doubt, and where jury rejected defendant's version of the transaction.

Judgment and order affirmed.

1. False Pretenses ⇐49(3)

Evidence sustained conviction for knowingly issuing a check with insufficient funds and with intent to defraud. West's Ann.Pen.Code, § 476a.

2. Larceny ⇐65

Evidence sustained conviction for grand theft of automobile. West's Ann. Pen.Code, § 487, subd. 3.

3. False Pretenses ⇐51

In prosecution for knowingly issuing a check with insufficient funds and with intent to defraud, intent to defraud was a question of fact. West's Ann.Pen.Code, § 476a.

4. False Pretenses ⇐39

In prosecution for knowingly issuing a check with insufficient funds and with intent to defraud, intent to defraud could be inferred from conduct of defendant or from circumstances surrounding transaction. West's Ann.Pen.Code, § 476a.

5. Criminal Law ⇐829(15)

In prosecution for knowingly issuing a check with insufficient funds and with intent to defraud and for grand theft of automobile, failure of trial court, on its own motion, to give instruction embodying principle that to justify conviction on circumstantial evidence, facts and circumstances must not only be entirely consistent with theory of guilt, but must be inconsist-

ent with any other rational conclusion, was not prejudicial error, where trial court gave instruction that where evidence is susceptible to two constructions that appear reasonable, jury must adopt construction in favor of defendant's innocence, and instruction that when case rests chiefly on circumstantial evidence, each fact which is essential to complete chain of circumstances that will establish guilt must be proved beyond reasonable doubt, and where jury rejected defendant's version of the transaction. West's Ann.Pen.Code, §§ 476a, 487, subd. 3.

6. Criminal Law ⇐1037(1, 2), 1044

Failure of defendant to make any objection or assignment of misconduct or to move for mistrial or to seek any instruction admonishing jury to disregard allegedly improper argument of deputy district attorney precluded reversal of judgment of conviction because of allegedly improper argument.

7. Criminal Law ⇐829(3)

In prosecution for knowingly issuing a check with insufficient funds and with intent to defraud and for grand theft of automobile, failure of trial court, on its own motion, to give instructions covering general definition of theft, intent in theft cases, definition of larceny by trick and device, or definition of theft by false pretenses was not prejudicial error under circumstances, where trial court instructed jury that every person who shall feloniously steal, take, or drive away the automobile of another is guilty of grand theft regardless of the value of the automobile. West's Ann.Pen.Code, §§ 476a, 487, subd. 3.

8. Criminal Law ⇐824(5)

In prosecution for knowingly issuing a check with insufficient funds, and with intent to defraud, and for grand theft of automobile, failure of trial court on its own motion to instruct jury that an oral extrajudicial admission of defendant should be viewed with caution was not error, where the only statement claimed to be an extrajudicial admission by defendant was the statement that he opened a bank account the latter part of February or the first of March, and it was uncontradicted that defendant opened his account with bank in latter part of March. West's Ann.Pen. Code, §§ 476a, 487, subd. 3.

9. Criminal Law ⇐824(1)

In a criminal case, trial court is required to instruct jury of trial court's own motion on law relating to facts of the case and on matters vital to a proper consideration of the evidence, but reviewing courts will scrutinize with great care any claim of prejudicial error predicated solely on omission of trial court to give of its own motion an instruction, the propriety of which is indicated solely by the condition of the evidence.

Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Arthur C. deGoede, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

After a jury trial, appellant was convicted of (1) knowingly issuing a check with insufficient funds and with intent to defraud (Penal Code, § 476a) and (2) grand theft of an automobile (Penal Code, § 487, subd. 3). He had admitted a prior felony conviction of incest. He appeals from the judgment and from the order denying his motion for a new trial.

In the early part of March, 1956, appellant went to Mike McCarthy Lincoln-Mercury Co. (hereinafter referred to as McCarthy) and after discussion with a salesman signed an order for a new car with specified accessories for the stated price of $3,700 "plus". When appellant suggested making a deposit of $100, the sales manager stated that he wouldn't order such a car from the factory without a larger deposit. The following day appellant made a deposit of $425 whereupon McCarthy ordered the car from the factory.

On March 26, 1956, having received notice that his car had arrived, appellant went to the McCarthy agency to take delivery.

He informed the sales manager that he was going to finance the car with the Automobile Club to the extent of $2,500 and that he would make up the difference with a down payment. Advised that the required down payment would be $1,037.52, he made out, signed and delivered to McCarthy's sales manager a counter check in that amount drawn on the Bank of Encino. At the same time he signed in blank a conditional sales contract bearing the notation "Until check arrives, $2500 from Auto Club due 4–1–56." He indicated that he would go to the Automobile Club and make arrangements to finance the $2,500 and that this amount would be sent to McCarthy in due course. The sales manager testified that he relied on the validity of the check in allowing the appellant to take the automobile.

The records of the Bank of Encino disclosed that on the date the check was issued, appellant had no account, but that on March 28, 1956, he opened an account with a balance of $661.08. Appellant had no other account with the bank at that time, and had made no arrangements for the extension of credit. A $500 check which was a part of the opening deposit was dishonored and returned on April 2, 1956. As of April 20, 1956, the balance in the account had declined to $12.11. McCarthy received no word from either appellant or the Automobile Club after March 26. The check given by appellant to cover the down payment on the automobile was returned to McCarthy dishonored after about five days. During the next three weeks representatives of the McCarthy Agency went to appellant's residence ten or twelve times in an effort to locate appellant, but found no one at the address, although furniture was observed therein. Messages left at appellant's address were unanswered. McCarthy repossessed the automobile in Fresno, California, sometime in May, 1956.

Appellant testified in substance: that the check for $1,037.52 was to be used only after appellant notified McCarthy that it might be cashed; that he told the sales manager that he did not have the money at the time, but would be getting some within a few days; that the sales manager said: "* * * give me a check for it * * * and I will hold the check until you give me an o:k to put it in the bank. And in case in the event that you don't, we'll finance it through our own financing institution"; that when the appellant told the sales manager he did not have a bank account, the latter stated "* * * surely you will have a bank account"; that it was appellant's understanding that the blank conditional sales contract was signed so that if the check could not be covered, or the Automobile Club loan was not realized, financing would be completed through the use of the conditional sales contract; that appellant was employed and had reasonable expectations of receiving sufficient funds to cover the check; that he never intended to defraud McCarthy, but fully intended to make the check good when he issued it.

[1–4] Our recital of the facts sufficiently refutes appellant's contention that the evidence is insufficient as a matter of law to sustain the judgment. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Implicit in the verdict of the jury is a rejection of appellant's testimony that he issued the check in good faith and upon the understanding that its delivery and use were conditional upon further authorization. Cf. People v. De Paula, 43 Cal.2d 643, 649, 276 P.2d 600. Intent to defraud is a question of fact. People v. Leon, 163 Cal.App.2d 791, 329 P.2d 996. Such intent may be inferred from the conduct of the accused or from the circumstances surrounding the transaction. People v. Leon, supra; People v. Markos, 146 Cal.App.2d 82, 85, 303 P.2d 363.

A more serious question is presented by appellant's contention that the trial court erred in failing upon its own motion to give "* * * an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational con-

clusion." People v. Yrigoyen, 45 Cal.2d 46, 49, 286 P.2d 153; See CALJIC Number 27. Appellant was represented at the trial by counsel, at whose request the court gave CALJIC Number 26, which reads as follows: "If the evidence in this case [as to either count] is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt. You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt" and CALJIC Number 28, which reads as follows: "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt." Counsel made no request for CALJIC Number 27 in either form or substance.

Appellant relies on People v. Yrigoyen, supra, 45 Cal.2d 46, 286 P.2d 1 [a prosecution for issuing a check with insufficient funds] and People v. Neel, 151 Cal.App.2d 1, 310 P.2d 986 [grand theft of an automobile] in which judgments of conviction were reversed on the ground that the trial court committed prejudicial error in failing *sua sponte* to give an instruction to the effect that to find the defendant guilty on circumstantial evidence alone the proved circumstances must be irreconcilable with any other rational conclusion than that of guilt.

In both of these cases, however, the trial court had failed to give *any* instruction to the jury on the interpretation of circumstantial evidence, although the People's evidence as to the defendant's criminal intent was necessarily circumstantial. The instant case presents quite a different situation. Assuming that an instruction embodying the substance of CALJIC Number 27 should have been given the jury, the question before us is whether the appellant was prejudiced by the trial court's failure to act on its own motion to give more complete instructions to supplement those requested by the defendant. In considering this question we note that the instruction which appellant now contends should have been given (CALJIC Number 27) is found in the one-volume text under the heading *"Circumstantial Evidence"* from which counsel for appellant presumably selected and requested CALJIC Numbers 26 and 28, which were given the jury. The failure of appellant's counsel to request CALJIC Number 27 indicates to us that he consciously and purposefully rejected that instruction, possibly under the belief that the other instructions requested and given would better serve his client's interest. CALJIC Number 26 required the jury to give the defendant the benefit of any reasonable interpretation of the evidence which was favorable to his innocence, and CALJIC Number 28 informed the jury that each fact essential to an incriminating chain of circumstances must be proved beyond a reasonable doubt. Cf. People v. Webster, 79 Cal.App.2d 321, 328–329, 179 P.2d 633.

Precisely the contention now made by appellant was rejected in the recent case of People v. Barkoff, 163 Cal.App.2d 639, 329 P.2d 1005 (hearing denied). In that case the defendant was convicted in a jury trial of two counts of abortion. The facts were not involved: the defendant admitted inserting a pessary (a contraceptive device which may induce abortion) in the body of the prosecution's female witness, and

"* * * the main issue was the intent with which he did it—was it for purposes of abortion as claimed by the prosecution, or for contraceptive purposes as claimed by the defendant?" 163 Cal.App.2d at page 643, 329 P.2d at page 1008. At the defendant's request the court gave CALJIC Number 26, but did not give Numbers 27 or 28 on circumstantial evidence. On appeal, as in the instant case, the defendant contended that the court *sua sponte* should have given CALJIC Number 27 or a similar instruction. After a comprehensive review of the applicable precedents, the court concluded that the failure to give CALJIC Number 27 was not prejudicial to the defendant. In affirming the judgment of conviction the court remarked: "While CALJIC No. 27 should have been given, the failure to do so under the circumstances here was not prejudicial. The court did give CALJIC No. 26 which while not as strong as CALJIC No. 27 did require the jury to give the defendant the benefit of any reasonable interpretation of the evidence favorable to his innocence. In the second place and more important, the evidence of defendant's guilt, although circumstantial, is overwhelming. It just is not reasonable to expect any reasonable person to believe under the circumstances of this case that defendant, having been told that the women were pregnant, inserted the pessaries for contraceptive purposes. It is inconceivable that had the jury been given CALJIC No. 27 in addition to CALJIC No. 26, any different result would have followed." People v. Barkoff, supra, 163 Cal.App.2d at page 645, 329 P.2d at page 1009.

[5] In the instant case the jury refused to believe the defendant's testimony as to the circumstances under which he gave a check on a non-existent bank account and found him guilty as charged. Since the jury rejected defendant's version of the transaction, it is inconceivable that the giving of the additional instruction on the subject of circumstantial evidence would have had any effect on the result. People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243; People v. Bender, 27 Cal.2d 164, 163 P.2d 8; see People v. Williams, 153 Cal.App.2d 5, 9, 314 P.2d 161.

Appellant's third contention is that the deputy district attorney was guilty of prejudicial misconduct in arguing to the jury that on the basis of defendant's admission of the prior felony conviction of incest he was an immoral person. The following are the portions of the argument of the district attorney of which the appellant now complains: "That man [the defendant] has been convicted of a felony. Now, it's very rare that this is allowed to be shown; only in cases of impeachment can a man's past record be brought up, and only in regard to felonies can it be brought up. But it is permissible to show it. In this felony, true it is not connected in any way with this case; but that's a felony that violates every written law and every moral law, and yet, that man sat upon this witness stand and has taken an oath to God, and Mr. Stanton wants you to believe that man over these other people and over the physical facts and physical evidence. Well, that can be done.

"Now, there's a little bit more about Mr. Roberts. He's not only been convicted of a felony, which violates, as I said, the moral and written law; but he's told you some things up on the witness stand that I don't think are quite what he wanted you to believe. * * *

"Before I close, let me just say this. The case actually really boils down a lot to the matter of credibility; boils down to who you are going to believe. And it boils down to what type of character, what—is this man a savoury character or unsavoury character? I think you can consider that in deciding. And again you can consider the man's prior conviction of incest."

[6] Conceding, arguendo, that the comments of the deputy district attorney might have exceeded the bounds of propriety, the failure of appellant to make any objection or assignment of misconduct or to move for a mistrial or to seek any instruction admonishing the jury to disregard the allegedly improper argument should preclude a re-

versal on this ground. See People v. Moore, 143 Cal.App.2d 333, 338, 299 P.2d 691. Moreover, each of the deputy district attorney's statements concerning the prior conviction was made solely in reference to the question of appellant's credibility. Cf. People v. Brain, 17 Cal.App.2d 141, 143, 61 P.2d 806.

[7] Appellant's fourth contention is that the trial court erred in failing to instruct the jury upon the elements of the crime of theft. The trial court instructed the jury that "It is the law of this state that every person who shall feloniously steal, take or drive away the automobile of another is guilty of grand theft regardless of the value of the vehicle." Appellant points out that the court failed to give instructions covering the general definition of theft, intent in theft cases, the definition of larceny by trick and device or the definition of theft by false pretenses. However, appellant made no request for any of these instructions, and it does not appear that the failure of the court to give them *sua sponte* should be regarded as prejudicial error under the circumstances of this case. The cases cited by appellant do not appear to sustain his contention.

[8] Finally, appellant argues that the trial court erred in failing to instruct the jury that an oral extrajudicial admission of the defendant should be viewed with caution. The only statement alluded to in appellant's brief as constituting an extrajudicial admission is the following attributed to appellant in the testimony of the arresting officer: "He was asked when he opened that bank account, and he stated that he opened it approximately the latter part of February or the first of March * * *."

There seems to be no merit in this contention for two reasons. In the first place, appellant did not request the instruction, and, in the second place, the quoted statement attributed to appellant did not constitute any admission of guilt. It is uncontradicted that appellant opened his account with the drawee bank in the latter part of March.

[9] It should be observed that many of the questions presented on the instant appeal revolve about appellant's contentions that the trial court, on its own motion, should have given certain instructions even though the defendant did not request them. Appellant was represented by counsel in the trial court, and his failure to request any of the instructions now asserted as grounds for reversal should be regarded as significant. Of course, "[i]n a criminal case the trial court is required to instruct the jury of its own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence." People v. Yrigoyen, supra, 45 Cal.2d 46, 49, 286 P.2d 1, 3; People v. Putnam, 20 Cal.2d 885, 890–891, 129 P.2d 367. However, "[r]eviewing courts will scrutinize with great care any claim of prejudicial error predicated solely upon the omission of the trial court to give of its own motion an instruction, the propriety of which is indicated solely by the condition of the evidence." People v. Davis, 43 Cal. 2d 661, 674, 276 P.2d 801, 808; see People v. Richardson, 74 Cal.App.2d 528, 533, 169 P.2d 44.

The judgment and order are affirmed.

FOX, P. J., and ASHBURN, J., concur.

51 Cal.2d 439

Loris HUNTER, Respondent,

v.

MOHAWK PETROLEUM CORPORATION (a Corporation), Appellant.

S. F. 19960.

Supreme Court of California, In Bank.

Jan. 23, 1959.

Action by invitee against owner of gasoline station for personal injuries sustained when customer of owner used air hose to blow out gasoline line and caused stream of gasoline from tank to strike the invitee. The Superior Court, City and County of San Francisco, A. K. Wylie, J., entered judgment for the invitee and the owner appealed. The Supreme Court, McComb, J., held where the customer had for six or seven hours been repairing his truck on the owner's premises but there was no evidence that he had done anything negligent until using the air hose, and there was nothing to put owner on notice that he might act negligently, the owner was not liable for the invitee's injuries.

Reversed.

Carter, J., dissented.

Opinion, 322 P.2d 551, vacated.

1. Negligence ⇐48, 50, 52

Possessor who holds land out to public for entry for his business purposes is liable to members of the public on the land for business purpose for their injuries sustained by accidental, negligent, or intentionally harmful acts of third persons if the possessor by exercise of reasonable care could have discovered the third person's acts were being or about to be done and the possessor could have protected the public by controlling the third person's conduct or by warning the public.

2. Negligence ⇐68

In absence of conduct to put person on notice to contrary, a person is entitled to assume others will not act negligently or unlawfully.

3. Negligence ⇐48

Where owner operated self-service gasoline station and customer pushed vehicle aside on the station property and tried for six or seven hours to repair it, and then proceeded to blow out gasoline line to gasoline tank with air hose, and thereby caused stream of gasoline to be ejected from the tank in face of another invitee, but there was no evidence that the customer had done anything negligent before this nor evidence of anything to put the owner on notice that customer might act negligently, the owner was not liable for the invitee's injuries.

Bledsoe, Smith, Cathcart, Johnson & Phelps, R. S. Cathcart and Wilbur J. Russ, San Francisco, for appellant.

Leon A. Blum and Harold L. Levin, San Francisco, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries received while plaintiff was a business visitor on defendant's property.

Facts: Defendant owned a self-service gasoline station in San Francisco, on a lot approximately 100 feet square. Gasoline was dispensed from pumps located in the center of the lot. Air and water facilities were located along a side of the lot for use by customers desiring to service their own vehicles. On the same edge of the lot and near the air and water outlets, a large blackboard was maintained by defendant for posting winning numbers in drawings of tickets previously given purchasers of defendant's gasoline.

On July 7, 1953, Mr. Paris, a customer, bought some gasoline for his pick-up truck. Being unable to start the motor, he pushed his truck over to the area where the air and water fixtures were situated. He

worked on the battery and motor for six or seven hours.

The station attendant paid no attention to Mr. Paris' activities, and did not offer to assist him or render any aid. Mr. Paris finally decided that the pipeline leading to the gasoline tank on his truck might be plugged. He then proceeded to blow it out with the air hose provided to inflate tires. Instead of the usual metal cap on the intake hole of the gasoline tank, there was simply a rag stuffed into the vent. Mr. Paris did not remove this rag, but disconnected the main gasoline line from underneath the car and attached the air hose to it to blow out the line.

In the meantime, plaintiff and her husband drove into the station. While her husband was purchasing gasoline, plaintiff got out of the car and went to the blackboard to see whether she held any winning tickets in the drawing. She was standing immediately at the rear of Mr. Paris' truck when suddenly a stream of gasoline from the truck's tank hit her in the face, causing serious burns on her face, chest, arms and neck. Her eyesight was materially impaired.

The jury returned a verdict in favor of plaintiff in the sum of $5,000.

[1] This is the sole question necessary for us to determine: *Does the mere fact that a business visitor has for some time been working on his vehicle on property owned by defendant constitute substantial evidence in and of itself to put the defendant-owner on notice that other business visitors are thereby threatened with danger, and is such "possibility" sufficient to impose liability on the owner where an injury arises out of a momentary, isolated, negligent act by the business visitor working on his vehicle?*

No. The rule is correctly stated thus in Restatement, Torts, section 348:

"A * * * possessor of land who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the land for such purpose for bodily harm caused to them by the accidental, negligent or intentionally harmful acts of third persons or animals if the possessor by the exercise of reasonable care could have

(a) discovered that such acts were being done or were about to be done, and

(b) protected the members of the public by

(i) controlling the conduct of the third persons, or

(ii) giving a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive from [him]."

[2] This rule presupposes that the owner of the land by reasonable care could have discovered that the act which caused the harm was being done or was about to be done.

In Porter v. California Jockey Club, Inc., 134 Cal.App.2d 158, 160 [2], 285 P.2d 60, 61, the rule is stated thus: "It is axiomatic that in the absence of conduct to put him on notice to the contrary a person is entitled to assume that others will not act negligently or unlawfully. (Citation.)" (See also Mawhiney v. Signal Trucking Co., 132 Cal.App.2d 809, 813 [3], 283 P.2d 27.)

[3] Applying the foregoing rule to the facts of the present case, there is no evidence in the record that Mr. Paris had been behaving negligently, nor is there any evidence of any fact which could possibly have put defendant on notice that he might act negligently. Under the circumstances and the authorities cited above, defendant was not liable for the injuries sustained by plaintiff. (See Guild v. Brown, 115 Cal.App. 374, 381, 1 P.2d 528.)

Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574; Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729; Johnstone v. Panama Pacific I. E. Co., 187 Cal. 323, 202 P. 34; Sample v. Eaton, 145 Cal.App.2d 312, 302 P.2d 431 [hearing denied by the Supreme Court]; Goldsmith v. Mills, 130 Cal.App.2d 493, 279 P.2d 51; Thomas v. Studio Amusements, Inc., 50 Cal.App.2d

538, 123 P.2d 552; Basye v. Craft's Golden State Shows, 43 Cal.App.2d 782, 111 P.2d 746 [hearing denied by the Supreme Court]; and Szasz v. Joyland Co., 84 Cal.App. 259, 257 P. 871 [hearing denied by the Supreme Court], relied on by plaintiff, are not in point, for the reason that in each of the cases there was either an allegation (as in the cases decided on demurrer), or proof (as in the cases decided after trial) of facts putting the owner of the property on notice of negligent conduct which threatened the safety of a business visitor.

As pointed out above, in the present case there was an absence of any such evidence; therefore, the cited cases are not authority for plaintiff's position.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Plaintiff was a business invitee of defendant, the operator of a self-service gasoline station. Plaintiff left her automobile to check a large blackboard maintained by defendant to notify customers of the winning numbers of tickets previously distributed to them. The blackboard was located near the air hose. While checking the numbers, she was injured by a stream of gasoline which was produced by the negligent acts of another invitee, Mr. Paris, who was blowing out the gas line of his truck. Mr. Paris was repairing his truck on the station premises with the permission of defendant and had been doing so for several hours. He was permitted by defendant to use the facilities made available by defendant for motorists.

Plaintiff contended that defendant did not exercise reasonable care in protecting her from the danger created by Mr. Paris in the use of said facilities, and that this negligence proximately caused her injuries. A jury rendered a verdict in favor of plaintiff, thus determining defendant's liability for the injury suffered by her.

There is no dispute as to the applicable rules of law. A landowner is under a duty of reasonable care to protect business invitees from harmful acts of third persons where he actually knows of a danger, or where, in the exercise of reasonable care, he should know a danger might exist. It is also conceded that there is no evidence that defendant had actual knowledge that Paris was engaging in negligent activities. Thus, the sole issue is whether there is any evidence from which a jury could infer that defendant, in the exercise of reasonable care, should have known that Mr. Paris might create an unreasonable risk of harm to other invitees by the negligent use of the available facilities. In other words, was there a fact question for the jury to determine?

An important factor in this case, which is entirely ignored by the majority of this court, is that Paris was using facilities provided by defendant when he inflicted the injury upon plaintiff and that he was using these facilities in a careless and negligent manner. In other words, it was the negligent use of defendant's facilities which was the proximate cause of the injury suffered by plaintiff. Of course, defendant knew that Paris was using its facilities, and it obviously owed a duty to plaintiff, and all others similarly situated, to see that such facilities were not so used as to cause them injury. If the injury had resulted from conduct by Paris without the negligent use of defendant's facilities, a different question would be presented, as such conduct would be beyond the control of defendant. Here it may be said that defendant knowingly permitted Paris to negligently use defendant's facilities and thus cause injury to plaintiff. There should be no question of liability in such a case, as it falls clearly within the rule stated in section 348 of the Restatement of Torts quoted in the majority opinion.

The evidence on this point was clearly and succinctly summarized by Mr. Presiding Justice Peters, who wrote the opin-

ion when this case was before the District Court of Appeal, which affirmed the judgment. It is as follows: "* * * appellant [defendant] furnished a place for customers to work on their cars. Appellant knew, or should have known, that persons using the facilities furnished by it might include amateurs, hot-rodders, and other do-it-yourselfers. It is certainly a reasonable possibility that such persons working on an instrumentality such as an automobile might create a dangerous situation. Yet appellant made no effort at all to discover what Paris was doing or how he might be doing it. He invited other customers to come to the area by maintaining the blackboard in the immediate vicinity of the area where Paris was working. No warning signs were posted to warn invitees of the possible danger. Appellant knew, or should have known, that Paris was working on his car for many hours. Appellant knew that the trouble was not battery trouble because appellant's employee had sold Paris a new battery and the employee knew that this did not start Paris' car. Certainly the attendant knew, or should have known, * * * that Paris might be engaged in any one of several activities that could create a danger to those nearby. He knew, or should have known, that among these possibilities was that if the person working on his car believed the gasoline line was stopped up he might use the air pressure to blow it out. He knew, or should have known, that the gasoline tank was capped with a rag stuffed in the vent. Paris was working on his car where the air hose was located. The possibility that the air hose might be used for this purpose was not so unlikely that it was unforeseeable as a matter of law." (Hunter v. Mohawk Petroleum Corp., Cal.App., 322 P.2d 551, 555.)

From this evidence the District Court of Appeal concluded that the jury could infer that defendant had notice of the possible danger to customers in the area of the blackboard. I wholeheartedly agree with this conclusion and can see no escape from the fact that the inferences to be drawn from this evidence were within the province of the jury. Therefore, the jury verdict cannot be disturbed by this court unless it again usurps the function of the jury and takes another excursion into the fact finding field.

For the foregoing reasons I would affirm the judgment.

167 Cal.App.2d 275

Reno J. BELLI, as Special Administrator of the Estate of Caterina Bonavia, Deceased, Plaintiff, Cross-Defendant and Respondent,

v.

Anthony BONAVIA, Defendant, Cross-Defendant and Appellant,

and

Leon Belli, Sr., as Administrator of the Estate of Anita Belli, etc., Deceased, Defendant, Cross-Complainant and Respondent

Civ. 18120.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1959.

Action by administrator of grantor's estate to quiet title to land and cross action by administrator of grantor's daughter's estate to quiet title to the land and for accounting of rentals, from the land, taken by grantor's son. The Superior Court, City and County of San Francisco, William T. Sweigert, J., gave judgment that the son and daughter each, by reason of deed made by grantor in 1933 to them and delivered to the daughter, acquired undivided one-half interest in the land, and the son and the daughter's administrator appealed. The District Court of Appeal, Kaufman, P. J., held that evidence sustained finding that the grantor delivered the deed of 1933 to the daughter with intent to pass title, and although the son in open court disclaimed any interest in the land under deed of 1933 and relied on gift deed from grantor to the son

executed in 1954, son acquired undivided one-half interest in fee under deed of 1933.

Affirmed.

1. Deeds ⇐208(1, 7)

In action to quiet title to land, evidence sustained trial court's finding that mother's deed to daughter and son was delivered to daughter with intent to pass present title. West's Ann.Civ.Code, § 1054.

2. Deeds ⇐194(2)

Possession of deed by grantee gives rise to presumption of delivery.

3. Deeds ⇐194(3)

Delivery of deed is presumed to take place at time of execution of the deed. West's Ann.Civ.Code, § 1055.

4. Deeds ⇐194(2, 3, 5)

Presumptions of delivery arising from grantee's possession of deed and that delivery took place at time of execution of the deed are applicable, although grantor exercises control over property, and deed is not recorded until after death of grantor.

5. Deeds ⇐194(1)

Where prima facie case of delivery of deed is made out or presumption established, burden of going forward with the evidence shifts to party attacking validity of the deed.

6. Deeds ⇐194(1)

Nothing but most satisfactory evidence of nondelivery should prevail over presumption of valid delivery.

7. Deeds ⇐56(2)

Payment of taxes and keeping up of insurance by grantor are consistent with intent to pass title.

8. Deeds ⇐67, 88

Validity of deed is not affected by failure of grantee to record or take possession from grantor.

9. Deeds ⇐56(2)

Lack of knowledge by one grantee of existence of deed or intent of grantor to pass title has no bearing on grantor's intent to divest himself of title.

10. Deeds ⇐57

Delivery of deed to one joint owner is delivery to both.

11. Deeds ⇐194(4)

Where a grant is beneficial, although grantee has no knowledge of deed, acceptance by the grantee is presumed.

12. Deeds ⇐211(1, 4)

In action to quiet title to land, evidence sustained finding that the 87-year-old mother was incompetent and gift deed from her, executed four days before she died, to son, was given by reason of son's undue influence.

13. Appeal and Error ⇐931(1)

On appeal, all conflicts in testimony must be resolved in favor of conclusion reached below.

14. Deeds ⇐211(4)

In action to quiet title involving validity of deed from mother to son, evidence sustained finding of existence of confidential relationship between grantor and her son.

15. Deeds ⇐196(3)

Presumption of undue influence arises from proof of existence of confidential relationship between grantor and grantee, coupled with activity on part of grantee in preparation of document.

16. Adverse Possession ⇐85(1)

Where grantor deeded property to her two children but remained in possession for 21 years after delivering the deed, grantor's possession was presumed subordinate to legal title. West's Ann.Code Civ.Proc. § 321.

17. Adverse Possession ⇐63(4)

To acquire title by adverse possession against his own conveyance, grantor must make disclaimer by assertion of adverse title with notice to owners.

18. Adverse Possession ⇐63(2)

Where close and affectionate relationship in family existed and grantor deeded property to her two children, payment of taxes, possession, and management of the property by grantor were family transac-

tions and were consistent with legal title in grantees.

19. Estoppel ⇐71

Where mother's deed to son and daughter had been validly delivered to daughter and son disclaimed his interest under deed and claimed entire property under deed subsequently executed under undue influence, the son rather than the mother's estate was owner of the one-half interest.

Ferrari & Ferrari, San Francisco, for appellant Bonavia.

Joe L. Casalnuovo, San Francisco, for respondent Leon Belli, Sr.

Charles P. Molinari, San Francisco, for respondent Rino J. Belli.

KAUFMAN, Presiding Justice.

Plaintiff, Reno Belli, as special administrator of the Estate of Caterina Bonavia, commenced this action to quiet title to an improved parcel of real property at 1730–32 Filbert Street in San Francisco, and to certain shares of stock, and for an accounting of rentals and dividends. Defendant, Leon Belli, Sr. administrator of the Estate of Anita Belli, answered and cross-complained to quiet title to the real property and asked for an accounting of the rentals from the real property by the defendant and cross-defendant Anthony Bonavia. Anthony Bonavia answered and asserted complete ownership of the real property under a deed dated September 1954, and complete ownership of the stock. The court below found that by reason of a deed dated August 19, 1933, Anita Belli and Anthony Bonavia each owned an undivided one-half interest in fee in the real property, and that Anthony Bonavia owned the shares of stock. The sole issue on appeal is the validity of the deeds to the Filbert Street property.

On appeal, Anthony Bonavia contends that: 1) The 1933 deed was not delivered with the intent to pass present title, but with the intention that title should not pass until the death of the grantor; 2) The evidence was insufficient to support the trial court's finding that the 1954 deed was invalid because the grantor lacked mental capacity to execute the deed and because it was the result of the undue influence of Anthony Bonavia; 3) Even if the 1933 deed was validly delivered and passed title, such title was lost by the continuous adverse possession of the grantor from 1933 to 1954.

The Estate of Caterina Bonavia argues that as Anthony Bonavia did not accept his interest under the 1933 deed and the law does not force any one to take title to real property against his will, it is proper for this court to reverse the finding of the court below as to the one-half interest of Anthony Bonavia and hold that the Estate of Caterina Bonavia is the owner thereof.

Caterina Bonavia, the mother of Anthony Bonavia and Anita Belli, was the owner of the property as 1730–1732 Filbert Street. On August 19, 1933, Caterina Bonavia executed and acknowledged a deed of gift to her two children, Anita and Anthony. The deed was signed and delivered and acknowledged in the presence of Anita Belli, her husband Leon Belli, Sr., Rosa Curlo and a notary public, Joseph Pensa, the entire transaction taking place in the office of Mr. Pensa. Anita accepted the deed, and she and her husband deposited it in their safe deposit box. Anthony testified that neither his sister nor his mother ever mentioned the 1933 deed to him and that he never accepted it.

After the 1933 deed, as before, Caterina Bonavia continued to live on the Filbert Street property which consisted of an improved lot with two cottages. Anita helped her in the management of the property by paying taxes, collecting rents, calling repairmen, etc. The expenses were paid indirectly by Caterina who received the benefit of the rents. Insurance was carried in the name of Caterina Bonavia. In the early 1940's, Anthony Bonavia moved in with his mother. Anita Belli died on July 13, 1941, survived by her sons, Reno Belli (Plaintiff herein) and Leon Belli, Jr., and

her husband Leon Belli, Sr. The 1933 deed was not recorded until after the death of Caterina Bonavia in 1954.

On April 16, 1953, Anthony Bonavia went to the City Hall in San Francisco, and asked a Mr. Howard to draw up a gift deed granting the Filbert Street property to Anthony. Anthony took the deed home and placed it away until September 30, 1954, when his mother told him that she was ready to sign it. Anthony called Mr. Colapietro, a notary public, and another witness to acknowledge the deed. Caterina was taken out of bed and propped up at a desk and chair to sign the deed. The entire transaction took only three to five minutes. Caterina Bonavia died a few days later on October 4, 1954. She was 87 years old. The cause of death was coronary thrombosis. For several months before her death, Caterina had been ill and failing. One week before her death, a close friend moved to the rear cottage on the property to take care of Caterina. Caterina had been unable to manage her own affairs. Anthony managed her affairs from 1952 on. Several witnesses testified that during the period before her death, Caterina was listless, forgetful and unresponsive and otherwise showed signs of advancing age and senility.

[1] As to appellant Anthony Bonavia's first contention that the 1933 deed was not delivered with the intent to pass present title, the record reveals ample evidence to substantiate the trial court's finding to the contrary. Civil Code, § 1054; Osborn v. Osborn, 42 Cal.2d 358, 267 P.2d 333; Hitch v. Hitch, 24 Cal.App.2d 291, 74 P.2d 1098. When she executed the deed, Caterina gave the deed to Anita and said, "Take this". Anita accepted the deed and placed it in a safe deposit box where it remained until her death in 1941. At the time of Anita's death, Leon Belli, Sr. had forgotten about the 1933 deed. He removed all the documents from the safe deposit box and kept them in his possession. Thus, Anita Belli had possession of the deed from 1933 until her death in 1941. After her death, her husband continued to hold it with his other papers.

[2–4] A presumption of delivery arises from the possession of the deed by the grantee. Stewart v. Silva, 192 Cal. 405, 221 P. 191; Severn v. Ruhde, 58 Cal.App. 2d 704, 137 P.2d 466. There is a further presumption that the delivery took place at the time of execution. Civil Code, § 1055; Marple v. Jackson, 184 Cal. 411, 193 P. 940. These presumptions are applicable even if the deed is not recorded until after the death of the grantor, who in the meantime exercises acts of control over the property by collecting rent, paying insurance in his own name etc. Merritt v. Rey, 104 Cal.App. 700, 286 P. 510; Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507; Drummond v. Drummond, 39 Cal.App.2d 418, 103 P.2d 217; In re Estate of Schmidt, 49 Cal.App.2d 86, 121 P.2d 104; Lewis v. Burns, 122 Cal. 358, 55 P. 132; Lewis v. Brown, 22 Cal.App. 38, 133 P. 331.

[5–11] Possession of the deed by the grantee also creates prima facie evidence of valid delivery. Labadie v. Labadie, 57 Cal.App.2d 456, 134 P.2d 858. Once a prima facie case is made out, or the presumption established, the burden shifts to the party attacking the validity of the deed. California Trust Co. v. Hughes, 111 Cal. App.2d 717, 245 P.2d 374. "Nothing but the most satisfactory evidence of nondelivery should prevail against the presumption". Stewart v. Silva, 192 Cal. 405, 221 P. 191, 192. Payment of taxes and keeping up insurance by the grantor are consistent with the intent to pass title. Hitch v. Hitch, 24 Cal.App.2d 291, 74 P.2d 1098. The validity of the document is not affected by the failure to record or change possession. Knox v. Kearney, 40 Cal.App. 290, 180 P. 661. The fact that one of the grantees has no knowledge of the deed or intent to pass present title, has no bearing on the grantor's intent to divest himself of title. Green v. Skinner, 185 Cal. 435, 197 P. 60. Delivery to one joint owner is delivery to both. Smith v. Lombard, 201 Cal. 518, 258 P. 55; Eshleman v. Henrietta Vineyard Co., 102 Cal. 199, 36 P. 579. Ac-

ceptance is presumed where a grant is beneficial, even where a grantee has no knowledge of the deed. In re Estate of Kalt, 16 Cal.2d 807, 108 P.2d 401, 133 A.L.R. 1424; Smith v. Lombard, 201 Cal. 518, 258 P. 55; Herman v. Mortensen, 72 Cal.App.2d 413, 164 P.2d 551.

[12, 13] As to appellant Anthony Bonavia's contention relating to the validity of the 1954 deed, there was sufficient evidence to sustain the trial court's finding that Caterina Bonavia was incompetent and that the deed was executed by reason of Anthony Bonavia's undue influence. Appellant Anthony Bonavia makes much of the conflicts between his testimony and that of the other witnesses. On appeal, all conflicts must be resolved in favor of the conclusion reached below. Ahern v. S. H. Kress & Co., 97 Cal.App.2d 691, 218 P.2d 108. There is uncontroverted evidence that at the time of the 1954 deed, Caterina Bonavia no longer recalled whom her family consisted of and what persons had claim upon her bounty. In re Estate of Dunne, 130 Cal.App.2d 216, 278 P.2d 733. The doctor testified that Caterina was in a semi-comatose condition for the period of time before her death. She had to be propped up in order to sign the deed. On the evidence presented, the trial court was justified in finding that Caterina Bonavia was generally mentally incompetent by reason of illness, old age and increasing senility. Hughes v. Grandy, 78 Cal.App.2d 555, 177 P.2d 939.

[14, 15] The evidence also established a confidential relationship between Anthony Bonavia and his mother. He made and withdrew deposits from a joint bank account, cashed her dividend checks, and paid taxes and necessary expenses. His activity in the preparation of the 1954 deed is discussed above. A presumption of undue influence arises from the proof of existence of a confidential relationship between the grantor and grantee, coupled with activity on the part of the grantee in the preparation of the document. In re Estate of White, 128 Cal.App.2d 659, 276 P.2d 11. See also Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289; Hughes v. Grandy, supra, and In re Estate of Abert, 91 Cal. App.2d 50, 204 P.2d 347.

[16–18] As to appellant Anthony Bonavia's final argument relating to adverse possession, there is no evidence of adverse possession by Caterina Bonavia after 1933. Her occupation is presumed to be subordinate to the legal title. Code of Civil Procedure, § 321. If a grantor is to acquire title by adverse possession against his own conveyance, a disclaimer by an assertion of adverse title with notice to the owners is necessary. Madden v. Alpha Hardware & Supply Co., 128 Cal.App.2d 72, 274 P.2d 705; Oglesby v. Hollister, 76 Cal. 136, 18 P. 146. The evidence indicates that there was always a close and affectionate relationship between Caterina Bonavia and her two children, her son-in-law, Leon Belli, Sr. and her grandsons. In family transactions, possession, payment of taxes, management of the property are all consistent with the legal title. Merritt v. Rey, 104 Cal.App. 700, 286 P. 510; Tully v. Tully, 137 Cal. 60, 69 P. 700; Reed v. Smith, 125 Cal. 491, 58 P. 139; Allen v. Allen, 159 Cal. 197, 113 P. 160. In the somewhat similar case of Merritt v. Rey, supra, the grantor lived on the property for 17 years after the execution and delivery of the deed, mortgaged the property in her own name, paid taxes, repairs, expenses and insurance, and was repaid by income from the property.

[19] We turn now to the sole contention on appeal made by the Estate of Caterina Bonavia. The estate argues that since Anthony Bonavia never accepted his interest under the 1933 deed and subsequently disclaimed it in open court, it is proper for this court to reverse the lower court's finding as to one-half interest of Anthony Bonavia and hold that the Estate of Caterina is the owner thereof. As we have pointed out above, acceptance of benefits will be presumed and knowledge of the grantee is not essential in a situation such as this one. The intention with which a grantor puts a deed in the hands of a third person is a question of fact to be

determined from all the circumstances surrounding the transaction. Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A.L.R. 734; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180. As we stated above, the record supports the finding of the trial court that the 1933 deed was delivered with intent to pass title at that time. Nor can we attach a great deal of significance to Anthony Bonavia's disclaimer of the 1933 deed in open court during the course of this litigation, in which he based his position on the validity of the 1954 deed.

We conclude that the judgment finds ample support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

167 Cal.App.2d 120

Irma L. TAYLOR, Plaintiff and Respondent,

v.

Lottie L. TAYLOR et al., Defendants and Respondents.

Katie M. EUSTACE, Executrix of the Estate of Charles W. Fourl, Deceased, Defendant, Cross-Complainant and Appellant,

Robert A. Casson et al. (28 partners), Respondents.

L. A. Wagner, Defendant, Cross-Complainant and Respondent.

Civ. 22541.

District Court of Appeal, Second District, Division 1, California.

Jan. 14, 1959.

Action for dissolution of a partnership and for accounting in receivership. From a judgment of the Superior Court, Los Angeles County, George Francis, J., an executrix and cross complainant appealed. The District Court of Appeal, White, P. J., held, inter alia, that where decedent and his legal secretary were co-owners of interest in oil well proceeds, the portion of such interest belonging to the secretary was never a part of decedent's estate, and hence the dead man's statute was not applicable, and secretary's testimony that portion remaining from such interest after certain litigation would be divided equally between such secretary and decedent was properly admitted since the action was not against an executor upon a claim.

Affirmed in part and in part reversed and remanded with directions.

See also 153 Cal.App.2d 144, 314 P.2d 60.

1. Appeal and Error ⇐907(2)

The Court of Appeal could not presume that evidence not in the record was considered by trial court.

2. Mines and Minerals ⇐100

Where one of owners of oil wells, who dealt with lessee in obtaining for all owners quitclaim deeds from lessee and his assignees in consideration of their becoming owners of 5% of proceeds of production subject to operating costs, was also the general partner of limited partnership which subsequently entered into oil lease with owners, and had account of lessee and his assignees placed upon partnership books, and there was no evidence indicating when or how error crept into partnership books causing only 5%55ths of its distributable income to be credited to such account in lieu of 5%55ths of the proceeds from sale of oil from wells subject only to operating costs, lessee's recovery upon dissolution of partnership and appointment of receivers was not limited to such erroneous amount credited to such account upon the partnership books.

3. Estoppel ⇐116

Frauds, Statute of ⇐158(1)

Limitation of Actions ⇐195(3)

Mines and Minerals ⇐100

Where oil well lessee and his assignees executed quitclaim deeds to owners and lessors in consideration of 5% of proceeds of oil wells less pro rata share of operating

cost, a limited partnership of which one of owners was general partner thereafter entered into oil lease with owners and had lessee's account placed upon partnership books, there was no evidence that lessee and his assignee even knew of existence of amendment to certificate of partnership whereby lessee and his assignee were admitted as "additional" limited partners, and there was no evidence indicating when or how error crept into partnership books causing only 50/855ths of distributable income to be credited to lessee's trust account in lieu of 50/855ths of proceeds from sale of oil from wells subject only to operating costs, under circumstances, affirmative defenses of statute of limitations, statute of frauds, laches and equitable estoppel were inapplicable in suit by lessee's executrix against receivers of dissolved partnership.

4. Mines and Minerals ⇐100

Where oil well lessee executed quitclaim deeds in consideration of "5% of production subject to operating costs only", lessee's interest in assets of limited partnership which thereafter executed a lease with well owners must be construed in light of circumstances then existing and expressed intention of the parties at time of execution of the quitclaim deeds.

5. Mines and Minerals ⇐99(3)

Where limited partnership as additional consideration for oil lease agreed to pay well owners' obligation to former lessee and his assignees amounting to "5% of production subject to operating expenses", it could not be presumed that owners or former lessee intended that quoted phrase would be treated as synonymous with 50/855ths or 5.84% of the distributable income of partnership created after former lessee's agreement.

6. Mines and Minerals ⇐101

Where oil well lessee executed quitclaim deeds in consideration of ownership of 5% of production subject to operating costs only, while lessee's interest was expressly limited to "the next two wells to be drilled" and was to be "subject to operating costs", in absence of evidence of any other limitation, items to be charged against lessee's interest were only those contemplated by the agreement.

7. Mines and Minerals ⇐98, 100

Where oil well lessee executed quitclaim deeds in consideration of ownership of 5% of production subject to operating costs only, before formation of limited partnership which executed a lease with full knowledge of lessee's interest, the 5% interest of such lessee and his assignees was not limited to term of lease or life of partnership, but constituted a perpetual interest in oil and other hydrocarbon substances to be produced from the wells drilled by the partnership under their lease, and such interest in production was not a partnership asset and could not be sold by receivers of partnership.

8. Witnesses ⇐133

Where decedent and his legal secretary were co-owners of interest in oil well proceeds, the portion of such interest belonging to the secretary was never a part of decedent's estate, and hence the dead man's statute was not applicable, and secretary's testimony that portion remaining from such interest after certain litigation would be divided equally between such secretary and decedent was properly admitted, since the action was not against an executor upon a claim. West's Ann.Code Civ. Proc. § 1880, subd. 3.

9. Mines and Minerals ⇐101

Evidence, including testimony of deceased oil lessee's legal secretary regarding an agreement whereby the portion of interest under oil lease remaining after certain litigation would be divided equally between lessee and secretary, warranted finding that secretary's portion in proceeds was equal to that of the lessee.

Edmond Gattone, Paul P. Selvin, Los Angeles, for appellant.

John W. Brooks, Long Beach, Alan F. Asher, W. A. Bullis, Los Angeles, for 28 partners, respondents.

Owen E. Kupfer, Los Angeles, for L. A. Wagner, respondent.

WHITE, Presiding Justice.

Appellant is the executrix of the estate of Charles W. Fourl, deceased, and a defendant and cross-defendant in the action. The appeal is from a portion of the interlocutory judgment that "the limited partnership of Massey and Associates was dissolved"; that receivers appointed by the court are in possession of all of its business and are managing and operating the same; that the respective interests of the members of the dissolved partnership and their successors and assigns are in accordance with the list therein, which includes Margot M. Mayo 27.5/855ths, L. A. Wagner 11.25/855ths, and appellant herein 11.25/855ths; that two accounts of the receivers are correct; that the receivers hold in trust (and not as partnership property) the following items: for Margot M. Mayo $1,430; for L. A. Wagner $5,821.87; and for appellant $5,821.88, each as of March 8, 1956; that the receivers shall sell all partnership assets at public auction and distribute the proceeds of operation and sale of the partnership property in accordance with the said list showing the respective interests of the partners and their successors and assigns.

The appeal must be considered in two parts: (1) appellant's claim that her interest is not 11.25/855ths or any other portion of the limited partnership, but instead is an "overriding interest" in certain oil wells drilled by the partnership on the Taylor land; and (2) appellant's claim that the court erred in its division of such "overriding interest" so as to award appellant only 11.25/855ths instead of 17.25/855ths of the proceeds from said oil wells.

Attorneys Brooks, Asher and Bullis represent 28 respondents who were members of the dissolved limited partnership and answer only the appellant's first point; while Attorney Kupfer represents respondent Wagner, who was a co-owner of the claimed "overriding interest" (with appellant's decedent and defendant Mayo who has not appeared in the instant appeal) and answers only the second point.

The two portions of the appeal will be separately considered. The following is a summary of the evidence pertinent to appellant's claim that the court erred in deciding that Fourl's interest in the two oil wells drilled by Massey and Associates is to be computed in the same manner as though it were the interest of a limited partner in Massey and Associates.

May 13, 1927, W. W. Taylor and Lottie L. Taylor, his wife, as owners and lessors, and Fourl (appellant's decedent) entered into an oil lease, under which four wells were drilled. As to those wells and their continued production there is no controversy.

Lessors, the Taylors, wanted more wells drilled. A disagreement arose as to the rights of Fourl and his assignees (Wagner and Mayo) under the Fourl lease in such proposed additional wells, or in the land upon which the owners proposed to drill them.

In 1937, an action to quiet title against the 1927 Fourl lease was commenced by the owners.

January 28, 1938, Attorney Cree, representing Lottie L. Taylor, Lees W. Taylor, and Jessie Taylor Reedy, the widow, son and daughter of W. W. Taylor, and the then owners of said land, wrote Fourl that, in return for "quitclaim deeds sufficient to clear the said premises of the oil and gas lease", Fourl and his assignees (Mayo and Wagner) would become the owners of "five percent (5%) of the proceeds, less the pro rata share of the operating costs, hereafter realized from the sale of all oil and gas produced and saved from the first two (2) wells drilled by the undersigned and associates on the undrilled portion of the said ten acres".

The witness Luther Mayo, assignor or Margot Mayo, testified that before he, Fourl and Wagner executed the quitclaims, Lees Taylor (deceased at the time of the trial), acting for himself and the other owners of the land, promised that Fourl and his assignees would receive as consideration for

their quitclaim deeds 5% of production subject to operating costs only.

Respondents, in their brief, state that "no evidence whatever was presented by the appellant to negative the effect of defendants' Exhibit 'O' or the testimony of Wagner that Fourl had received this offer before the execution of the quitclaim deed".

Defendant's Exhibit "O" was offered and introduced in evidence by appellant. It is the letter from Attorney Cree's files in which Fourl was offered five percent of the proceeds, less the pro rata share of the operating costs. It mentions no partnership. At that time, Massey and Associates had not been formed. The land was then subject to no oil lease other than Fourl's lease because of which the landowners were seeking quitclaim deeds. Respondents concede that the only consideration offered for the execution of the quitclaim deeds was the 5% interest in the production of the next two wells to be drilled on the land as stated in said letter, and that on February 7, 1938, the quitclaim deeds were executed by Fourl, Wagner and Mayo.

June 16, 1938, the three owners of the land became partners in Massey and Associates, Lees W. Taylor a general partner and the others limited partners. In all there were about 30 partners, two general and the remainder limited.

September 1, 1938, Massey and Associates entered into an oil lease with the owners, by which the partnership agreed to drill two wells, from the production of which the owners would receive 12.5%, their attorney Brooks 1%, and their geologist or engineer 1% "off the top", leaving 85.5% of the selling price of such production to be paid by the respective purchasers to Massey and Associates.

October 28, 1938 and December 29, 1939, the wells "spurted in". In May, 1940, the first distribution of income was made to the partners.

September 23, 1940, is the date of an amendment to the certificate of partnership of Massey and Associates. It recites that "it is desired to admit" Mayo, Wagner and Fourl as "additional" limited partners. Margot Mayo, assignee of Luther Mayo whose interest was the consideration for his quitclaim to the owners, signed the certificate. Fourl and Wagner did not. There is no evidence that they even knew of its existence. From May, 1941 to the beginning of the receivership, Margot Mayo was paid the same as the limited partners of Massey and Associates. Fourl and Wagner received no payment.

August 10, 1950 Fourl died.

April 17, 1951 and June 26, 1953, Taylor and Massey, the general partners, died. Massey and Associates, according to its certificate of limited partnership, was dissolved by the death of the last general partner on June 26, 1953. Irma L. Taylor, one of the limited partners and the widow of Lees W. Taylor, one of the general partners, seeks by the instant action to have the partnership assets sold and distributed in accordance with the partnership agreement.

January 22, 1954, receivers were appointed to operate and sell the partnership business and distribute its income and assets.

The portion of the judgment which gives rise to appellant's first claim of error on the part of the trial court is that "by whatever name they may be called", the interests of Fourl, Wagner and Mayo are to be sold by the receivers along with the partnership assets and the interests of Fourl, Wagner and Mayo in the proceeds of the sale "are to be computed in the same way as the interests of the Limited partners".

Fourl, Mayo and Wagner were not members of Massey and Associates. There is no evidence that the original agreement between the owners and Fourl, Mayo and Wagner was every modified with respect to the consideration for the quitclaim deeds, or otherwise, or that they agreed to look solely to Massey and Associates for payment of the 5% due them.

Although the interests of Fourl, Wagner and Mayo are not mentioned in the Massey oil lease, it is conceded that Massey and Associates, when entering into their lease

for the drilling of two wells, knew of such interest and agreed with the owners that the 5% would be paid to Fourl, Wagner and Mayo out of the portion of the proceeds from the oil to be paid to them by the purchasers.

On the books of Massey and Associates, during its entire existence, 5%55ths of the *partnership's distributable income* was credited to Fourl, Mayo and Wagner. We note, however, that 5%55ths is not 5% (but is 5.84%) of the 85.5% of the production. In other words, 5%55ths is 5% of the entire production before payment of the 14.5% royalties "off the top". Without conflict the evidence is that against such 5% or 5%55ths of the entire production credited to Fourl, Mayo and Wagner, Massey and Associates charged, not only 5%55ths of the cost of operating its two wells, but also 5%55ths of about $80,000 expended for drilling said wells, the amounts of partners' salaries, other items of expense of partnership administration, and reserves to repay the contributions of the various partners.

No evidence that Fourl was ever told or knew anything of the bookkeeping methods or entries of Massey and Associates has been called to our attention and we have found none.

Respondents, in their brief, state that some further explanation "seems to be required for the trial court's finding that the interest in question should be determined 'in the same way as the interests of the limited partners' * * *

"The interest in question always has been so computed; and this without objection or question on the part of any one of the three interested parties (Mayo, Wagner or Fourl). No concealment was practiced by the management of the limited partnership. It would require the most extreme credulity to hold that Fourl, 'the principal negotiator for the quitclaiming lessees' was ignorant of the manner in which the interests were being computed; or that he would allow the statute of limitations, each year, successively to bar a claim for a greater share of the annual earnings of the partnership than was being impounded for the three quitclaiming lessees, collectively."

Respondents, in their brief, urge that, assuming a share of the production greater than that credited to Fourl and his assignees on the partnership books was once owed to them, it has been lost and cannot now be collected because of laches, equitable estoppel and the statute of limitations, all of which issues were pleaded and presented in the trial court.

[1] Those matters were mentioned by counsel during the trial, at the end of which it was stipulated by all counsel at the suggestion of the trial court that appellant's answer may be "deemed a cross-complaint" and respondents may be deemed to have denied the allegations thereof and "to have raised the affirmative defenses of the Statute of Frauds, Statute of Limitations, estoppel and laches". Nowhere in the record or briefs on appeal is there any mention of the specific statute or statutes so relied upon. Under the peculiar circumstances of this case, however, we have presumed that any statute or statutes lending support to the judgment was pleaded as an affirmative defense. We cannot presume that evidence not in the record was considered by the trial court.

Respondents call attention to Fourl's delay until the witnesses to the agreement, as well as the setting up of the accounts, were dead. Also, it is noted by this court that Fourl, himself, was dead when this action was instituted not by his representative but by one of the surviving partners.

[2] From the evidence, it appears without conflict that Lees Taylor, the owner who dealt with Fourl in obtaining for all the landowners the quitclaims of Fourl, Mayo and Wagner, was also the general partner in Massey and Associates who had the account of Fourl, Mayo and Wagner placed upon the books of Massey and Associates. There is nothing in the record showing that any payment or statement of that account was ever offered to or requested by Fourl. The trial court found

and concluded that the amounts so credited to the accounts of Fourl, Mayo and Wagner and at the time of the trial remaining in the hands of the receivers of the partnership property appointed by the court were not partnership property, but were held by the receivers in trust for Fourl, Mayo and Wagner.

There is no evidence in the record indicating when or how the error crept into the partnership books causing only 5/855ths of its *distributable income* to be credited to this trust account in lieu of 5/855ths of the *proceeds from the sale of the oil from its two wells subject only to operating costs*. Nor is there any evidence that Taylor, Fourl or the partnership bookkeeper suspected that an error had been made in the account. Appellant's recovery is not limited to such erroneous amount credited to Fourl upon the books of Massey and Associates. Jefferson v. Pietroroia, 5 Cal.2d 222, 54 P.2d 7.

[3] Respondents, while apparently taking it for granted that the statute of frauds, laches and equitable estoppel preclude a recovery by appellant of any larger sum than the amount credited to Fourl upon the books of Massey and Associates, have not stated in their brief either logic or citations of authority for their application in support of the judgment from which the instant appeal was taken. Considering the record and all the circumstances in this case, we deem respondents' affirmative defenses of the statute of limitations, statute of frauds, laches and equitable estoppel inapplicable.

Respondents, presumably as further justification for the court's finding that Fourl's interest was to be computed in the same manner as that of a limited partner, state in their brief that "substantial and uncontradicted evidence rebuts" appellant's "contention that Fourl was entitled to an overriding royalty interest; and that the most that he ever could have been entitled to receive is a participating interest."

While there is some confusion in the record and briefs surrounding the use of the terms "overriding" and "participating" interests, our attention has been called to no testimony or documentary evidence tending to show that either of those terms was used by either Fourl, Taylor (one of the owners and agent for the others), or Cree (the owners' attorney) while negotiating their agreement that the consideration for the quitclaims to the Taylors would be 5% of production subject to operating costs only; nor is there any evidence that those terms were used by the parties in later discussing said 5% interest. Fourl's interest not having been named by the parties to the agreement, we deem the naming of such interest unnecessary to this decision.

[4] Fourl's interest, designated by the parties to the agreement at the time of its creation as "5% of production subject to operating costs only", must be construed in the light of the circumstances then existing and the expressed intention of the parties at that time. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 651, 52 P.2d 237.

The two oil wells from which Fourl's 5% of production was to be received were to be drilled on the same ten acres on Signal Hill on which there were already six producing wells, four of which had been drilled under the Fourl lease then being cancelled.

[5] Massey and Associates, as lessees under a lease made some months after Fourl's agreement with and quitclaim to the landowners, drilled the two oil wells. The funds used for the drilling were contributed by the general and limited partners of Massey and Associates in return for agreed portions of the partnership's distributable income. The lease to Massey and Associates expressly required payment "off the top" of the 14.5% royalties hereinbefore referred to. While not mentioned in the lease, all parties to the instant action concede that Massey and Associates, as additional consideration to the owners for the oil lease to them, agreed to pay the owners' obligation to Fourl and his assignees amounting to 5% of the proceeds from the

production of the proposed two oil wells subject to operating expenses only. It cannot be presumed that either the Taylors (the landowners) or Fourl intended that "5% of production subject to operating expenses" would be treated as synonymous with 5%55ths or 5.84% of the distributable income of a partnership not yet created, to be earned by such partnership as the lessee in an oil lease not yet executed.

[6] An interest in oil production created by the landowners, as was the Fourl interest in the instant action, unless expressly limited is "generally regarded in Southern California as an unlimited, permanent interest". While the evidence is without conflict that Fourl's interest here being considered was expressly limited to "the next two wells to be drilled" and was to be "subject to operating costs", there is in the record no evidence of any other limitation upon it. The items to be charged against Fourl's interest are only those contemplated by the agreement. Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d 653, 657, 52 P.2d 245, 247.

[7] Fourl was not a successor or assignee of the partnership. His interest in the oil produced by Massey and Associates was never owned by the partnership. That interest was granted to Fourl by the landowners before the formation of the partnership. Massey and Associates leased the land with full knowledge of Fourl's interest. Therefore, the 5% interest of Fourl and his assignees was not limited to the term of the lease or the life of the partnership, but was and is a perpetual interest in the oil and other hydro-carbon substances to be produced from the two wells drilled by Massey and Associates under their lease. Callahan v. Martin, 3 Cal.2d 110, 114, 125, 43 P.2d 788, 101 A.L.R. 871; Beam v. Dugan, 132 Cal.App. 546, 549, 553, 23 P.2d 58; Standard Oil Co. of California v. John P. Mills Organization, 3 Cal.2d 128, 133, 43 P.2d 797; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 648, 52 P. 2d 237. The interest of Fourl in the production of said two wells is not a partnership asset and may not be sold by the receivers in the instant action.

A fair epitome of the record concerning appellant's second claim of error follows.

Respondent Wagner was a legal secretary employed in Fourl's law office for about 20 years. She also loaned money to him. In 1940 the law office was closed.

She testified that Fourl agreed that the portion of the 5% remaining after payment to Mayo (when his interest was determined in a then pending court action for that purpose) would be divided equally between Fourl and Wagner; that on several occasions he promised to go with her to the office of Massey and Associates and sign a paper to that effect; that he always said he would do so, but he never did. Respondent also calls the court's attention to the presumption that co-owners' interests are equal when not expressly otherwise stated.

Appellant contends that the 5% being the consideration for the quitclaims of the former oil lease must be divided in the same ratio as their interests in the former oil lease. He urges that testimony as to the fractional co-ownership of the oil lease quitclaimed as consideration for the 5%, and the presumption that the 5% should be divided in the same manner, requires reversal of the judgment giving to appellant and Wagner equal portions.

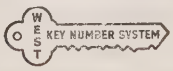
[8] Appellant insists that the oral testimony of Wagner must be disregarded by the court because of the Dead Man Statute (Code Civ.Proc. § 1880, sub. 3) which provides that a person cannot be a witness in an action or proceeding prosecuted "against an executor * * * upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person." The instant action is not "against an executor * * * upon a claim". It is conceded by all parties that decedent and Wagner were co-owners of the 5% interest involved herein. The portion of said 5% interest belonging to Wagner is not and never was a part of Fourl's estate.

Consequently, the statute so relied upon by appellant is not applicable, and the testimony of Wagner was properly admitted over appellant's objection on that ground.

[9] Considering that testimony together with the other evidence, admissions, and stipulations in the instant appeal, we are not convinced that, as a matter of law, the finding and conclusion as to Wagner's portion being equal to that of Fourl is without sufficient support.

The judgment as to defendant and cross-complainant L. A. Wagner is affirmed. In all other respects the judgment insofar as it affects the appellant herein is reversed and the cause remanded with directions to the court below to retry the cause as to such appellant and render judgment as to her in accordance with the views herein expressed.

FOURT and LILLIE, JJ., concur.



167 Cal.App.2d 288

PEOPLE of the State of California, Plaintiff,

v.

Armando Raul CONTRERAS, Defendant.

Cr. 3459.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1959.

Prosecution for selling heroin. The Superior Court, Santa Clara County, William F. James, J., after jury's verdict, entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that where evidence that defendant knowingly sold heroin was direct and not circumstantial, failure of trial court to give instruction to the effect that if the evidence was susceptible of two constructions, one which pointed to defendant's innocence and the other to defendant's guilt, jury must adopt interpretation which admits of defendant's innocence and reject that which points to his guilt, was not error.

Judgment affirmed.

1. Criminal Law ⇐814(17)

In prosecution for selling heroin, wherein evidence that defendant knowingly sold heroin was direct and not circumstantial, failure of trial court to give instruction to the effect that if the evidence was susceptible of two constructions, one of which pointed to defendant's innocence and the other to defendant's guilt, jury must adopt interpretation which admits of defendant's innocence and reject that which points to his guilt, was not error. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⇐1173(2)

Failure of a trial court to instruct on circumstantial evidence is prejudicial only when it is improbable that the jury would have reached the same result had instruction been given.

3. Criminal Law ⇐1137(3)

Defendant cannot complain on appeal of an instruction given at his own request even if trial court committed error in giving such instruction.

4. Criminal Law ⇐778(5)

In prosecution for selling heroin, wherein evidence that defendant knowingly sold heroin was direct and not circumstantial, instruction to the effect that if there was any single fact proved which was inconsistent with defendant's guilt, jury had duty to acquit him, did not violate rule that an accused is not required to prove his innocence. West's Ann.Health & Safety Code, § 11500.

Haley & Rockefeller, Daniel Haley, Sunnyvale, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

A jury found defendant guilty of selling heroin in violation of Health and Safety Code section 11500. He appeals from the judgment of conviction, claiming that the trial court erred in failing to give an instruction on circumstantial evidence and an instruction on reasonable doubt.

The facts, which are not in dispute, are as follows: On Sunday, July 21, 1957, Officers Juarez and Lopez of the San Jose Police Department, were instructed to go to Post Street and purchase narcotics from anyone who would sell to them. They were given $20 in marked bills to use. The officers saw the defendant in front of Rusty's Cafe on Post Street. Defendant asked Officer Juarez if he was going "to connect". Juarez answered that he wanted to buy heroin. Defendant said a man by the name of Tommy would be around later. Juarez gave the defendant $10. Later the defendant returned with a small rubber balloon. Defendant handed the balloon and a $5 bill to Officer Juarez. Upon examination a gelatin capsule inside the balloon was found to contain one gram of heroin.

The first question is whether the trial court erred in failing to give the following instruction proferred by the defendant.

> "If the evidence of this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the Defendant and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the Defendant's innocence, and reject that which points to his guilt."

[1] Defendant, citing People v. Yrigoyen, 45 Cal.2d 46, 286 P.2d 1; People v. Zerillo, 36 Cal.2d 222, 223 P.2d 223; People v. Bender, 27 Cal.2d 164, 163 P.2d 8, relies on the well-established rule that when circumstantial evidence is received to prove a fact necessary to convict, the trial court should, on its own motion, give an instruction concerning circumstantial evidence. The record discloses that the evidence produced by the People was all direct evidence, not circumstantial. Hence, the failure to give the instruction was not error.

[2] Also, the fact that instructions on circumstantial evidence were not given is prejudicial only when it is improbable that the jury would have reached the same result had the instruction been given. People v. Goldstein, 139 Cal.App.2d 146, 293 P.2d 495; People v. Bardin, 148 Cal.App.2d 776, 307 P.2d 384; People v. Candiotto, 128 Cal.App.2d 347, 275 P.2d 500. In all the cases cited by the defendant, there was conflicting evidence or some facts or circumstances inconsistent with guilt. The same is not true of the instant case. The circumstances relied upon by the prosecution point to defendant as a person who knew what he was selling and wilfully did so. We can only conclude that under the circumstances of this case the failure to give the requested instruction on circumstantial evidence did not result in a verdict different from that which would have been rendered had the instruction been given.

[3, 4] Defendant next complains of the following instruction:

> "If you find there is any single fact proved to your satisfaction by a preponderance of the evidence, which said fact is inconsistent with the defendant's guilt, that, in and of itself in your minds is sufficient to raise a reasonable doubt of said defendant's guilt, then the defendant would be entitled to the benefit of such reasonable doubt and it will be your duty to acquit him."

Defendant argues that the giving of this instruction was reversible error, as the instruction violated the rule that the accused is not required to prove his innocence. The contention is without merit. The instructions as a whole well state that the burden of proving defendant's guilt is on the prosecution. Furthermore, the record

reveals that the instruction complained of was given at defendant's own request. Even if the court had committed error in giving this instruction, defendant cannot complain on appeal of an instruction given at his own request. People v. Williams, 128 Cal.App.2d 458, 275 P.2d 513.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

O. A. KELLY, Betty Lee Morales and Helen Clark, as Trustees of the Eden Foundation, Ltd., a Trust, Plaintiffs and Appellants,

v.

SPARLING WATER COMPANY, now known as Hillside Water Company, a corporation, Defendant and Respondent,

O. A. KELLY, Betty Lee Morales and Helen Clark, as Trustees of Eden Foundation, Ltd., a Trust, Plaintiffs and Appellants,

v.

Maurice C. SPARLING, as Executor of the Estate of Raymond Walter Sparling, deceased, Defendant and Respondent.*

Civ. 23210.

District Court of Appeal, Second District, Division 3, California.

Jan. 21, 1959.

Hearing Granted March 18, 1959.

Action for injunction restraining defendants from diverting water from spring on plaintiffs' property, and for damages. The Superior Court, Los Angeles County, Bayard Rhone, J., rendered judgment for plaintiffs after nonjury trial and judgment was later modified in ruling on defendants' motion for new trial. Plaintiffs appealed. The District Court of Appeal, Vallée, J., held that where judge who did not preside at trial did not in any respect change or add to findings of trial judge whose findings supported original judgment, judge did not have authority, on motion for new trial, to modify original judgment.

Parts of modified judgment reversed and original judgment reinstated.

* Opinion vacated 343 P.2d 257.

1. New Trial ⇐9, 164

Purpose of statute providing that judgment rendered in nonjury case may be modified or vacated, in whole or in part, by court in ruling on motion for new trial, and that new trial may be granted on all or part of issues, is to afford trial court the right to correct its own errors. West's Ann.Code Civ.Proc. § 662.

2. New Trial ⇐164

On motion for new trial, judge who did not preside at trial may not modify judgment which is based on findings by trial judge on conflicting evidence without changing the findings or making new and different findings unless the original findings do not support the original judgment. West's Ann.Code Civ.Proc. §§ 661, 662.

3. New Trial ⇐164

Where judge who did not preside at trial did not in any respect change or add to findings of trial judge whose findings supported original judgment, judge did not have authority, on motion for new trial, to modify original judgment. West's Ann. Code Civ.Proc. §§ 661, 662.

4. Damages ⇐142

Special damages not alleged in complaint cannot be recovered.

5. Damages ⇐157(1)

A general allegation of damages will authorize proof of all damages necessarily resulting or which may be legally implied from act complained of.

6. Damages ⇐5, 157(1)

Damages which necessarily result from act complained of are denominated "general damages," and may be proved under the ad damnum clause or general allegation of damage; while those which are natural

consequences of act complained of, and not necessary result of it, are termed "special damages".

See publication Words and Phrases, for other judicial constructions and definitions of "General Damages" and "Special Damages".

7. Waters and Water Courses ⇐107(3)

Loss of eucalyptus trees which died due to lack of water caused by diversion of water from spring on plaintiffs' property constituted general damages, and plaintiffs were not required to specifically plead such loss. West's Ann.Civ.Code, §§ 658, 660.

8. Waters and Water Courses ⇐107(3)

In action to restrain defendants from diverting water from spring on plaintiffs' property, and for damages, evidence supported trial judge's findings that drilling of well by defendants caused spring upon plaintiffs' property to cease to flow.

9. Appeal and Error ⇐843(2)

Where part of modified judgment denying plaintiffs relief against defendant was to be reversed and original judgment which awarded damages against defendant was to be reinstated, cost bill filed by defendant fell with reversal of part of modified judgment and it was unnecessary to consider plaintiffs' appeal from order denying their motion to retax costs.

Joseph M. Wapner, Los Angeles, for appellants.

Belcher, Henzie & Fargo, and George M. Henzie, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from parts of a modified judgment. The judgment was modified by the court in ruling on defendants' motion for a new trial. Code Civ.Proc. § 662.

There were two actions below, which were consolidated. They prayed for an injunction to restrain defendants from diverting water from a spring on plaintiffs' property and for damages. One judgment was rendered in the consolidated actions.

A Mr. and Mrs. Barton owned about 19 acres of land, known as the Eden property, in Topanga Canyon from about 1931 to 1954. During that time and for many years prior there was a spring on the property which supplied water for domestic and irrigation uses. During the time the Bartons occupied the property there never was a shortage of water. In early 1954 the Bartons conveyed the property to plaintiffs. Adjoining and below the Eden property there was about an acre of land known as the Moldenhauer property. In July 1954 Raymond Sparling, now deceased, purchased about 3,200 square feet of the Moldenhauer property for the purpose of drilling a water well and, if it proved productive, conveying it to Sparling Water Company of which he was president for the sale of water to consumers outside the watershed.

The trial court found: 1. In September 1954 and for many years prior thereto there was a spring on the Eden property which produced water at the rate of 2,304 gallons a day (1.6 gallons a minute). 2. The spring had its source from underground water-bearing strata underlying the Eden and Moldenhauer properties and had no surface flow. 3. The waters from the spring were collected in a concrete-lined gathering basin on the Eden property and did not flow off of it. 4. The gathering basin was located about 485 feet upslope from the Moldenhauer property. 5. The water collected in the gathering basin was used for many years to serve the Eden and Moldenhauer properties. 6. In August and September 1954 Sparling drilled a well, known as the Sparling well, on the Moldenhauer property to a depth of 310 feet. 7. In drilling the Sparling well, four or more water-bearing strata were entered or passed through. 8. In so doing the water-bearing strata which were the source of the water in the spring on the Eden property were entered, resulting in lowering the water in those strata and causing the spring to cease to flow and the surrounding marshy terrain to dry up.

The trial court further found: 1. Immediately on the Sparling well being put

into operation, Sparling conveyed the land on which the well was situated to Sparling Water Company, now Hillside Water Company. 2. Since that time Sparling Water Company, called "the company," has produced from the well and sold to its customers in excess of 14,000,000 gallons of water. 3. None of the water produced from the well has been used on the land on which the well is situated, and there is no beneficial use to which the water could be put on that land. 4. By reason of the drilling of the Sparling well and the drying up of the spring, 14 eucalyptus trees on the Eden property having a reasonable value of $100 each were caused to die, to plaintiffs' damage in the sum of $1,400.

The trial court also found: 1. Plaintiffs now reasonably require and can put to beneficial use on their land for domestic and irrigation purposes 45,000 gallons of water a month, and no more. 2. Plaintiffs could drill a well on their land to the same water-bearing strata as are tapped by the Sparling well at a cost to them for the drilling and equipment of the well of $2,500. *The drilling of another well to the strata from which the Sparling well is producing would be likely to cause an economic waste of water and continued litigation between the parties.* 3. There is a shortage of water in the occupied areas of Topanga Canyon.

The court concluded plaintiffs were entitled to judgment against defendant Maurice C. Sparling, as executor of the estate of Raymond Sparling, deceased, in the sum of $1,400 for the loss of the 14 eucalyptus trees; to judgment for damages against Sparling Water Company, now known as Hillside Water Company, in the sum of $600, the cost of purchasing water; and that Sparling Water Company should be ordered to plug the Sparling well and to cease producing water therefrom until such time as the water levels in the underground strata again have risen so that the spring on the Eden property again flows at the rate of 2,304 gallons a day (1.6 gallons a minute), and should be enjoined from thereafter producing from the well to any extent which will reduce the flow of the spring below that amount, provided that these injunctions should be stayed so long as the water company shall deliver to plaintiffs in the reservoir upon their land 45,000 gallons of water each month with not less than 1,000 gallons each day, and that the court should retain jurisdiction to fix the amount of water which can be economically used upon the Eden property up to but not to exceed 2,304 gallons a day (1.6 gallons a minute). Judgment was entered accordingly.

Defendants moved for a new trial. A judge other than the one who presided at the trial heard the motion. The motion for a new trial was denied. However, in so ruling, the court modified the conclusions of law and the judgment. It did not modify or add to the findings in any respect. The modifications of the conclusions of law were: 1. Plaintiffs are not entitled to judgment for the loss of the 14 eucalyptus trees, "not having plead any special damages." 2. Plaintiffs are entitled to judgment against defendant Sparling Water Company, ordering said defendant at its election either: (a) to pay plaintiffs $3,000, being the cost of drilling and equipping a well upon the Eden property and of obtaining water from Sparling Water Company at its established rates for a reasonable period until the well is drilled and equipped; or (b) to do the things provided by the original judgment.[1]

1. The other elections as stated in the modified judgment were either to: "(b) Plug the Sparling Well and cease producing water therefrom until such time as the water levels in the underground strata again have arisen so that the spring upon the Eden Property again flows at the rate of two thousand three hundred and four (2304) gallons per day (1.6 gallons per minute) or until a well is drilled upon the Eden Property, and be enjoined from thereafter producing water from the Sparling Well to any extent which will reduce the flow of the spring upon the Eden Property below two thousand three hundred and four (2304) gallons per day (1.6 gallons per minute) or until a well is drilled upon the Eden Property; or (c) Deliver to plaintiffs in the reservoir now

The modifications of the conclusions of law further concluded that in the event Sparling Water Company elected to pay the $3,000 to plaintiffs for the drilling and equipping of a well, plaintiffs should have the right to produce as much water therefrom as reasonably might be required from time to time for a reasonable overlying use on the Eden property. A modified judgment was entered accordingly. Plaintiffs appeal from the parts of the modified judgment which (1) deny plaintiffs relief against the executor of the estate of Raymond Sparling for the loss of the eucalyptus trees; (2) give Sparling Water Company, now Hillside Water Company, an election to pay them $3,000, the cost of drilling and equipping a well, and of obtaining water from the company until the well is drilled and equipped; and (3) awards costs to such executor.

The principal specifications of error are that in ruling on the motion for a new trial the court erred (1) in adding to the judgment the alternative giving the company an election to pay plaintiffs $3,000, the cost of drilling and equipping a well upon the Eden property, and of obtaining water from the company until the well is drilled and equipped; (2) in striking that part of the judgment awarding plaintiffs $1,400 for the eucalyptus trees on the ground the loss was special damages which had not been pleaded; and (3) awarding costs to the executor.

[1] The cause was tried without a jury. In ruling on a motion for a new trial in a cause tried without a jury the court may, on such terms as may be just, change or add to the findings, modify the judgment in whole or in part, vacate the judgment in whole or in part, and grant a new trial on all or part of the issues. Code Civ.Proc. § 662. The purpose of section 662 is to afford the trial court the right to correct its own errors in ruling on a motion for a new trial. Solorza v. Park Water Co., 86 Cal.App.2d 653, 663, 195 P.2d 523.

[2] As we have indicated, the judge who heard and ruled on the motion for a new trial and who modified the judgment was not the one who presided at the trial, who saw, heard, and evaluated the testimony, who judged the credibility of the witnesses, who weighed the evidence, who obviously believed and accepted the testimony of some witnesses and who disbelieved and rejected the testimony of others; who heard the arguments of counsel, and on conflicting evidence made findings. No affidavits were filed in support of the motion. It is said that the judge who ruled on the motion did not have a transcript of the oral proceedings before him. He took no evidence. He manifestly ignored the findings. A judge who did not preside at the trial but who is designated under section 661 of the Code of Civil Procedure to hear a motion for a new trial may not modify a judgment which is based on findings made by a trial judge on conflicting evidence without changing the findings or making new and different findings unless the original findings do not support the original judgment. The original findings at bar support the original judgment.

maintained by plaintiffs upon the Eden Property, at its own expense and without cost to plaintiffs, forty-five thousand (45,000) gallons of water each month with not less than one thousand (1,000) gallons to be delivered each day so long as water is produced from the Sparling Well or until a well is drilled upon the Eden Property. In the event said defendant exercises this election, the court shall retain continuing jurisdiction to fix the amount of water which economically could be used in the future upon the Eden Property, up to, but not to exceed, two thousand three hundred and four (2304) gallons a day (1.6 gallons per minute). Provided, however, that should said spring in the future resume production and water become available therefrom the obligation of Sparling Water Company, now known as Hillside Water Company, to furnish water to plaintiffs, as hereinabove or hereafter in the future fixed, shall be reduced by the amount of water available to plaintiffs from said spring and in no event shall exceed the different between the water available from said spring and two thousand three hundred and four (2304) gallons per day (1.6 gallons per minute)."

City of Long Beach v. Wright, 134 Cal. App. 366, 25 P.2d 541, was an appeal from an amended judgment. One judge presided at the trial; another was designated to hear the motion for a new trial. The judge who ruled on the motion for a new trial increased the amounts awarded to condemnees. The court held (134 Cal.App. at page 370, 25 P.2d at page 542):

"Respondents urge that a judge who did not preside at the trial, but who is designated under section 661 of the Code of Civil Procedure to hear a motion for new trial, may exercise all the powers of the court in connection therewith as provided in section 662 of the Code of Civil Procedure. Section 661 provides that in case of the inability of the judge who tried the case to hear such a motion it shall be heard and determined by any other judge.

* * * * * *

"It has long been the law of this state that 'a party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury,' and that 'he cannot be compelled to accept a decision upon the facts from another judge.' Guardianship of Sullivan, 143 Cal. 462, 467, 77 P. 153, 155; De Mund v. Superior Court, 213 Cal. 502, 505, 2 P.2d 985; Hughes v. De Mund, 96 Cal.App. 365, 368, 274 P. 405. In the last-cited case it was urged that a judge other than the one hearing the evidence may weigh the evidence and decide according to its preponderance in determining a motion for a new trial. With this contention the appellate court was in accord, but said (96 Cal.App. at page 370, 274 P. at page 406): 'If the motion is denied, however, an appeal may be taken from the original judgment, rendered by a judge who heard the evidence. If a new trial is granted, the case will be decided again by a judge who hears the evidence. But in this case the judgment was rendered by a judge who did not hear the greater and more important part of the evidence.' In the award of damages as changed and made in the instant case the judge who made the changes heard none of the evidence and yet made a very substantial increase in the award, on extremely conflicting evidence, over that made by the judge who heard all of the evidence. * * *

"[134 Cal.App. at page 372, 25 P.2d at page 543.] In our opinion it was not the purpose of such section [Code Civ. Proc. § 662] to authorize a judge who did not hear the evidence to change the decision of one who did, by weighing conflicting evidence as to values and selecting the values which in his opinion are the best, even assuming that such decision is not supported by the evidence.

"The decision on a question of fact of one judge in a trial court composed of more than one is the decision of the court, and in our opinion to hold that the action of the Legislature does what respondents claim for it would in effect be holding that the Legislature has the power, without constitutional authority so to do, to vest a superior court judge with powers not contemplated by section 5, article 6, of the Constitution, and more akin to the jurisdiction of courts of appeal, though greater even, extending, as they would, not only to the reviewing of conflicting evidence but to the modifying of decisions reviewed in accordance with the judgment reached by the reviewing judge."

In David v. Goodman, 114 Cal.App.2d 571, 250 P.2d 704, 706, the appellant contended that "a trial court is without power to enter a judgment based upon findings made by another judge." Upholding the contention, the court stated (114 Cal.App. 2d at page 574, 250 P.2d at page 706):

"The leading case in this state on the subject is Guardianship of Sullivan, 143 Cal. 462, 77 P. 153, an incompetency proceeding. There it ap-

pears that 'The evidence was all taken and the examination of the alleged incompetent had before one judge, who has never given any decision in the matter. The matter was subsequently argued and submitted for decision to another judge, who never heard any of the witnesses testify, and before whom * * * no report of the testimony was ever produced. He orally decided * * * that letters of guardianship should issue. The only order of judgment ever entered was signed by still another judge, who had never heard either evidence or argument.' In reversing the order the court said: 'A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury * * *. He cannot be compelled to accept a decision upon the facts from another judge * * *.' That case has been followed in In re Williams, 52 Cal.App. 566, 199 P. 347; Hughes v. De Mund, 96 Cal.App. 365, 274 P. 405; City of Long Beach v. Wright, 134 Cal.App. 366, 25 P.2d 541; McAllen v. Souza, 24 Cal.App.2d 247, 74 P.2d 853, and Reimer v. Firpo, 94 Cal.App.2d 798, 212 P.2d 23. See, also, De Mund v. Superior Court, 213 Cal. 502, 505, 2 P.2d 985, and Foss v. Commissioner of Int. Rev., 1 Cir., 75 F.2d 326, 329."

[3] As stated earlier, the judge who ruled on the motion for a new trial did not in any respect change or add to the findings of the judge who presided at the trial. The findings of the judge who presided at the trial stated that the drilling of another well on the Eden property to the strata from which the Sparling well is producing would be likely to cause an economic waste of water and continual litigation between the parties. In view of this unchanged finding, the judge who denied the motion for a new trial was without power to give Sparling Water Company the election to pay plaintiffs $3,000 to drill and equip a well upon the Eden property.

It is appropriate to observe that the modified judgment makes no provision for the eventuality that plaintiffs might find a dry hole or might drill two or more dry holes before producing sufficient water for their domestic and irrigation purposes. Further, it does not appear how the judge who ruled on the motion for a new trial arrived at the figure $3,000 as the cost of drilling and equipping a well upon the Eden property when the trial judge found it to be $2,500.

Plaintiffs did not plead the loss of the 14 eucalyptus trees as special damages. They alleged general damages in an amount in excess of that awarded to them in the original judgment. The trial judge found that by reason of the drilling of the Sparling well and the drying up of the spring, the 14 eucalyptus trees were caused to die, and concluded that plaintiffs are entitled to judgment against defendant Maurice C. Sparling, as executor of the estate of Raymond Sparling, in the sum of $1,400. This conclusion was omitted from the modified conclusions of law but the finding remained. In view of the unchanged finding, it was not within the power of the judge who denied the motion for a new trial to strike that part of the original judgment which awarded plaintiffs $1,400 for the loss of the trees unless the damages for the loss were special damages as a matter of law.

Defendants contend the loss of the eucalyptus trees was special damage; and that since they were not pleaded specifically, they may not be recovered. If the loss of the eucalyptus trees constitutes general damages, the judge who ruled on the motion for new trial erred in striking that part of the original judgment which awarded plaintiffs damages for their loss.

[4, 5] Special damages not alleged in the complaint cannot be recovered. Bonde v. Bishop, 112 Cal.App.2d 1, 5, 245 P.2d 617. A general allegation of damages will authorize proof of all damages necessarily resulting or which may be legally implied from the act complained of. Morris v. Allen, 17 Cal.App. 684, 688, 121 P. 690;

Olds & Stoller, Inc. v. Seifert, 81 Cal.App. 423, 427, 254 P. 289; Armstrong v. Adams, 102 Cal.App. 677, 682, 283 P. 871.

[6] Damages which necessarily result from the act complained of are denominated general damages, and may be proved under the *ad damnum* clause or general allegation of damage; while those which are the natural consequences of the act complained of, and not the necessary result of it, are termed special damages. Treadwell v. Whittier, 80 Cal. 574, 579, 22 P. 266, 5 L.R.A. 498; Stoltz v. Converse, 75 Cal.App.2d 909, 914, 172 P.2d 78; 14 Cal.Jur.2d 650, § 22.

Zvolanek v. Bodger Seeds, Ltd., 5 Cal.App.2d 106, 42 P.2d 92, was an action for damages for injuries to land and sweet peas growing thereon resulting from flooding by water. The defendant so negligently flooded its land in irrigating that water ran into and over the land of the plaintiff and the sweet peas growing thereon and damaged them. Holding the damage to the sweet peas was general, the court stated (5 Cal.App.2d at page 108, 42 P.2d at page 93):

> "The measure of damages arising from tort, such as the one herein pleaded, is the amount which will compensate for all detriment proximately caused thereby, whether it could be anticipated or not. (Civ.Code, § 3333.) The damage alleged herein was that which necessarily resulted from the flooding of the land and the sweet peas thereon."

[7] We are of the opinion that the judge who presided at the trial was warranted in concluding that the loss of the trees was general damage. The trees were "quite big" and had been planted some years before the Bartons purchased the property on marshy ground near the spring "with the object of sucking off and disposing of a lot of the water from the overflow of the spring." This evidence was elicited without objection:

"Q. After the well was drilled by Mr. Sparling, what was the condition around the eucalyptus grove? A. The eucalyptus trees began to dry up, and the place dried up.

"Q. Have any of the eucalyptus trees since the Sparling well was dug died? A. About fourteen of them.

"Q. Can you describe those trees for us? A. The largest one that died first was right across the drive from the spring, and it stands about 100 feet in height, and it died first and is just standing there dead. Then subsequently small ones began to die."

The trees were real property and were a part of the land. Civ.Code §§ 658, 660; Peterson v. Gibbs, 147 Cal. 1, 7, 81 P. 121; City of Los Angeles v. Hughes, 202 Cal. 731, 736–737, 262 P. 737. They were growing in marshy terrain. They were nourished by the water in the strata in which the Sparling well was drilled. Drilling of the Sparling well caused the spring to cease to flow. The drilling of the well caused the marshy terrain to dry up and the trees to die. A reasonable inference is that the death of the trees necessarily resulted from the drilling of the Sparling well.

[8] Defendants contend that plaintiffs are not hurt by the modified judgment for the reason they were not entitled to any judgment. They claim, in effect, there was no evidence that they took any water from plaintiffs and therefore plaintiffs were not prejudiced by any error in modifying the judgment. No purpose would be served in reviewing the extensive evidence received by the judge who presided at the trial. We have examined the record and are satisfied the evidence supports his findings in all respects and particularly the finding that the drilling of the Sparling well caused the spring upon the Eden property to cease to flow and the surrounding marshy terrain to dry up.

[9] Since that part of the modified judgment denying plaintiffs relief against the executor of the estate of Raymond Sparling must be reversed and the original judgment which awards damages against

him reinstated, plaintiffs are entitled to costs from him. The cost bill filed by such executor falls with the reversal of that part of the modified judgment. (13 Cal. Jur.2d 276, § 54.) It is therefore unnecessary to consider plaintiffs' appeal from the order denying their motion to retax costs.

The parts of the modified judgment entered November 5, 1957 are reversed. The judgment entered August 28, 1957 is reinstated as rendered.

SHINN, P. J., and WOOD, J., concur.

167 Cal.App.2d 400

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Earl Leon MALONE, also known as Earl Maxwell, Defendant and Appellant.

Cr. 2909.

District Court of Appeal, Third District, California.

Jan. 27, 1959.

Defendant was convicted of grand theft and from a judgment and order denying his motion for new trial in the Superior Court, Tehama County, Curtiss E. Wetter, J., the defendant appealed. The District Court of Appeal, Schottky, J., held that whether a witness connecting defendant with the crime was an accomplice was a question for the jury and that the evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐507(5)

A thief and receiver of stolen property generally are not accomplices of each other with respect to corroboration except that when the thief and receiver conspire together to steal with a prearranged plan for one who actually steals to deliver the property to another they are "accomplices" of each other. West's Ann.Pen. Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplices".

2. Criminal Law ⇐507(5)

Unless a thief and receiver of stolen goods conspire together in a prearranged plan for one to steal and deliver to the other, the rule is that the thief and receiver are not "accomplices" with respect to corroboration. West's Ann.Pen.Code, § 1111.

3. Criminal Law ⇐742(2)

In prosecution for grand theft where there was no evidence that an alleged accomplice knew that the pipe was stolen until after it was unloaded and he denied complicity in the crime the question of whether he was an accomplice was one of fact for the jury. West's Ann.Pen.Code, § 1111.

4. Criminal Law ⇐1144(14)

Where instructions given by the court are not in the record, the appellate court must assume that the jury was properly instructed.

5. Larceny ⇐65

In prosecution for grand theft, evidence sustained conviction where the jury determined on proper evidence that the testimony of a witness connecting defendant with the crime was not that of an accomplice whose testimony was required to be corroborated. West's Ann.Pen.Code, § 1111.

Edward J. Allen, Red Bluff, for appellant.

Edmund G. Brown, Atty. Gen., by Robert K. Puglia, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant above named was found guilty of the crime of grand theft. His motion

for a new trial was denied, and he has appealed from the judgment and from the order denying his motion for a new trial.

The principal and in fact the only contention of appellant is that there is no evidence to connect him with the offense charged, except the testimony of Ray Hill and Dorothy Andrada, both of whom appellant asserts are accomplices. Before discussing this contention, we shall give a brief summary of the evidence as shown by the record.

Approximately 600 feet of rigid electrical conduit pipe was taken without the owner's permission from a construction project at the Red Bluff High School about 10:00 p. m. the evening of May 5, 1958. The night watchman saw a man who had a bundle of conduit in his hand throw it into the rear of a pickup truck and then enter the cab of the truck where another person was seated and drive away. The night watchman was unable to identify the thief. About 11:00 p. m. Ray Hill saw the defendant in the living room of the home of Hill's grandfather. The defendant told Ray Hill that he had some pipe to deliver to his father's home. Ray Hill then directed the defendant to his father's home, and subsequently, with Ray Hill's assistance, the pipe was unloaded. After the pipe had been unloaded Ray Hill was told, "Gee this stuff is hot, will you cover it up?" The next morning Ray Hill determined that the pipe which was unloaded was ¾ inch conduit. Twenty hours later Hill notified the police who came and got the conduit. At the trial Hill testified that he saw another person in the truck who he thought was Dorothy Andrada. She testified that she accompanied the defendant to the jobsight where he got out of the pickup and loaded the pipe into it. They then drove off and went out to Dan Hill's place (Ray's father) with the pipe where it was unloaded.

Appellant did not testify at the trial and called no witnesses in his defense.

Appellant contends that the evidence is insufficient to sustain his conviction of grand theft because both Ray Hill and Dorothy Andrada are accomplices and there is no other evidence to connect him with the crime. It is conceded that Dorothy Andrada was an accomplice; and that if it must be held as a matter of law that Ray Hill also was an accomplice, the evidence is insufficient to sustain the judgment.

Appellant argues that since the testimony of one accomplice can not be corroborated by the testimony of another accomplice (People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, 238), the conviction is repugnant to California Penal Code, section 1111, which states: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[1–5] A thief and the receiver of the stolen property generally are not accomplices of each other. People v. Lima, 25 Cal.2d 573, 154 P.2d 698; People v. Raven, 44 Cal.2d 523, 282 P.2d 866; People v. Conrad, 125 Cal.App.2d 184, 270 P. 2d 31. However, there is an exception to the foregoing rule. When the thief and receiver conspire together to steal with a prearranged plan for the one who actually steals to deliver the property to the other, they are accomplices of each other. People v. Lima, supra; People v. Raven, supra; People v. Hamilton, 143 Cal.App.2d 305, 299 P.2d 716.

There is no evidence in the record from which it may be inferred that Ray Hill conspired with the defendant to steal the pipe. The most that could be inferred is that Hill took possession of the pipe knowing that it was stolen. Unless the thief and the receiver conspire together in a prear-

ranged plan for one to steal and deliver to the other, the rule is that the thief and the receiver are not accomplices. People v. Lima, supra. There is no evidence in the record which indicates that Hill knew that the pipe was stolen until after it was unloaded. Hill denied complicity in the crime. Upon the record in the instant case the question of whether or not Hill was an accomplice was one of fact for the jury to determine under proper instructions. People v. Griffin, 98 Cal.App.2d 1, 219 P. 2d 519. The instructions given by the court are not in the record, and we must assume that the jury was properly instructed. The jury by its verdict of guilty determined that Hill was not an accomplice of appellant, and inasmuch as the testimony of Hill connects appellant with the crime charged the evidence is sufficient to sustain the judgment.

The judgment and order are affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

167 Cal.App.2d 134

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Preston PERSKY, Defendant and Appellant.

Cr. 2873.

District Court of Appeal, Third District, California.

Jan. 14, 1959.

Prosecution for grand theft. The Superior Court, Mendocino County, Hale McCowen, J., entered judgment of conviction on three counts, and defendant appealed. The District Court of Appeal, Schottky, J., held that where defendant was charged in one count with taking equity of prosecuting witness in an automobile, and in another count was charged with taking legal title to the automobile, and under a third count defendant was charged with taking the proceeds from the sale of a second automobile, and under a fourth count was charged with taking such other automobile, such counts were in the alternative, and there was no inconsistency in verdict of jury finding defendant guilty of taking of both automobiles, but finding defendant not guilty of taking of the equity in one automobile, and the proceeds of the sale of the second automobile.

Judgment and order affirmed, appeal from order denying probation dismissed.

1. Criminal Law ⇐1023(12)

An order denying probation is nonappealable, and a purported appeal therefrom would be dismissed.

2. Criminal Law ⇐1144(13)

On appeal by a defendant from a judgment of conviction, District Court of Appeals, in summarizing the evidence shown by the record, must view the evidence in the light most favorable to the state, and conflicts in the testimony must be disregarded.

3. Larceny ⇐55

Evidence was sufficient to sustain conviction for unlawful taking of two automobiles, and for unlawful taking of money.

4. Criminal Law ⇐665(2)

In prosecution for unlawful taking of money from owner of an automobile agency, by defendant-manager, in view of fact the state's case involved many accounting records, and in view of fact owner of the business was familiar with many aspects of the case, trial judge would not be deemed to have abused his discretion in permitting such two witnesses to remain in the courtroom during the trial. West's Ann.Code Civ.Proc. § 2043.

5. Criminal Law ⇐1170½(5)

In prosecution for theft of personalty by defendant who was manager of an automobile agency of complaining witness, trial court would not be deemed to have

committed prejudicial error in not permitting cross-examination of prosecuting witness as to statements made by him in a complaint filed in a civil action against defendant dealing with the same matter as the criminal prosecution, where record disclosed that trial court told counsel for defendant that if he would explain to the court how the proposed questioning was relevant to anything in the direct examination he would hear him, but no explanation was ever offered.

6. Indictment and Information ⇐128

An accusatory pleading may charge different statements of the same offense under separate counts. West's Ann.Pen. Code, § 954.

7. Criminal Law ⇐878(4)

Where defendant was charged in one count with taking equity of prosecuting witness in an automobile, and in a second count was charged with taking legal title to the automobile, and under a third count defendant was charged with taking the proceeds from the sale of a second automobile, and under a fourth count was charged with taking such second automobile, such counts were in the alternative, and there was no inconsistency in verdict of jury finding defendant guilty of taking of both automobiles, but finding defendant not guilty of taking of the equity in one automobile, and the proceeds of the sale of the other automobile.

8. Criminal Law ⇐384

In prosecution for grand theft, wherein defendant was charged with taking certain automobiles while manager of an automobile agency owned by prosecuting witness, trial court did not err in excluding evidence of asserted sales tax regulation dealing with over allowances and discounts on theory that it was a common practice in the industry that special discounts, over allowances and fictitious down payments are listed on conditional sales contracts for automobiles, in view of fact offered evidence was too remote to have any materiality, and even if it were a practice of the automobile industry to give over allowances, proof of asserted sales tax regulation was entirely collateral to any issue in the case.

Timothy J. Crowley, Santa Rosa, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Dep. Atty. Gen., for respondent.

SCHOTTKY, Justice.

[1] Defendant was charged with five counts of grand theft. Pen.Code, § 484. In count one defendant was accused of taking "* * * an equity of the value of $456.00 in a 1955 Studebaker automobile, and of the personal property of L. J. Downing." In count two defendant was accused of taking "* * * one 1955 Studebaker automobile of the personal property of L. J. Downing." In count three the defendant was accused of taking "* * * One Thousand Four Hundred Ninety-five and no/100ths ($1,495.00) Dollars, in money, lawful money of the United States, and of the personal property of L. J. Downing." In count four the defendant was accused of taking "* * * one 1953 Lincoln automobile of the personal property of L. J. Downing." In count five the defendant was accused of taking "* * * in excess of Fifteen Hundred ($1500.00) dollars, in money, lawful money of the United States, and of the personal property of L. J. Downing." A jury found defendant not guilty of counts one and three and guilty of counts two, four and five. Defendant's motion for a new trial was denied, probation was denied and judgment was pronounced. Defendant appeals from the judgment, from the order denying his motion for a new trial and from the order denying probation. The latter order, being non-appealable, the appeal therefrom must be dismissed.

Appellant makes a multifold attack upon the judgment and order. He urges that: 1. The evidence is insufficient to sustain the verdicts; 2. The court erred in denying appellant's motion to exclude all witnesses from the courtroom; 3. The

court erred in limiting the cross-examination of the witness, Downing; 4. The verdicts on counts one and two and the verdicts on counts three and four are inconsistent; and 5. The court erred in refusing to admit testimony concerning the State Board of Equalization sales tax regulations.

[2] Before discussing these contentions, we shall summarize the evidence as shown by the record, bearing in mind the familiar rule that the evidence must be viewed in the light most favorable to the respondent and that conflicts in the testimony must be disregarded.

On October 1, 1956, Preston Persky was employed by Loren Downing, an automobile dealer, to manage his business located at Fort Bragg, California. The parties agreed that Persky was to manage the business and that he was to be paid as a salary fifty per cent of the net profit of the business. The agreement further provided that Persky would be entitled to draw on such profit at the rate of $100 per week. Persky began his duties. Downing continued to sign all the contracts which were discounted at the bank and to sign all checks. In all other respects, except for a few deals, all transactions in automobiles were by or under the supervision of Persky. A used car lot was established in Windsor, near Santa Rosa, in the back yard of one Clifford Turner. Cars were kept there and transactions were entered into there. Persky introduced certain records referred to as "Whiz Tickets", which were the sales tickets, from which the bookkeeper obtained the necessary information to post his books. The accounting records of the establishment were posted from these tickets. Persky continued to operate the business until the latter part of March, 1957, and finally about March 31, 1957, he discontinued his participation in the business. Some months later an audit of the business was had. This revealed discrepancies existed between the amounts listed on the sales tickets and the amounts listed on the contracts of sale which were discounted with the bank. It also revealed that certain automobiles were missing. As a result of the audit, Downing filed a civil action against Persky. He also made a complaint to the district attorney who, after certain preliminary proceedings, filed an information charging Persky with five counts of grand theft as hereinbefore set forth.

Counts one and two involved the same transaction and were merely alternative methods of charging the same crime. Counts three and four also involved the same automobile and were alternative methods of charging the same crime.

In February, 1957, Persky purchased a 1955 Studebaker from the business for $1,456. He traded a 1952 Mercury for which he was allowed the sum of $456. Persky did not have title to the Mercury, but he informed Downing that he would get title. This was never done. The Mercury was registered to a Raymond Arbizu. The legal owner was a Henry Rondoni who testified that the Arbizu contract was in default, that he had been approached by a man who said he knew where the Mercury was and who offered to deliver it to Rondoni for $100 or buy it for $200. Rondoni sent this man to talk to the dealer who had sold the car and who was contingently liable on the contract. Since the incident no one had attempted to purchase the car. Downing has never received title to the Mercury.

In March, 1957, one H. D. Burnett purchased an Oldsmobile from the firm. The sale was negotiated by Clifford Turner. Burnett traded a 1953 Lincoln valued at $1,495 as a down payment. The records of the business do not reveal what happened to the car. Persky testified that he sold the car for $939 at an automobile auction. He also testified he paid a few bills which were owed by Downing and that he retained the balance of the funds. He figured that he had more than that due him.

The evidence to support count five of the information is a little more complex. During the audit it was discovered that the figures on the contracts which were

discounted with a bank did not correspond with the figures on the sales or "Whiz" tickets. The auditor accepted the figures that appeared on the contracts because they were signed by the purchaser while the sales tickets were not. The contracts indicated cash payments, which the sales tickets did not. In several of the cases the customer testified that a cash down payment was made or that a larger cash down payment was made than was reflected in the sales tickets. From these computations a shortage of over $1,500 was determined to exist. One Ruth Wassalino purchased a 1953 Ford. The contract indicated that $369.80 was paid down. The sales ticket which was in Persky's handwriting indicated that $25 was received down and that $119.80 was due. Mrs. Wassalino testified that she made a down payment of $250. She gave a check of $250 to Clifford Turner. One Florence Valentine purchased a 1949 Chevrolet from Persky for $349. She paid $325 down. The sales ticket indicated that the total price of the car was $193 and that a deposit of $75 had been made. James Thomas testified that he purchased a car from Persky and paid $100 in two installments. He had a receipt signed by Persky for $54 and a receipt signed by a William Sartain for $46. Thomas testified "it was understood that it was okay to pay him, to give him the money and he was going to give it to Mr. Persky."

We are satisfied that the evidence is sufficient to support the conviction on count two. If Persky falsely represented that he would get title to the Mercury which he traded in on the Studebaker he purchased, he would be guilty of theft. Persky made no effort to obtain title to the Mercury except by writing the Department of Motor Vehicles the latter part of March, 1957, to learn the registered and legal owner of the car. It is rather strange for a person to trade in an automobile that he does not have title to and to state that he will get title and then do nothing to actually obtain title. We believe that the jury could find that Persky obtained the Studebaker through false representations and that Persky never intended to get title to the Mercury when he purchased the Studebaker.

We believe also that the evidence is sufficient to support the conviction on count four. Persky, by his own testimony, admitted that he sold the Lincoln and retained the proceeds. This was not an open claim of title to the car. This was an unlawful disposition of the property of Downing to satisfy an alleged debt Downing owed Persky.

The evidence to support count five consists of the evidence which shows that Persky collected sums which were not reported to the firm. The evidence clearly establishes that Persky personally received the sum of $304 which was not reported. (Florence Valentine $250, James Thomas $54.) In addition Persky testified that he had received $150 from a Mr. Harmon. This would show the sum of $454 actually received by Persky. Even the lesser amount satisfied the requirement of grand theft.

Appellant has made a lengthy, earnest and able argument in support of his contention that the record does not support the conviction on any of the counts. However, his argument points out testimony which appellant contends is favorable to appellant, and merely accentuates the conflict in the testimony. It was the province of the jury to weigh the evidence, and we are convinced that the evidence supports the conviction on counts two, four and five.

[3] Appelant's second contention is that the court erred in not excluding all the witnesses during the trial. Before any testimony was received counsel for appellant made a motion to exclude all witnesses. The prosecution was permitted to have Mr. Downing and the certified public accountant who made the audit remain. The case involved many accounting records, and it is understandable that the district attorney would need an accountant at his side to advise him on the accounting aspects of the case. Mr. Downing was the owner of the business, and he would be familiar

with many aspects of it. Under such circumstances we do not believe we would be justified in holding that the trial judge abused his discretion in permitting the two witnesses to remain. The rule is that the exercise of the power which is provided for in section 2043 of the Code of Civil Procedure as to the exclusion of witnesses is discretionary with the trial court. Witkin California Evidence, sec. 568; People v. Lariscy, 14 Cal.2d 30, 92 P.2d 638; People v. Garbutt, 197 Cal. 200, 239 P. 1080.

[4] Appellant next contends that the court committed prejudicial error in not permitting cross examination of Mr. Downing as to statements made by him in a complaint filed in a civil action against Persky which dealt with the same matter as the criminal prosecution. Appellant contends that this was admissible for the purpose of testing the credibility of Downing. The record shows that the following occurred: "Mr. Crowley: However, it would go to show, first of all, test his credibility, his veracity, which is certainly heavily under attack in this matter, and I think successfully so, and it would go also to his motive for instituting these criminal proceedings. If the court wishes, I could abandon the question along that line for today, because we won't be going too much longer anyway and perhaps I could supply some authority to show the relevancy of these questions tomorrow. The Court: Well, you will have the opportunity to do so, but the objection is sustained at this time."

The record does not show that appellant's counsel sought to pursue the matter further, but the record does show that the complaint was later introduced in evidence and was before the court and jury.

Appellant was, of course, entitled to impeach the witness by showing that statements in the complaint filed in the civil action were inconsistent with the testimony of the witness in court. However, appellant did not point out to the trial court and has not pointed out in his brief filed in this court anything in the complaint which was inconsistent with the testimony given at the trial. The record discloses that the trial court told counsel for appellant "if you will explain to me how that is relevant to anything in his direct examination I'll hear you." In view of the fact that no explanation was ever offered, the ruling of the trial court was not erroneous.

[5, 6] Appellant contends further that the verdict of guilty on count two is inconsistent with the verdict of not guilty on count one, and that the verdict of guilty on count four is inconsistent with the not guilty on count three. The information charged appellant in count one with the unlawful taking of Downing's equity in the 1955 Studebaker. In count two appellant is charged with the taking of the Studebaker automobile, personal property of Downing. Both charges are for grand theft. Similarly, count three charges appellant with the taking of $1,495 which was the value of a 1953 Lincoln, and count four charges appellant with taking the 1953 Lincoln automobile. An accusatory pleading "may charge * * * different statements of the same offense * * * under separate counts * * *." Pen. Code, § 954.

[7] The jury was instructed that if they found the defendant guilty as charged on either counts one or two, they must find him not guilty as charged in the other, and if they should find defendant guilty as charged in either of counts three and four, they must find him not guilty as charged in the other. The court went on to say, "That is, Counts One and Two relate to the same set of circumstances charging the crime in a little different language, and you can't find him guilty on both Counts One and Two. If you construe the evidence such that you are convinced to a moral certainty that he is guilty of Count One, you must find him not guilty on Count Two. I'm using that simply as an illustration, and the same thing applies to Three and Four." A similar instruction has been approved for situations as in the present

case where the facts charged in two counts are merely different statements of the same offense. People v. Hiden, 102 Cal. App.2d 655, 660, 228 P.2d 95; see People v. Breyer, 139 Cal.App. 547, 34 P.2d 1065, 1067. Such an instruction does not state or imply that the jury should bring in a guilty verdict on either or any of the offenses charged.

The finding of not guilty of counts one and three cannot be deemed an acquittal of counts two and four. Pen.Code, § 954. As stated in People v. Nye, 38 Cal.2d 34, at page 39, 237 P.2d 1, at page 4: "An indictment or information may charge 'different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts' and a verdict of acquittal on one count is not an acquittal on any other count. (Pen.Code, § 954.) Thus, whether or not Counts II and IV charged different statements of the same offense or two offenses of the same class of offenses, the dismissal of Count II was not tantamount to an acquittal on Count IV. People v. Codina, 30 Cal.2d 356, 360, 181 P.2d 881."

The elements of the corpus delicti of the offenses charged in count one are different from the elements charged in count two and the offense charged in count three is different from the offense charged in count four. In count one appellant is charged with taking an equitable right, and in count two appellant is charged with taking the legal title to the car. Under count three appellant is charged with taking the proceeds from the sale of the automobile, and under count four appellant is charged with taking the automobile.

It is apparent that these counts are in the alternative and that the jury would have had to find that Downing had either an equity in the car or was the legal owner. Apparently they found the latter. There was no inconsistency in such a verdict.

[8] The court did not err in excluding evidence of the asserted sales tax regulation dealing with over allowances and discounts. Counsel for appellant sought to prove that "it was common practice in the industry, and as a matter of fact, the sales tax people themselves, the people themselves, recognized the fact that special discounts, over allowances and fictitious cash down payments were listed on conditional sales contracts and prior to January 9, 1956, the rule and regulation in the industry was that the sales tax would be computed on what was actually received by the dealer and not what was shown on the conditional sales contract." The court excluded the offered evidence on the ground that it was immaterial and collateral testimony, and we think the ruling was correct, as it was too remote to have any materiality in the instant case. Appellant testified that the contracts were drafted to show that an adequate down payment was received so that the bank's minimum down payment requirements would be met, and that the contracts which were prepared by appellant did not correctly state the amount of the down payments. Even if it were a practice of the automobile industry to give over allowances, which would in effect be a practice of committing fraud, we believe that proof of the asserted sales tax regulation was entirely collateral to any issue in the case and was properly excluded.

We are convinced from a study of the entire record that the appellant received a fair trial, that there was ample evidence that he was guilty of the counts of which he was found guilty, and that no prejudicial errors were committed.

The judgment and order are affirmed. The appeal from the order denying probation is dismissed.

VAN DYKE, P. J., and PEEK, J., concur.

167 Cal.App.2d 396

Eunice GARBUTT, Plaintiff and Respondent,

v.

Harry SCHECHTER and George Schechter, copartners, doing business under the fictitious firm name and style of 4-Star Mills, Defendants and Appellants.

Civ. 23282.

District Court of Appeal, Second District, Division 3, California.

Jan. 27, 1959.

Rehearing Denied Feb. 25, 1959.

Action for injuries sustained by plaintiff when a chair on which she sat upon in defendant's store rocked and caused the plaintiff to fall to the floor. Verdict and judgment for the plaintiff in the Superior Court of Los Angeles County, Emil Gumpert, J., and the defendants appealed. The District Court of Appeal, Shinn, P. J., held that evidence justified judgment against the defendants on the ground that the chair created an unreasonable risk for customers and that defendant knew or by reasonable care should have known of that fact.

Judgment affirmed.

1. Appeal and Error ⇐996, 1001(1)

If upon the evidence reasonable minds might differ as to the answers of a jury on the facts, the appellate court is concluded by the implied findings of the jury, and only where the Appellate Court can say that an affirmative answer to the questions would be unreasonable would it be justified in holding the evidence insufficient to support the verdict for the appellee.

2. Negligence ⇐44

Owners of a store were required to furnish chairs for their customers' use that would provide them with reasonable safety, and alleged fact that a smaller or more nimble person than plaintiff would not have fallen or might not have been hurt as result of construction of a chair would not acquit the defendants of negligence.

3. Evidence ⇐14

It is a well-recognized fact that big persons fall harder than small ones.

4. Negligence ⇐32(1)

Defendants as owners of a store owed a duty towards all invitees, not merely to a selected few, and a large woman was as much entitled to a safe chair to be furnished by defendants, as a small one.

5. Negligence ⇐134(4, 7)

In action for injuries sustained by plaintiff, a large woman, who seated herself on a chair furnished by defendants in their store and the chair tipped forward and caused the plaintiff to fall to the floor, where the design of the chair was a wide departure from common standards of chair construction and it was so designed that it rocked forward when weight was applied to the front part of the seat, evidence justified judgment against defendants on the ground that the chair created an unreasonable risk for customers and that defendant knew or by reasonable care should have known of that fact.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for appellants.

Robert Silver, Beverly Hills, Eugene E. Glushon, Los Angeles, for respondent.

SHINN, Presiding Justice.

In a jury trial Eunice Garbutt was awarded verdict and judgment in the amount of $25,000 for personal injuries sustained in a fall from a chair in a place of business of defendants Schechter. Defendants made a motion for new trial which was denied and they have appealed from the judgment, contending there was no evidence that the chair from which plaintiff fell was unsafe for patrons to sit upon and that they were not guilty of negligence.

Plaintiff and her husband entered defendants' place of business for the purpose of purchasing some lace. They were shown into a small showroom by a receptionist where plaintiff stood at the end of a table looking at a lace sample book. Mr. Garbutt seated himself on a chair. Harry Schechter came in to wait upon them,

plaintiff selected some lace and as Harry Schechter was leaving to have the lace packaged he asked plaintiff to be seated and plaintiff sat on an "S" shaped chrome chair that had no arm rest.

Plaintiff was 5 feet, 4 inches in height and 200 pounds in weight. She had had surgery in her lower spine. As she seated herself the chair tipped forward and went out from under her, causing her to fall to the floor. Due to her condition it was necessary for her to get onto her knees to arise from that position. As she fell, her left foot went out from under her but she was able to arise and stood waiting Mr. Schechter's return. As a result of the fall she was required to undergo surgery; she had not worked since the accident and the business she had conducted was sold at inventory prices. After her first surgery she would seat herself as follows: "I would sit down very carefully, then move myself back, because I had no bottom spine, so I would sit down on the chair * * * like this and then move myself back into the chair." She had seen the same type of chair many times and had seen them in use, but did not recall whether she had previously sat on one of them.

The chair was introduced in evidence as an exhibit and is before us as a part of the record. The frame of the chair is composed of 1-inch aluminum tubing and the seat is supported only by legs in front which are directly in line with the front of the seat and are curved backward near the bottom. The framework which serves the purpose of legs commences to curve backward at a point 4 inches above the floor and it reaches the floor 4 inches to the rear of the front edge of the seat. Beyond that the base of the frame is flat and sufficiently well designed to prevent the chair from tipping backward, but due to the curve of the legs it has a tendency to roll forward. The seat of the chair measures 14 inches from front to back and its center of gravity was determined by experiment to be 5 inches forward of the back of the seat and the point of support furnished by the front legs to be about 3¼ inches from the front edge of the seat. Also it had been determined by experiment that the chair would overturn forward upon the application of different weights at different points on the seat forward of the point of support, whereas weight placed behind the point of support would not cause it to overturn. It was an obvious fact that when the chair overturned more of plaintiff's weight rested forward of the point of support than behind it. Equally obvious is the fact that the plaintiff's weight would be shifted to the front or the rear of the point of support as she might have leaned forward or backward.

[1] The questions for the jury were whether the chair created an unreasonable risk for customers and whether defendants knew or in the exercise of reasonable care would have known that fact. If, upon the evidence, reasonable minds might differ as to the answers, we are concluded by the implied findings of the jury. Only in case we could say that an affirmative answer to either of these questions would be unreasonable would we be justified in holding the evidence to be insufficient to support the verdict. Counsel for defendants, of course, do not question that the power of a reviewing court is thus limited.

Defendants say "There is nothing inherently dangerous in such chair. Perhaps, there is no more simple or ordinary appliance than a chair. Persons using chairs do not ordinarily place themselves thereon in the manner described by plaintiff as being the manner in which she placed herself upon this chair. To place one's weight on the forward end or edge of a chair is extremely unusual and not to be expected. There is no evidence that defendants or either of them had the slightest inkling that plaintiff here would do so." They contend that an unusual combination of circumstances contributed to the accident, namely, plaintiff's weight and her physical condition, which made it necessary for her to rest her weight at first upon the front part of the seat and to attempt to move

backwards on the seat. They then argue that they had no duty to anticipate this unusual combination of conditions and apparently contend that in any other circumstances the chair would not have toppled over. They say that chairs of this type are in common use, but if this be granted, it is nevertheless a fact that the design is a wide departure from common standards of chair construction. This chair is so designed that it rocks forward when weight is applied to the front part of the seat. As a chair it is an oddity in which safety has been sacrificed to the convenience and economy of using metal tubing with easy bends at the bottom of the front legs, which give the seat the only support it has. It is of the type of newfangled creations that are called modern, and which are designed more to please the eye than to provide the stability one expects to find when reposing the anatomy upon a chair in a place of business.

[2, 3] Although defendants were not required to anticipate that someone might use the chair in the identical manner in which plaintiff attempted to seat herself upon it, they were required to furnish chairs for their customers that would provide them with reasonable safety. Werkman v. Howard Zink Corp., 97 Cal.App.2d 418, 218 P. 2d 43, and cases cited. It is quite likely that a smaller or a more nimble person would not have fallen or might not have been hurt, but if this were true it would not acquit defendants of negligence. The well recognized fact that big persons fall harder than small ones is relevant only to the extent of plaintiff's injuries which, admittedly, were serious.

[4] Defendants owed a duty toward all invitees, not merely to a selected few. A large woman is as much entitled to a safe chair as a small one and is much more in need of it. Robinson v. Pioche, 5 Cal. 460.

[5] It is inherent in the verdict that the jury believed it to be a practice reasonably to be anticipated that women are likely to sit on the edges of chairs, and are especially prone to do so when examining samples at dress goods counters. We think that was a fair and reasonable conclusion. Also it was demonstrated that the chair will go out from under one who sits forward on the seat, although a conventional chair, used in the same manner, would provide safety.

Inasmuch as we are of the opinion that the implied findings of the jury upon the material issues have ample support in the evidence the judgment must be and is affirmed.

PARKER, WOOD and VALLÉE, JJ., concur.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert THOMAS, Defendant and Appellant.*

Cr. 6355.

District Court of Appeal, Second District, Division 2, California.

Jan. 26, 1959.

Hearing Granted March 25, 1959.

Defendant was convicted of possession of heroin. From an order of the Superior Court of Los Angeles County, Edward R. Brand, J., denying the defendant's motion to vacate the judgment, the defendant appeals. The District Court of Appeals, Fox, P. J., held that where illegal restraint had been imposed upon defendant by reason of the sentence, court was thereafter without jurisdiction to vacate the sentence originally pronounced and that defendant's appeal was not dismissable on the theory that the question might have been raised upon appeal from the judgment.

Reversed and sentence vacated and sentence to county jail reinstated.

Herndon, J., dissented.

* Opinion vacated 342 P.2d 889.

1. Criminal Law ⇐996(2), 998

If the sentence has been entered in the minutes of the court or if defendant has begun serving the sentence or has been restrained by it, court is without jurisdiction to vacate or modify the sentence originally pronounced.

2. Criminal Law ⇐998

In narcotics prosecution alleging that defendant had suffered a prior conviction where defendant was sentenced and left the courtroom and was in the custody of a deputy sheriff pursuant to the county jail sentence that had been returned, a "legal restraint" had been imposed upon the defendant by reason of the sentence and the trial court was thereafter without jurisdiction to vacate the sentence originally imposed in order to impose punishment on the defendant in the state prison because of a prior conviction. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⇐1131(4)

An appeal from order denying defendant's motion to vacate judgment sentencing him to state prison based on a prior conviction and to reinstate the county jail sentence was not dismissable on the ground that the question might have been raised upon appeal from the judgment where such appeal would not have presented the question involved and where the motion to vacate the prior judgment was an appropriate procedure to develop the factual situation to show that the court lacked jurisdiction to pronounce the second judgment and that it was therefore void. West's Ann.Pen.Code, § 1237, subd. 3.

4. Criminal Law ⇐1023(12)

Where an order denying defendant's motion to vacate judgment and sentence was made after final judgment and it affected the substantial rights of the defendant, the order was appealable. West's Ann. Pen.Code, § 1237, subd. 3.

Spiegel, Turner & Wolfson, Santa Monica, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was charged with violating Health and Safety Code section 11500 (possession of heroin). It was also alleged that he had suffered a prior conviction for violation of this same code section and that he had served a term of imprisonment therefor in the state prison. At the trial in the Santa Monica branch of the superior court, defendant was found guilty of possession and evidence was received with respect to his alleged prior conviction, but determination of that question was continued until the hearing on defendant's application for probation and sentence, which was set for April 7, 1958. In the meantime defendant was in the county jail. On the morning of April 7th defendant was transported to the Santa Monica court from the county jail in the custody of a deputy sheriff. Defendant's case was heard shortly after 10:00 o'clock. Probation was denied. He was sentenced to six months in the county jail, and remanded to custody. However, no mention was made of the alleged prior conviction. The clerk made notes of the judge's disposition of defendant's case but did not then make a formal entry thereof in the minutes. After defendant and the deputy sheriff who had him in custody left the courtroom the clerk discovered that the judge had failed to dispose of the alleged prior conviction. The clerk called the matter to the attention of the deputy district attorney and the deputy public defender who represented defendant, and the three of them held a conference with the judge in his chambers with respect to this matter. As a result, the judge directed the clerk to have the defendant brought back into court that afternoon. The clerk telephoned the sheriff's office in Los Angeles before going to lunch that the defendant was to be returned immediately to the superior court in Santa Monica. Defendant was returned to the jail at 3:15 p. m.; he was checked out for return to the Santa Monica court at 3:35. The order remanding defendant to the county jail for a period of six months was stamped as having been received there at 3:39 p. m.

When defendant was notified that he must return immediately to the Santa Monica court "[h]e was in the process of receiving his cell clothes." Defendant and his attorney appeared again in the Santa Monica court at 4:50 that afternoon. The judge explained that in view of the heavy calendar that morning he had inadvertently overlooked the alleged prior conviction. No objection was raised by defendant's counsel to this hearing, during the course of which defendant admitted the prior conviction (sale of Marijuana) and that he was presently on parole. The judge thereupon vacated the previous sentence of six months in the county jail and imposed a sentence in the state prison.

Soon thereafter new counsel for defendant filed a motion to vacate the last judgment and to reinstate the county jail sentence. An affidavit of defendant's aunt was filed in support of the motion to the effect that upon the jail sentence being pronounced the deputy sheriff took defendant out of the courtroom. At the hearing on the motion to vacate the judgment there was testimony of the court clerk and a deputy sheriff covering the above procedural matters. Defendant's motion was denied. He has appealed from that order.

Defendant contends that the second judgment is void on the ground that the court was without jurisdiction to vacate the sentence originally pronounced. Defendant's position is well taken.

[1] The rule here applicable is stated in People v. McAllister, 15 Cal.2d 519, at pages 526–527, 102 P.2d 1072, at page 1075, as follows: "If the sentence has been entered in the minutes of the court, or if the defendant has begun serving said sentence or has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced. On the other hand, if the sentence pronounced has not been entered by the clerk in his minutes, and no legal restraint has been imposed upon the defendant by reason of said sentence, then it is proper for the court to change the sentence originally pronounced."

[2] When defendant in the instant case left the courtroom in Santa Monica in the forenoon he was in the custody of a deputy sheriff pursuant to the county jail sentence that had been pronounced. When he was returned to the county jail he was handed his prison garb in furtherance of the execution of that sentence. There can be no doubt that "legal restraint" had been imposed upon him "by reason of said sentence." It therefore follows that the instant case comes squarely within the latter portion of the rule quoted from People v. McAllister, supra. Hence, under the authority of that case, the court was thereafter "without jurisdiction to vacate * * * the sentence originally pronounced." See also People v. Reimringer, 116 Cal.App.2d 332, 343, 253 P.2d 756; People v. Ysabel, 28 Cal.App.2d 259, 261, 82 P.2d 476; In re Daniels, 119 Cal.App. 350, 6 P.2d 549. From this it follows that the sentence in the afternoon to the state prison was void. People v. McAllister, supra.

[3–4] The People suggest that defendant's appeal should be dismissed upon the theory that the question presented might have been raised upon an appeal from the judgment and that therefore an appeal from the order denying defendant's motion does not lie. That theory, however, is not here applicable. Subsection 3 of section 1237 of the Penal Code provides that an appeal may be taken from any order after judgment, affecting the substantial rights of the party. The record before us indicates that an appeal from the judgment would not have presented the question here tendered for our consideration. The clerk's minutes show that defendant was sentenced to the state prison. They do not reveal that a county jail sentence had first been pronounced. It was therefore necessary for an appropriate record to be made which would show the initial jail sentence, the fact that defendant was legally restrained by reason of its imposition, and that he was thereafter returned to the court at which

time the prior sentence was set aside and a more severe sentence imposed. A motion to vacate the prior judgment was an appropriate procedure for developing the factual situation as a basis for showing that the court lacked jurisdiction to pronounce the second judgment, and that it was therefore void. This was the procedure that was used in People v. McAllister. See also People v. Stratton, 133 Cal.App. 309, 314, 24 P.2d 174; People v. Walker, 132 Cal. 137, 64 P. 133; People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585. As it is manifest that the order in question was made after final judgment, and that it affected the substantial rights of the defendant, the right to appeal from the order is clear. People v. Godfrey, 100 Cal.App. 91, 279 P. 1030.

The order is reversed, the sentence to the state prison is vacated, and the sentence to the county jail for six months is reinstated.

ASHBURN, J., concurs.

HERNDON, Justice.

I dissent.

Through an understandable inadvertence shared by the trial judge, the deputy district attorney and defense counsel, there was a failure at the time of rendering the original judgment to notice and dispose of the charge that appellant previously had been convicted of a felony involving the sale of narcotics. This prior, if found true, made mandatory the imposition of a state prison sentence. The trial judge acted with such promptness to correct the oversight that appellant was recalled from the county jail to the courtroom within twenty minutes after he had arrived at the jail following the imposition of sentence and before the remand order was received there.

The original judgment had not been entered in the minutes of the court. And in a technical sense appellant actually had not begun to serve the jail term because he was ordered back to the courtroom before the remand order, or mittimus, had reached the jail. Cf. Hynes v. United States, 7 Cir., 35 F.2d 734. Appellant suffered no prejudice whatsoever by reason of any restraint imposed upon him during the brief interval between the pronouncement of the original sentence and the correction thereof. He would have been under precisely the same restraint in any event. I do not agree that the decision in People v. McAllister, 15 Cal. 2d 519, 102 P.2d 1072, reasonably interpreted, compels us to accord appellant the completely undeserved benefit of such an inconsequential and technical irregularity. It is to be remembered that in McAllister the Supreme Court affirmed the order denying a motion to vacate the alternative provision of the sentence, which was added by way of modification.

I would affirm the order presently under review.

167 Cal.App.2d 229

Harry Jerome WILSON, Plaintiff and Appellant,

v.

BOARD OF RETIREMENT OF LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION; H. L. Byram, Walter G. Gastil, Harry S. Hargrave, Gladys Johnson, Edward C. Sprulll, Alfred L. Thomas, Clarence H. Thurber, and William T. Cobb, as Members of the Board of Retirement of the Los Angeles County Employees Retirement Association; County of Los Angeles, a Body Politic and Corporate; H. L. Byram, Treasurer of the County of Los Angeles; Joseph M. Lowery, Auditor of the County of Los Angeles, Defendants and Respondents.

Civ. 23407.

District Court of Appeal, Second District, Division 2, California.

Jan. 20, 1959.

Hearing Denied March 18, 1959.

Action by member of Los Angeles County Employees Retirement Association alleging that Board of Retirement of As-

sociation violated its duties in purchasing certain securities with funds of the retirement system. The Superior Court of Los Angeles County, Kenneth N. Chantry, J., granted defendant's motion for judgment on pleadings and member appealed from judgment entered thereon. The District Court of Appeal, Herndon, J., held that under statute authorizing county employees retirement associations to invest in securities which are legal for savings bank investments, it was not improper for Board to purchase securities at a premium.

Affirmed.

1. Evidence ⇐20(2)

Court could take judicial notice that it had been customary for banks to invest in bonds purchased at a premium.

2. Banks and Banking ⇐194
Trusts ⇐217(1)

Legislative and judicial limitations on investment practices of banks and trust estates have as their objective the security of the investment. West's Ann.Civ.Code, § 730.08.

3. Counties ⇐69(3)

Treating the powers and duties of Board of Retirement of Los Angeles County Employees Retirement Association as those of trustee of a trust, Board had power to purchase securities at a premium for trust corpus. West's Ann.Civ.Code, § 730.-08.

4. Counties ⇐69(3)

Under statute authorizing county employees' retirement associations to invest in securities which are legal for savings bank investments, it was intended to establish a common standard of legality for investments of savings banks and of funds and it was not improper for Board of Retirement of County Employees Retirement Association to purchase securities at a premium. West's Ann.Gov.Code, §§ 31450 et seq., 31520–31532, 31588, 31594, 31595; West's Ann.Civ.Code, § 730.08.

5. Counties ⇐69(3)

Practice of amortizing premiums on securities purchased at a premium by Board of Retirement of County Employees Retirement Association did not conflict with section of Government Code requiring that income in excess of expenditures be funded as a reserve against deficiencies in income in other years. West's Ann. Gov.Code, § 31592.

6. Evidence ⇐35

District Court of Appeal would take judicial notice of laws of sister state. West's Ann.Code Civ.Proc. § 1875, subd. 3.

7. Counties ⇐69(3)

In view of statute authorizing purchase of bonds for investment by savings banks if such bonds were legal for an investment for savings banks in either New York or Massachusetts, purchase of bonds by Board of Retirement of County Employees Retirement Association was proper where subject bonds were legal for investment by savings banks in New York and Massachusetts. West's Ann.Financial Code, § 1372; West's Ann.Code Civ.Proc. § 1875, subd. 3; M.G.L.A. c. 168, § 42; Banking Law N.Y. § 235, subd. 24.

8. Counties ⇐69(3)

Section of Financial Code to effect that bonds of International Bank for Reconstruction and Development may be purchased for investment in an amount not exceeding 1 per cent of bank's savings deposits was not applicable to county employees retirement association, and purchase of such bonds in excess of 1 per cent of retirement funds was not illegal. West's Ann.Financial Code, §§ 1350–1371, 1360.1, 1372.

John J. Guerin, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents.

HERNDON, Justice.

Appellant instituted the instant action as a member of the Los Angeles County Employees Retirement Association and al-

so as a taxpayer of said county, alleging that respondent Board of Retirement of said Association violated its duties in purchasing certain securities with funds of the retirement system. The complaint is in three counts: the first is for declaratory relief; the second (based on the allegations of the first) sounds in assumpsit for the sum of $2,090,770.65 allegedly owed the County and the retirement system by virtue of the unlawful purchase of bonds at a premium; and the third seeks a judgment for the difference between $4,000,000 paid for securities of the International Bank for Reconstruction and Development and the market value of such securities at the date of the filing of the complaint, and also certain incidental declaratory relief. Plaintiff moved for a summary judgment and defendants moved for a judgment on the pleadings. Plaintiff appeals from the adverse judgment entered upon the granting of the latter motion.

Appellant correctly points out that there is no dispute concerning the facts and that the issues presented by this appeal are purely legal in nature.

The factual background necessary to an understanding of appellant's contentions may be briefly summarized as follows: Since January 1, 1938, all permanent employees, certain elected officials, and the employees of the several districts of Los Angeles County are members of the Los Angeles County Employees Retirement Association, under the statutory authorization of what are now sections 31450 et. seq. of the Government Code. The funds of the Association are substantial; as of December 31, 1957, the total assets of the retirement fund exceeded $179,000,000. These funds are carried upon the books of the county auditor and treasurer (Government Code, section 31588) and the funds are in the safekeeping of the county treasurer. Government Code, section 31594. The respondent Board of Retirement is vested with the management of the retirement system (Government Code, sections 31520–31532) and with the management and control of the retirement fund. Government Code, section 31594. It is agreed that the following provisions of section 31595 of the Government Code limit the authorized investments available to respondent board:

"All funds received by the county treasurer not required for current disbursements shall be invested only in: (a) Securities which are legal for savings bank investments in the State * * *."

Section 1372 of the Financial Code[1] deals with the construction of statutes (other than those codified in Chapter 11 of the Financial Code) authorizing investment in securities which are legal for savings banks, and provides in effect that such investments as were authorized by the Bank Act (now repealed) are legalized thereby. This section also provides that

1. "*Other laws authorizing investment in securities legal for savings banks; construction.* The provisions of this chapter govern the investment of funds by savings banks but wherever by any law of this State it is now provided that the moneys of any pension fund, retirement plan, trust fund, or the moneys of any special fund the investment of which is governed by law, or the funds of any political subdivision or public corporation may or shall be invested in securities which are a legal investment for savings banks, then such law shall be deemed to authorize or require, as the case may be, that such moneys be invested in securities in which savings banks were authorized to invest their funds by the provisions of the Bank Act as it read prior to January 1, 1949, including securities authorized for investment by paragraph (f) of subdivision 5 of Section 61 of the Bank Act (for which purpose said paragraph (f) shall be deemed to have been re-enacted on December 31, 1948), or by any other law of this State or in which savings banks are authorized to invest their funds by the provisions of Sections 1350 to 1366, inclusive, of this chapter; provided, that the provisions of said sections limiting the amount which a savings bank may invest in securities to a specified percent of its paid-up capital and surplus, or savings deposits, shall not apply to investments authorized by the terms of this section."

paragraph (f) of subdivision 5 of Section 61 of the Bank Act "* * * shall be deemed to have been re-enacted on December 31, 1948. * * *"

The pertinent portions of section 61 of the Bank Act, to which reference has been made in the statute above, are found in Stats.1909, chapter 76, page 87, and as amended by Stats.1941, chapter 795, page 2332–2334, and read as follows:

"Sec. 61. Any savings bank may purchase, hold or sell real or personal property, as follows:

* * * * * *

"5. Irrespective of the provisions of Subdivision 6 of this section, bonds and other securities of the following classes:

* * * * * *

"(f) Bonds legal for investment by savings banks in the State of New York or the State of Massachusetts;

* * * * * *

"6. Bonds and other securities of the following classes; provided, that such bonds or securities shall first have been certified by the Superintendent of Banks after an investigation as provided for under Section 61a of this act * * *."

It is not disputed that prior to the institution of this action the named respondents paid the sum of $2,090,770.65 as "premiums" on securities purchased with the funds of the retirement system; however, the parties agree that the word "premium" means and was intended to mean "* * * that part of the purchase price other than accrued interest in excess of the par value of the security purchased." In other words, the parties agree that prior to the institution of this action the respondents purchased bonds for the retirement fund at prices which in the aggregate exceeded the total par value of the bonds by $2,090,770.65. See Estate of Gartenlaub, 185 Cal. 648, 650, 198 P. 209, 16 A.L.R. 520. The parties also agree that the respondents have credited sufficient of the interest received on these securities to the "premiums" paid to amortize the premiums prior to maturity of the respective bonds. Finally, it is agreed that prior to September 11, 1957, the respondents purchased $4,000,000 par value bonds of the International Bank for Reconstruction and Development with the funds of the retirement system.

Appellant's theories, on which his complaint was framed, are (a) that respondents had no authority to purchase securities above par, and that the Retirement Board improperly deducts an amount each year from interest received on the premium securities to amortize the premium paid for them; and (b) that prior to September 11, 1957, bonds of the International Bank for Reconstruction and Development were not authorized as legal investments for the Retirement Fund, and that on the date the suit was filed the market value of such securities was less than the price paid for them.

The prayer is for declaratory relief, an accounting, a judgment in the sum of $2,090,770.65 with interest and penalties, judgment for the difference between the price paid and the market value of the International Bank's bonds and for interest, penalties, costs of suit and attorney's fees.

Initially, appellant argues that the respondents had no authority to purchase securities above par. He says: "* * * the Retirement Law of 1937, read as a whole forbids the payment of premiums to private persons, firms, or corporations with funds of the retirement system when purchasing securities; forbids the use of interest earned on the retirement fund to amortize interest so paid, and, further, any premiums so paid from the retirement fund would be an unlawful gift of public moneys. * * *"

"* * * the respondents herein are public officers administering the funds of a public trust, and that the acts of such public officers must find specific authority under the Retirement Law of 1937 for their acts in relation to purchasing securities with funds of the retirement system; and unless there is such specific statutory authority, and concededly there is none un-

der the Retirement Law of 1937; or unless the case law determines that said respondents have such authority, then they are not lawfully authorized to pay premiums with funds of the retirement system when purchasing securities, or to recoup the premiums so paid from interest earned on the retirement fund."

Both appellant and respondents cite and rely on Estate of Gartenlaub, supra, 185 Cal. 648, 198 P. 209, as being determinative of the question whether a trustee may purchase securities at a premium. Appellant concedes that where the purchase at a premium *is* proper, Gartenlaub, supra, requires the trustee to amortize the premium paid from the interest received on the bond. But appellant contends that "* * * in the absence of a specific direction in the trust instrument or the statute authorizing the purchase of a security at a premium such payments are improper and the amortization of such premiums paid from interest is equally improper."

Appellant's contention finds no support in Gartenlaub, supra. In that case there was no specific provision in the trust instrument authorizing the trustee to purchase bonds at a premium, and the Supreme Court affirmed the order settling the accounts of the trustee who had purchased bonds at a premium and then amortized the premium paid from the interest received. See 2 Scott, Trusts, 1335–1336, § 239.2; 4 Bogert, Trusts and Trustees, 314, § 831; 1 Nossaman, Trusts Administration and Taxation, 177–179, § 15.02. As respondents illustrate with extensive citations, the practice of purchasing bonds for trust estates at prices exceeding their face value is well-known if not common. See 4 A.L.R. 1249; 16 A.L.R. 527; 48 A.L.R. 689; 101 A.L.R. 7; 131 A.L.R. 1426; Edgerton, Premiums and Discounts in Trust Accounts, 31 Harv.L.Rev. 447, 461. Respondent cites section 24 of Title 12, United States Code, and the federal regulations thereunder (12 Code of Federal Regulations, page 25, Title 12, Part 1, section 1.2, 3 Federal Register 1619) which authorizes national banks to purchase investment securities above par provided the premium paid is amortized, and respondent quotes extensively from an accounting treatise, Finney, Principles of Accounting (third ed., 1946) in which the propriety of the accounting procedure by which the amortization of the premium is effected is discussed.

[1–4] Appellant concedes that it is a fact of which we may take judicial notice that it has been customary for banks to invest in bonds purchased at a premium. Cf. Graddon v. Knight, 138 Cal.App.2d 577, 583, 292 P.2d 632; see 18 Cal.Jur.2d 462, § 41. However, appellant contends that in such activity "* * * private banks are dealing with private funds in a commercial enterprise carried on for profit, * * *" and that the same rules as to investment practices do not apply to the custodian of a fund such as is involved in the instant case. Appellant's contention must be rejected. Legislative and judicial limitations on investment practices of banks and trust estates have the same object—the stability of the investment. Treating the powers and duties of respondents as those of the trustee of a trust, the law is established that the respondents have the power to purchase securities at a premium for the trust corpus. Estate of Gartenlaub, supra, 185 Cal. 648, 198 P. 209; see Civil Code, section 730.08. And treating the powers and duties of respondents as solely derived from the statutory provisions of Government Code, sections 31450 et. seq., the explicit authorization therein to invest in "Securities which are legal for savings bank investments in the State * * *" (Government Code, section 31595) clearly indicates that the Legislature intended to establish a common standard of legality for the investments of savings banks and of funds of the character here involved. Thus, we must hold that there is nothing improper, in itself, in the purchase by respondents of securities at a premium. The indicated practice of amortizing such premiums must be sanc-

tioned as being in accord with California law.

[5] As stated in Gartenlaub, supra, 185 Cal. at page 652, 198 P. at page 210: "* * * where a premium is paid, the ostensible interest yielded by the bond cannot be considered entirely as interest on the face value of the bond, for a sum in excess of the face value has gone into the investment, and the amount of interest remains unchanged, resulting, necessarily, in a decreased rate of return. A portion of the nominal interest is therefore a repayment of the premium." Such a practice does not conflict with the provisions of section 31592 of the Government Code[2] which merely require that net income in excess of expenditures be funded as a reserve against deficiencies in income in other years. Thus, plaintiff's first and second causes of action, for declaratory relief and money judgment are without merit and the judgment for defendants must be affirmed.

[6, 7] Appellant's second contention and the third cause of action alleged involve the purchase by respondents prior to September 11, 1957, of $4,000,000 worth of bonds of the International Bank for Reconstruction and Development. It is appellant's contention that such bonds were not authorized as legal investments for the retirement fund because they were not certified as legal investments for savings banks in California as required by subdivision 6 of section 61 of the Bank Act quoted supra. Conceding that the subject bonds were not so certified, it is apparent that their purchase by respondent was authorized by the provisions of section 61, subdivision 5(f)[3] of the Bank Act, supra, if the subject bonds were legal for investment by savings banks in either New York or Massachusetts on December 31, 1948, (the time as of which section 1372 of the Financial Code provides that "* * * paragraph (f) of subdivision 5 of Section 61 of the Bank Act * * *" shall be deemed to have been re-enacted.) We take judicial notice of the laws of a sister state (section 1875, subd. 3, Code Civ. Proc.). Examining the statutes of Massachusetts we find that section 54 of Chapter 168 of the General Laws of the State of Massachusetts, as amended by Chapter 361, page 347, Statutes of 1948,* specifically permits savings banks to invest in bonds, notes, or obligations issued, assumed, or guaranteed by the International Bank for Reconstruction and Development. This authority was in effect on December 31, 1948. The New York Bank Law, § 235, subd. 24, as amended by Chapter 507, Statutes of 1946, provides that a savings bank may invest in "[o]bligations issued or guaranteed by the international bank for reconstruction and development." This provision also was in effect on December 31, 1948. Thus, we must conclude that the purchase of the subject bonds by respondents was proper because the subject bonds were legal for investment by savings banks in New York and Massachusetts, and therefore authorized for investment by respondents by section 1372 of the Financial Code.

[8] In 1957 the Financial Code was amended by the enactment of section 1360.-1 as follows: *"Bonds of International Bank for Reconstruction and Development* An amount not exceeding 25 percent of the paid-up capital and surplus of the savings bank or not exceeding 1 percent of the bank's savings deposits, whichever is

2. *"Excess interest as reserve against contingencies*
"Interest earned on the retirement fund during any year in excess of the total interest credited to contributions during such year shall remain in the fund as a reserve against deficiencies in interest earned in other years, losses on investments, and other contingencies."

3. "5. Irrespective of the provisions of Subdivision 6 of this section, bonds and other securities of the following classes:
* * *
"(f) Bonds legal for investment by savings banks in the State of New York or the State of Massachusetts."

* Now M.G.L.A. c. 168, § 42.

lesser, in bonds issued by the International Bank for Reconstruction and Development." This section became effective on September 11, 1957, and is one of the statutes minutely defining the investments into which savings banks may put their funds. Financial Code, sections 1350–1371. Appellant here contends that the percentage limitations of savings bank investment in bonds of the International Bank found in section 1360.1 also apply to the retirement funds of the respondent association. Thus, appellant argues that the respondent board could not legally invest more than one percent of the retirement funds in bonds of the International Bank and that the Board's purchase of $2,208,752.87 of such bonds was illegal as violative of section 1360.1 of the Financial Code.

Examining section 1360.1 we conclude that the Legislature did not intend for it to apply to "* * * any pension fund, retirement plan, trust fund, * * * or the funds of any political subdivision or public corporation * * *" (Financial Code, § 1372) and appellant's contention must be rejected. Initially, it should be observed that a retirement fund of the character here in question has no "paid up capital and surplus" nor are its funds properly denominated "deposits". Thus, it would require a most strained construction of the language employed by the Legislature to apply section 1360.1. Moreover, the 1957 amendment is merely supplementary to an already existing, and quite comprehensive, statutory scheme by which the investments permitted savings banks were minutely defined. Sections 1350 to 1371 of the Financial Code. However, section 1372 of the Financial Code specifically exempts "* * * any pension fund, retirement plan, [or] trust fund * * *" from the percentage limitations applicable to savings banks found in sections 1350 to 1366 of the Financial Code. From the insertion of the subject matter of section 1360.1 in these sections, we are fortified in our conclusion that the Legislature did not intend for the percentage limitations of section 1360.1 to apply to the investment management of the subject retirement fund.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

167 Cal.App.2d 318

INDEPENDENT IRON WORKS, INCORPORATED, Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION, Robert C. Kirkwood, James H. Quinn, Paul R. Leake, George R. Reilly, and Robert E. McDavid, Defendants and Respondents.

Civ. 17860.

District Court of Appeal, First District, Division 1, California.

Jan. 23, 1959.

Action by a taxpayer to recover penalties levied against it under provisions of the Sales Tax Act. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment adverse to taxpayer and it appealed. The District Court of Appeals, Peters, P. J., held that evidence, including testimony that prior to tax period in question, taxpayer's attention was specifically directed to certain errors it was making in its returns, and that such errors were repeated for the period in question, and that numerous transactions were not reported by the taxpayer and that such failure had nothing to do with the accounting system adopted by taxpayer, supported imposition of 10 per cent negligence penalty on taxpayer.

Judgment affirmed.

1. Licenses ⇐34

In action by taxpayer to recover penalties levied on it by the board of equalization under provisions of the Sales Tax Act, evidence, including testimony that prior to tax period in question, taxpayer's attention was specifically directed to certain errors it was making in its returns, and that the same errors were repeated for the period in question, and that numerous transactions were not reported by the taxpayer, and that such failure had nothing to do with the accounting system adopted by taxpayer, supported imposition of 10 per cent negligence penalty on taxpayer. West's Ann. Rev. & Tax.Code, § 6484.

2. Licenses ⇐41

Where taxpayer reasonably could not have had the belief that out-of-state sales were not subject to sales tax, because in an audit made of taxpayer's accounts for prior years, heavy assessments were made against taxpayer because it failed to report out-of-state sales, a negligence penalty was properly imposed on taxpayer for failure to report such sales for a succeeding period, and imposition of such negligence penalty could not be avoided on theory that there was an "honest dispute" over the legality of the tax involved. West's Ann.Rev. & Tax.Code, § 6484.

3. Licenses ⇐41

Where a sales taxpayer did not report certain out-of-state sales transactions nor pay the sales tax due thereon and then sue for a refund, his failure to do so implied that no "honest dispute" existed as to whether imposition of the tax was constitutional, and therefore, imposition of negligence penalty would not be deemed unjustified on ground there was an "honest dispute" over the legality of the tax imposed. West's Ann.Rev. & Tax.Code, § 6484.

4. Licenses ⇐34

The doctrine of equitable recoupment of alleged overpayments of taxes, against deficiency assessments, has no application to an action by a sales taxpayer to recover negligence penalty assessed against it where the penalty was imposed because the taxpayer with full knowledge of its actions disregarded tax statute involved. West's Ann.Rev. & Tax.Code, § 6484.

5. Licenses ⇐34

Doctrine of equitable recoupment of alleged overpayments of taxes against deficiency assessments was not applicable in an action by taxpayer to recover negligence penalties assessed against it for failure to pay certain sales taxes, where taxpayer failed to prove overpayments. West's Ann. Rev. & Tax.Code, § 6484.

6. Licenses ⇐34

Where sales taxpayer failed to exhaust its administrative remedies before commencing an action for recovery of tax penalty imposed on it under provisions of the Sales Tax Act, theory of equitable recoupment of claimed overpayments of taxes against assessment of penalties was not available to it. West's Ann.Rev. & Tax. Code, §§ 6484, 6565.

Lloyd W. Dinkelspiel, Charles A. Wood, Jr., Heller, Ehrman, White & McAuliffe, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Eugene B. Jacobs, Harry W. Low, Deputies Atty. Gen., San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by a taxpayer to recover two penalties levied by the Board against it under the provisions of the Sales Tax Act. One was a mandatory late payment penalty imposed under section 6565 of the Revenue and Taxation Code, and the other was a negligence penalty imposed under section 6484 of the same code. From a judgment in favor of the Board the plaintiff appeals.

The complaint here involved was filed by the taxpayer on October 17, 1955. The complaint alleged that the tax period involved was from July 1, 1950, to June 30, 1953; that the taxpayer had filed returns for that period; that on September 22,

1953, the Board notified the taxpayer of an additional assessment and of the imposition of the two penalties; that the taxpayer protested; that thereafter the deficiency assessment and the two penalties were reduced; that the deficiency assessment and the two penalties were paid by the taxpayer; that on October 12, 1954, the taxpayer filed its claim for refund; that the claim was denied; that the taxpayer requests the refund of $7,474.88, the amount of the two penalties. In an exhibit attached to the complaint it is averred that the 10 per cent negligence penalty was imposed because the taxpayer kept its books in an improper fashion, and it is averred that its method of keeping books was proper and did not constitute negligence. It is also averred in the exhibit that the reason for the late payment was that the accountants it employed failed to file a timely protest; that the taxpayer should not be held responsible for this failure; that in periods prior to 1950 the taxpayer had made overpayments of its tax totaling $25,000; that it should be permitted to offset these overpayments against the penalties even though the claim for such overpayments was barred by the statute of limitations. Insofar as this contention involves claimed overpayments prior to 1950, it has now been abandoned.

The answer of the Board denies that the two penalties were wrongfully imposed and collected. It is averred that the Board gave the taxpayer timely notice of an additional assessment of $45,711.31, plus interest, plus a 10 per cent negligence penalty; that the taxpayer failed to pay this assessment and failed to challenge it; that on October 22, 1953, this assessment became final and an additional 10 per cent penalty for failure to pay the tax was assessed; that thereafter, and beyond the time permitted by law, an untimely protest was filed by the taxpayer on January 18, 1954; that the Board nevertheless made a re-audit of the taxpayer's books; that on such voluntary re-audit the assessment was reduced to $37,374.39 and the two 10 per cent penalties reduced accordingly.

On these issues, the trial court entered its judgment in favor of the Board, and the taxpayer appeals.

The evidence, so far as pertinent, produced at the hearing was as follows: For the tax period July 1, 1950, to June 30, 1953, on September 22, 1953, the Board notified the taxpayer of a deficiency assessment of $45,711.31 and of a 10 per cent negligence penalty. This deficiency assessment became final on October 22, 1953. Prior to that date the taxpayer neither paid nor challenged the assessment. Upon failure to pay, an additional 10 per cent penalty was imposed as required by law. In January of 1954 the taxpayer filed its protest against the additional assessment and penalties. Even though the additional assessment and penalties were then final, the Board made a re-audit of the taxpayer's books and voluntarily reduced the assessment from $45,711.31 to $37,374.39, and also reduced the two 10 per cent penalties accordingly.

The taxpayer is a company engaged in the structural steel business. Since 1924 it has adopted a method of accounting acceptable to the federal and state taxing authorities and a method that is commonly used in the industry. In its sales tax returns for the 1950–1953 period it made certain errors which are the basis for the re-assessment and the penalties here imposed. These errors were of three types.

1. The taxpayer issued re-sale certificates to manufacturers from which it acquired various supplies which were consumed by it in its business. As these supplies were assigned to particular jobs, the taxpayer, contrary to the rules of the Board, failed to report the tax.

2. The taxpayer failed to report out-of-state sales, that is, contracts to be completed out of the state. Under the then existing provisions of the sales and use tax laws, such transactions were taxable.

3. The taxpayer just failed to submit returns on between 27 to 30 transactions during the taxable year that should have been reported.

Although the evidence is conflicting, substantial evidence supports the conclusion that none of these errors was generic to the taxpayer's accounting system. These errors could have been avoided had the taxpayer properly evaluated the information contained in its accounting system. The Board's witnesses testified that the errors were the result of the improper extracting of information from the taxpayer's own accounts.

The evidence also shows that during the tax period here involved—1950 to 1953—the taxpayer had actual notice that the items included in the deficiency asessment should have been reported. The Board had audited the taxpayer's accounts for the 1947–1950 tax period in 1950, and had discovered certain deficiencies. These errors were explained to the taxpayer and the working papers resulting from the audit were turned over to the taxpayer. In spite of this fact, the taxpayer committed some of the same errors in the 1950–1953 period that it had committed during the 1947–1950 period. The bulk of the taxpayer's deficiency was caused by its failure to properly report materials assigned to contracts being performed by it. This same identical error was committed in the 1947–1950 period, and, even though the taxpayer was thoroughly informed of the proper procedures, it committed the same error in the 1950–1953 period.

The evidence shows that no penalties were imposed for the errors discovered in the 1947–1950 audit. Although the evidence is conflicting on the issue, that in favor of the Board is that no negligence penalty was imposed because the 1950 audit was a first audit by the Board, and that the Board seldom, if ever, imposes a negligence penalty for errors discovered on a first audit.

The appellant now claims that it made certain overpayments of its tax during the 1950–1953 period and that, even though barred by the statute of limitations, it should be permitted to offset these overpayments against the penalties. The evidence on this issue was meager and conflicting.

The original re-assessment for the 1950–1953 period was in the amount of $45,711.31. Thereafter, the taxpayer filed a late protest. The State caused a re-audit of the taxpayer's books to be made even though the deficiency assessment and penalties were then final. On such re-audit the deficiency was reduced to $37,374.39, and the two 10 per cent penalties were reduced accordingly. The Board reduced the deficiency because the auditors for the Board discovered on the re-audit that the taxpayer had been incorrectly reflecting certain exempt freight charges as part of its gross sale receipts. The State auditors called this to the attention of the taxpayer and the taxpayer prepared a proper schedule of these overcharges and submitted it to the Board. Admittedly, the total amount claimed was not refunded. The auditor for the Board testified that this was because some freight charges were properly taxable, and these were deducted from the refund. This witness was quite clear that this was the sole reason why some of the freight charges were disallowed, and was positive that none of the freight charges for the entire 1950–1953 period were disallowed because of the statute of limitations.

On the other hand, the vice-president and treasurer of the taxpayer testified that $5,521.76 of the tax claimed by the taxpayer as a refund was for the period July 1, 1950, to June 30, 1951, and that this amount was disallowed by the Board because of the statute of limitations.

This is the only evidence relating to claimed overpayments by the taxpayer that were not allowed as refunds. On this conflicting evidence the trial court specifically found that "there is no sufficient evidence to justify the application of the 'doctrine of equitable recoupment.'"

[1] On this appeal appellant first attacks the 10 per cent negligence penalty, claiming that the evidence does not support its imposition. The contention is without merit.

In arguing this point appellant relies on the testimony of its own witnesses that

the errors were caused by reason of appellant's accounting system, that the system used was a proper one, and that to change it would impose an unconscionable burden on the taxpayer.

In its opening brief appellant makes no mention of the 1947–1950 audit during which it was notified of the nature of the errors it was committing. In its reply brief, after respondent had called attention to the facts surrounding this audit in its brief, appellant vigorously contends that all the evidence relating to this 1947–1950 audit was irrelevant and inadmissible.

On the issue of how much was due for the tax period 1950–1953, appellant is obviously correct that audits prior to that time were irrelevant. But the evidence relating to the prior audits was not introduced on the issue of the amount of tax imposed, but on the issue of whether or not the Board was justified in imposing a negligence penalty. The prior audit showed that prior to the 1950–1953 tax period, the taxpayer's attention was specifically directed to certain errors it was making in its returns. The 1950–1953 audit disclosed that the taxpayer continued to report its tax under methods it knew, and had been informed, were erroneous and illegal. Certainly, the point need not be labored that the ignoring of the notice received by it in the prior audit was relevant and admissible on the negligence issue.

In addition to this evidence that supports the imposition of the 10 per cent negligence penalty, there was evidence of numerous transactions that just were not reported by the taxpayer, and which failure had nothing to do with the accounting system adopted by it. This, too, was evidence of negligence. Thus, the finding on this issue is amply supported by the evidence.

[2, 3] Appellant also contends that the negligence penalty, insofar as it is based on that part of the additional assessment involving the out-of-state sales, that is, contracts to be completed out of the state, was unjustified because there was an "honest dispute" over the legality of such a tax. It may be assumed that a bona fide and reasonable belief that a particular transaction is not taxable would prevent the imposition of a negligence penalty. But here, the appellant not only failed to prove that it had such a bona fide and reasonable belief, but the evidence shows that, reasonably, it could not have had such a belief. In the 1947–1950 audit heavy assessments were made against the taxpayer because it had failed to report these out-of-state sales. Appellant was then notified that these sales were considered taxable by the Board. Thus, the taxpayer knew, or should have known, that the Board considered the transactions taxable. If the taxpayer honestly believed that the imposition of the tax was unconstitutional, as appellant now seems to contend, it should have followed the procedure of reporting the transactions, then paying the tax and then suing for a refund. The fact that the taxpayer did not follow this procedure implies that no "honest dispute" existed. It is of some significance that in 1956 the constitutionality of taxing sales consummated out of the state but originating in California was upheld. Levine v. State Board of Equalization, 142 Cal.App.2d 760, 299 P.2d 738.*

This brings us to the contention of appellant that it made certain overpayments for the 1950–1953 tax period that were disallowed and that, under the doctrine of equitable recoupment, it should be entitled to recover these claimed overpayments, even though a claim for them is barred by the statute of limitations. Although this point is now vigorously urged on this appeal, it was not a major issue before the trial court. It was not until the closing moments of the trial that appellant pro-

* It should be mentioned that in 1953, after the taxable period here involved, the State amended section 6009.1 of the Revenue and Taxation Code (Stats. of 1953, Chap. 972, § 1, p. 2460) to provide that such transactions are not taxable under the Sales or Use Taxes. This statute changed the rule formerly existing, and has no relevancy to the tax period here involved.

duced the very scant evidence on this issue to which reference has already been made.

The overpayments that appellant claims were disallowed admittedly were barred by section 6902 of the Revenue and Taxation Code which provides that the Board shall approve no claim for refund of taxes unless such a claim for refund is filed within three years of the last day of the month following the close of the quarterly period for which the overpayment was made. Section 6905 of the Code provides that failure to file a claim within the time prescribed constitutes a waiver of any demand against the State on account of the claimed overpayment.

Appellant admits that these sections bar any claim for refund of the taxes here in dispute, but claims that, under the doctrine of equitable recoupment, the amount of such overpayment for the same taxable period may be used as a setoff against the claim of the State for a deficiency or for a penalty.

If it be assumed, contrary to the fact, that the evidence shows an overpayment of taxes for the period 1950–1953 which was disallowed because of the running of the statute of limitations, and if we assume, contrary to the fact, that this is a proceeding involving a setoff, then we would be presented with the question as to whether California will permit a setoff of such taxes against penalties assessed for the same taxable period under the doctrine of equitable recoupment.

A brief discussion of the extent and application of the doctrine will demonstrate that it is not here applicable. It should first be mentioned that whether California will enforce such doctrine has not, as yet, been decided by the California courts. The doctrine had its origin in the federal courts. The United States Supreme Court has held that where the government attempts to impose a deficiency assessment, the taxpayer may interpose a setoff in the event that the taxpayer has made overpayments of its tax with regard to the same taxable event upon which the government's claim to a deficiency is predicated, even though the claim for a refund is barred by the statute of limitations. Thus, in Bull v. United States, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421, the tax commissioner taxed the same sum of money under both the estate and income tax laws. The correct tax was the income tax. In a suit by the government to collect that tax, the taxpayer was permitted to recoup the estate tax erroneously paid, on the theory that, equitably, the commissioner should not be permitted to recover two taxes on inconsistent theories.

In Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 67 S.Ct. 271, 91 L. Ed. 296, it was held that the doctrine of equitable recoupment should be limited to situations where "the single transaction or taxable event had been subjected to two taxes on inconsistent legal theories." In such event "what was mistakenly paid [may be] recouped against what [is] correctly due." 329 U.S. at page 300, 67 S.Ct. at page 272. In that case the Supreme Court disallowed a recoupment claim under the following facts: From 1919 to 1926 the taxpayer had been mistakenly paying excise taxes on certain materials. In 1926 the taxpayer claimed and received a refund of the amount of excise tax it had paid from 1922–1926, but the claim was barred on the 1919–1922 payments. Because it had deducted the amount of the excise taxes from its income over the years involved, the government determined to tax the refund as income. Taxpayer paid the assessment of income tax and brought a claim for refund, or recoupment, of the amount of unrecoverable excise taxes (1919–22). This claim, the Supreme Court, in reversing the lower courts, disallowed, on the grounds that the overpayment of taxes did not arise out of the same transaction or taxable event involved in the government's assessment of income tax. The Court pointed out that to apply the recoupment doctrine under these facts

would be to render the statute of limitations meaningless because if the doctrine applied to such a state of facts, the taxpayer could resurrect old overpayment claims whenever the government attempted enforcement of any tax.

The New York Court of Appeals enforced a broader application of the doctrine in National Cash Register Co. v. Joseph, 1949, 299 N.Y. 200, 86 N.E.2d 561. In that case, also involving a sales tax, an audit for 1935 to 1940 of the taxpayer's accounts revealed a deficiency of $45,000. Plaintiff brought an action for a review of the determination of the amount of the deficiency and review of taxing authority's denial of a claim of refund for $11,000 alleged to have been overpaid during the same audit period. The statute of limitations had run against direct recovery of the overpayments. The Court held that the claim should have been allowed since the government had itself decided to "open up" the period involved. The Court held that the overpayments came within the one transaction doctrine of the Rothensies case.

The New York case has been criticized. (See notes, 49 Columb.L.Rev. 1156; 63 Harv.L.Rev. 369).

The federal law, to some extent, has been codified. (See "Section 820 of the Revenue Act of 1938" by Maguire, Surrey and Traynor, 48 Yale Law Journal 509, 719.)

It may be assumed that the equitable conscience of the California appellate courts is as sensitive to fair play as the conscience of the United States Supreme Court, and perhaps as sensitive as that of the New York Court of Appeals. For the purposes of this opinion, but without deciding the issue, it may be assumed that the doctrine of equitable recoupment exists in this state. Such an assumption would not assist the appellant, because, under the facts of this case, the doctrine, even in its broadest application, is not applicable. This is so for several reasons:

[4] 1. This action was not one for recoupment against a deficiency assessment of claimed overpayments. It was an action by the taxpayer to recover certain penalties assessed against it. The doctrine of recoupment has no application to such an action. This is so because the negligence penalty under attack was imposed because the taxpayer, with full knowledge of what it was doing, disregarded the tax statutes for the entire three-year audit period, not for the one-year period in which the claimed overpayments were made. Since the amount of the deficiency assessment as reduced was not attacked, it is difficult to see how the doctrine of equitable recoupment could apply in a direct action by the taxpayer to recover penalties.

[5] 2. There is another conclusive reason why the doctrine could not apply to the facts of the present case, and that is that the taxpayer failed in its proof. The trial court expressly so found, and that finding is amply supported. As already pointed out, supra, there is a conflict in the evidence as to whether or not the taxpayer did, in fact, make any overpayments during the entire three-year period which were barred by the statute of limitations and which the Board refused to allow as a deduction. The evidence most favorable to the Board is to the effect that no such overpayments were made or disallowed. We are bound by that testimony.

The appellant points out that one of its witnesses referred to a letter from the Board which purportedly stated that certain overpayments were barred and therefore disallowed as deductions against the deficiency assessment. Appellant's counsel failed to have the letter introduced into evidence so that it is not properly before us. Nevertheless, appellant attempts to use the letter to attack the testimony to which reference has already been made. Even if the letter could be considered, which it cannot, it would merely create a further conflict in the evidence. The evidence that no overpayments were disallowed as deductions is clear and unequivocal. We are bound by that testimony.

[6] 3. Another reason why recoupment could not possibly be here applicable is that the record shows that the appellant has failed to exhaust its administrative remedies as required by California law. This is a direct action by the taxpayer to recover tax penalties, not a defensive action in the nature of a setoff. Even if it be assumed, however, that a suit in equitable recoupment could be brought by the taxpayer after the imposition of a deficiency assessment, it would not assist this taxpayer, because such an action could only be brought under California law after the taxpayer has exhausted its administrative remedies. Appellant seems to be arguing that it may file such a suit and contest the administrative action, without regard to other administrative remedies that it may have. That is not the law. In West Publishing Co. v. McColgan, 27 Cal.2d 705, 712, 166 P.2d 861, 865, the court stated: "If the commissioner erred in his computation, the error could easily have been avoided by giving him the necessary information at the outset, or it could have been corrected by giving the necessary information upon the filing of the claim for refund. Plaintiff cannot complain of alleged errors in the computation of tax liability, when it refused to avail itself of its administrative remedies to prevent or correct such errors. [Many citations.]"

In People v. West Publishing Co., 35 Cal. 2d 80, 92, 216 P.2d 441, 448, the court, in discussing certain claimed but barred exemptions, used the following language: "Appellant seeks to offset against the assessment, which was based upon estimated sales of $900,000 for the tax period in question, the amount which it claims to be attributable to sales to state agencies for both that tax period and a later tax period, without making any showing at any stage of the proceedings that the amount of its actual sales, less the claimed sales to such agencies, was not far in excess of the estimate of $900,000. Under these circumstances, it appears peculiarly appropriate here to apply the rule requiring the taxpayer to exhaust administrative remedies before asking for judicial relief, and it becomes unnecessary to discuss the question of whether a counterclaim may ever be interposed in an action brought by the state for the purpose of enforcing a tax liability."

It must be remembered that under the law the Board was not required to pay any attention to the taxpayer's letter of protest of January, 1954. This is so because the two penalty assessments of September 22, 1953, became final on October 22, 1953. If the taxpayer believed that it had grounds for recoupment against any portion of the deficiency assessment it should have first exhausted its administrative remedies before instituting a direct action against the Board to recover the penalties. This it elected not to do. This is fatal to an action subsequently brought.

For the foregoing reasons the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

167 Cal.App.2d 383

Gail JOHNSTON, Plaintiff and Respondent,

v.

KEY SYSTEM TRANSIT LINES, a corporation, Defendant and Appellant.

Civ. 17662.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1959.

Hearing Denied March 25, 1959.

Action for death of passenger in automobile which was struck by defendant's train at urban crossing. The Superior Court, Alameda County, Chris B. Fox, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence

would sustain finding that trainmen's negligence with regard to speed and warning had been proximate cause of collision.

Affirmed.

1. Negligence ⇐61(1)

Where concurrent negligence of two parties proximately contributes to cause an injury, neither can escape liability because of negligence of the other.

2. Railroads ⇐348(2)

In action for death of passenger in automobile which was struck by defendant's train at urban crossing, evidence would sustain finding that trainmen's negligence with regard to speed and warning had been proximate cause of collision.

3. Appeal and Error ⇐206(2)

In action for death of passenger in automobile which was struck by defendant's train at urban crossing, trial court, to which no objection had been addressed, would not be put in error for permitting cross-examination of trainmen as to number of stops made and time consumed between a certain point and point where collision occurred, even though distance between those points had not been established.

4. Appeal and Error ⇐207

In action for death of passenger in automobile which was struck by defendant's train at urban crossing, plaintiff's counsel's references to a "big monster" and a "wicked corporation" were not of such character that a timely admonition would not have been effective, and defendant, which had made no objection to statements at time they were made, could not successfully complain on appeal.

5. Trial ⇐121(2)

In action for death of passenger in automobile which was struck by defendant's train at urban crossing, plaintiff's counsel's comment, on fact that train with its brakes set had dragged automobile 400 feet and that weight of automobile would add to train's braking power, was legitimate argument of an inference which might reasonably be drawn by jury from physical facts.

6. Trial ⇐122

In action for death of passenger in automobile which was struck by defendant's train at urban crossing, plaintiff's counsel did not go beyond realm of legitimate argument in calling jury's attention to fact that passengers on train had not been called by defendant as witnesses and that police officer whom defendant had subpoenaed had not been put on stand.

7. Appeal and Error ⇐1004(3)

Damages reduction order of trial court, entered on motion for new trial, was entitled to be given great weight by appellate court.

8. Death ⇐99(3)

Award of $37,500, to 45-year-old widow for death of her 16-year-old son, was not excessive.

Hardin, Fletcher, Cook & Hayes, Oakland, Cyril Viadro, San Francisco, of counsel, for appellant.

Bernard Allard, Oakland, Leon Seyranian, Oakland, of counsel, for respondent.

DOOLING, Justice.

Defendant appeals from a plaintiff's judgment in an action for wrongful death. Respondent's son was a passenger in an automobile which was struck by a train operated by appellant at the intersection of 28th and Poplar Streets in Oakland. The son died as a result of this collision.

The collision occurred a few minutes after midnight on June 19, 1955. The automobile, driven by Richard Schuler, was proceeding easterly on 28th Street and despite the fact that there were three warning signs of various types at and before the intersection it did not stop or slacken speed before the collision with the train. The train was traveling northerly on Poplar Street and, although its brakes were set, the track was being sanded and the motor was in reverse, it carried the automobile 401 feet from the point of impact before it came to a stop.

Appellant concedes that there was evidence from which the jury could find that the train was traveling at a negligent speed and that no warning of any sort was sounded before the collision. The intersection was a blind one with a building flush to the curb on the corner between the automobile and train as they approached one another. There was testimony that neither Schuler nor the other passenger in his automobile saw the warning signs as the automobile approached the intersection.

While conceding that the jury could have found that the train was negligently operated at an excessive speed and without any warning signal of its approach to the crossing being sounded appellant argues that there was no basis in the evidence for the jury's finding that this negligence was a proximate cause of the collision.

[1] It may be conceded that Schuler was negligent in the driving of his automobile and that his negligence was a proximate cause of the collision, but where the concurrent negligence of two parties proximately contributes to cause an injury neither can escape liability because of the negligence of the other. Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 602, 110 P.2d 1044; Deshotel v. Atchison, Topeka & Santa Fe Ry. Co., 144 Cal.App.2d 224, 231, 300 P.2d 910. Appellant in view of this rule is driven to the argument that even if a warning signal of the approach of the train had been sounded Schuler would have disregarded it and driven onto the track in front of the approaching train. A similar argument was made in Johnson v. Southern Pac. Co., 105 Cal.App. 340, 288 P. 81. The court in that case said at pages 348–349, of 105 Cal.App., at page 85 of 288 P.:

"Thus, if it be conceded as it must be, that Jack Salyer, as the driver of the automobile, was guilty of gross negligence in failing to stop, look, and listen for the approach of the train, yet the jury was warranted, under the testimony, in coming to the concusion that, had the proper signals been given, then and in that case Jack Salyer would have heard the same and taken proper precautions to avert the accident; or, at least, that the deceased Hallie Lindsley Johnson would have heard the signals of the approaching train and taken such precautions, in the way of warning Jack Salyer of the approach of the train as might or would be reasonably necessary to insure his own safety. With these premises in view, there is sufficient testimony * * * to support the judgment that, notwithstanding Jack Salyer's negligence, the negligence of the defendants proximately contributed to the death of Hallie Lindsley Johnson * * *." Cf. Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 126–127, 137 P.2d 441; Quiroga v. Southern Pacific Co., 130 Cal. App.2d 93, 101, 278 P.2d 80.

[2] None of the cases cited by appellant to support its argument that there was no evidence that its negligence was a proximate cause of the accident is factually in point and we are satisfied that the jury could properly find that its negligence was a proximate cause of the fatality.

[3] Appellant also complains of the cross-examination of its trainmen as to the number of stops made and time thereby consumed between 12th and Oak Streets and the scene of the collision on the ground that the distance between the two points was not established. This ground of objection was not urged to the trial court, the objection voiced being that the evidence was incompetent, immaterial, irrelevant and too remote. The burden is on a party to specify the ground of his objection to the trial court and he cannot on appeal rely on a ground of objection not so urged. (3 Cal. Jur.2d, Appeal and Error, § 157, pp. 636–637.) It is obvious that if the objection urged on appeal had been presented in the trial court respondent could readily have supplied the proof of the absence of which appellant now seeks to complain.

Appellant also urges a number of instances of alleged misconduct of counsel for respondent.

In the opening statement counsel promised to introduce an ordinance regulating the speed of the train. He attempted to do so on the trial but appellant's objection to its introduction was sustained. There is no showing that respondent's offer of proof in this particular was not made in good faith.

[4] Counsel for respondent at one point in his argument to the jury said: "I am not out after a big monster. Don't misunderstand me. I am not pointing at a wicked corporation * * *" No objection was made to this statement at the time and it was not of such a character that a timely admonition would not have been effective.

[5] Counsel's comment on the fact that the train with its brakes set dragged the automobile 401 feet and that the weight of the automobile would add to the train's braking power was a legitimate argument of an inference which might reasonably be drawn by the jury from the physical facts.

The evidence showed that no improvements had been made in the braking system of the train over a period of years. When counsel referred to this fact in argument the court sustained appellant's objection stating that there was no evidence "as to whether the equipment was adequate or inadequate, or could or could not have been improved upon, and certainly raises an issue that I don't think is in the case." No further admonition was requested of the court and counsel for respondent accepted the ruling.

[6] Counsel for respondent did not go beyond the realm of legitimate argument in calling the jury's attention to the fact that passengers on the train had not been called by appellant as witnesses or that a police officer whom appellant had subpoenaed was not put upon the stand. Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 761, 239 P.2d 671, 33 A.L.R.2d 778.

A reference was made in argument to the fact that "* * * Schuler's brakes weren't in good shape either." The court sustained an objection that there was no evidence on this point and while the jury was not expressly admonished to disregard the argument, as reasonable persons, they could only understand the ruling of the court to have that effect, particularly in view of the fact that the jury received the standard instructions that arguments of counsel are not evidence and that they should disregard statements of the attorneys not supported by the evidence.

We find no support in the record for any of appellant's claims of prejudicial misconduct.

The final claim is that the damages, even as reduced by the court, are excessive and the result of passion and prejudice. The jury awarded $75,000. Respondent accepted a reduction ordered by the court to $37,500. Decedent was 16 years of age. His mother, a widow, was 45 years of age.

[7, 8] In reducing the damages on motion for new trial the court must have held that while, in the court's opinion the award was excessive, the verdict for plaintiff was not the result of passion and prejudice. Hughes v. Hearst Publications, Inc., 79 Cal. App.2d 703, 705, 180 P.2d 419 and cases cited. The order of the trial court on motion for new trial is entitled to be given great weight by the appellate court. Johnston v. Long, 30 Cal.2d 54, 76, 181 P.2d 645; Deshotel v. Atchison, T. & S. F. Ry. Co., supra, 144 Cal.App.2d 224, 230, 300 P.2d 910. We cannot say that the award in this case is so disproportionate to the injury suffered as to shock the conscience. Daggett v. Atchison, T. & S. F. Ry. Co., 48 Cal.2d 655, 666, 313 P.2d 557.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

167 Cal.App.2d 143

C. F. BOLSTER CO., a copartnership, Plaintiff and Respondent,

v.

J. C. BOESPFLUG CONSTRUCTION COMPANY, a corporation, and The Travelers Indemnity Company, a corporation, Defendants and Appellants.

Civ. 23195.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1959.

Rehearing Denied Feb. 4, 1959.

Hearing Denied March 11, 1959.

Plastering subcontractor's action against general contractor and surety on its bond for extra work allegedly done by subcontractor at general contractor's direction. The Superior Court of Los Angeles County, Paul Nourse, J., entered judgment for subcontractor and general contractor and surety on its bond appealed. The District Court of Appeal, Herndon, J., held evidence sustained finding that extra work done by subcontractor was necessitated because of failure of general contractor to prepare surfaces in accordance with specifications and that work was done at the specific instance and request of general contractor.

Affirmed.

Opinion, Cal.App., 330 P.2d 831, vacated.

1. Contracts ⇐350(1)

In action by plastering subcontractor against general contractor and its surety for extra work allegedly done by subcontractor at general contractor's direction, evidence sustained finding that extra leveling coat of cement plaster which subcontractor applied to exterior concrete surfaces of buildings was necessitated by defective concrete surfaces due to general contractor's failure to properly prepare the same to receive the two coats of plaster called for in specifications, and that such work was done at the specific instance and request of general contractor.

2. Contracts ⇐232(2)

"Extra work" as used in connection with building contracts means work arising outside of and entirely independent of contract, that is, something not required in its performance, not contemplated by parties and not controlled by contract.

See publication Words and Phrases, for other judicial constructions and definitions of "Extra Work".

3. Contracts ⇐232(1)

Extra work may be performed by contractor for owner or by subcontractor for general contractor.

4. Contracts ⇐232(7)

Where the extras in building construction are of a different character from work called for in contract and no price is agreed on for extra work, their reasonable value may be recovered.

5. Appeal and Error ⇐991, 996

Resolution of purely factual questions was within the exclusive province of trier of fact and since findings were supported by substantial evidence, District Court of Appeal was without power to substitute its deductions for those of trial judge.

6. Contracts ⇐332(1)

Requirement that a waiver of building contract clause requiring written authorization for change order specifying any extra work must be pleaded in order to allow party to recover, is satisfied by allegation of facts which would constitute a waiver.

7. Contracts ⇐332(1)

In action by plastering subcontractor against general contractor and surety on its bond to recover for extra work allegedly done at instance and request of general contractor, complaint incorporating subcontract including requirement of written authorization for any extra work and alleging that in addition to work required under terms of subcontract, at special instance and request of general contractor subcontractor applied extra coat of cement plaster to building, constituted sufficient pleading of waiver.

8. Contracts ⇐350(1)

In action by plastering subcontractor to recover from general contractor and surety on bond for extra work consisting of an additional leveling coat of cement plaster, record disclosing that subcontractor had previously submitted written offer to do work for specified amount and thereafter general contractor directed subcontractor to proceed without referring to necessity of compliance with contract clause requiring written order for extra work, was sufficient to support finding that general contractor had waived requirement of a written order.

9. Contracts ⇐29

Generally existence of implied contract is usually a question of fact for the trial court and where evidence is conflicting or where reasonable, conflicting inferences may be drawn from evidence which is not conflicting, question of fact is presented for trial court.

Monteleone & McCrory, Los Angeles, for appellants.

Mantalica, Barclay & Teegarden, Lewis C. Teegarden, Los Angeles, for respondent.

HERNDON, Justice.

In the court below plaintiff, C. F. Bolster Co., a contractor, recovered judgment against defendant, J. C. Boespflug Construction Company, the general contractor, and The Travelers Indemnity Company, its surety, for extra work allegedly done by plaintiff at defendant contractor's direction in the construction of certain school buildings for the Los Angeles City High School District. By the terms of a subcontract, dated October 12, 1954, plaintiff undertook to do the interior and exterior plastering work on the project in conformity with and subject to the plans and specifications for the agreed sum of $201,914.00.

In substance, the trial court found that at defendant's instance and request plaintiff had applied an extra leveling coat of cement plaster to the exterior concrete surfaces of said buildings and that the reasonable value of the labor and materials utilized therein was $8135.96. The effect of the findings was to sustain plaintiff's contention that the extra work was necessitated by defendant's failure properly to prepare the concrete surfaces so that "irregularities" therein would not show through the two coats of plaster called for by the specifications.

The subcontract incorporates by reference the plans and specifications on the project which were prepared by the architect, Mr. A. C. Zimmerman. See Enochs v. Christie, 137 Cal.App.2d Supp. 887, 889, 291 P.2d 200; Bell v. Rio Grande Oil Co., 23 Cal.App.2d 436, 440, 73 P.2d 662. Under the terms of the specifications so incorporated, all materials furnished and work done were subject to the architect's inspection and approval for the owner. The architect was declared to be the interpreter of the specifications and the judge of the quality of materials, workmanship and performance.

An entire section of the specifications, section "K", deals with the plastering work which was plaintiff's responsibility under the subcontract. This section required plaintiff to apply two coats of plaster: first a "brush coat" which was essentially a coat of paint consisting of colored stucco without sand; and, second, a "dash coat", which was described in the testimony as a soupy mortar mix sometimes applied with a "dash brush." The specified thickness of the dash coat was 3/32 of an inch and it was provided that "[t]he dashing shall be done with a plasterer's dash brush using a strong whipping motion to secure a good bond." It was provided in paragraph 56 of section "K" that "[a]t least one week prior to starting the work, the contractor shall make up samples of stucco work under the direction of the architect. The finished work shall match the approved samples in color and texture."

The specifications (section K) require that "Concrete surfaces to be plastered

shall be finished, cleaned and sandblasted as specified in the section on Portland Cement Concrete. Before starting plastering, the subcontractor for the work of this section shall inspect all surfaces to be plastered and report to the contractor and inspector any surfaces to be plastered which have not been prepared for plastering as specified * * *."

On February 11, 1955, plaintiff wrote defendant a letter reading as follows: "On the above project, we would like permission to machine apply the exterior stucco coat. It has been our experience, and the experience of the industry as a whole, that machine application produces a finished surface that is much superior to hand application. There will be no change in price." It will be noted that the foregoing requested a change from the method of application required by the above quoted section of the specifications which provided for application of the dash coat "with a plasterer's brush." Defendant transmitted the above letter to the architect on February 15, 1955, who wrote defendant as follows:

"Where stucco dash coat is specified, (Par. 55, Sec. K, Contract Specifications), the Architect will approve the application of stucco by machine, provided it is an air spray machine and the exterior woodwork is properly masked. A demonstration of the method of masking and application will have to be approved by the Inspector and the Architect before starting the stucco work. If the methods are approved, the Architect will process a change order to the above-referenced paragraph. Par. 56, Sec. K, Contract Specifications, requires samples of stucco work. If possible, these samples should be made at the time the machine application is demonstrated. As to the texture of the dash coat, the Architect has in mind a texture produced by a slight troweling of the dash coat. When you get ready to make the samples, the Architect will give you the address of a building to look at."

Defendant promptly transmitted the architect's letter to plaintiff, and subsequently notified plaintiff of the building to which the architect referred. The pre-trial stipulation recites that the specifications were modified to permit plaintiff to apply the stucco by means of a gun instead of by hand.

The section of the specifications on Portland Cement Concrete, section "E" (to which the above quoted plastering specifications referred), deals with the requirements of the concrete work for which *defendant* was responsible in this case. The provisions of this section required defendant to grind down or otherwise remove fins, pour lines, bulges, stains and irregularities of surfaces, and to sandblast the concrete surfaces which were to be plastered. It was further provided that "In addition, all exterior surfaces to be plastered with a dash coat shall have all irregularities removed which will show through the dash coat of plaster. * * *."

There is substantial evidence in the record, both testimonial and photographic, tending to prove the unsatisfactory conditions of the concrete surfaces of the exterior walls which defendant constructed and on which plaintiff was obligated to apply plaster. There is testimony as to the existence of excessive numbers of ridges, protrusions, indentations, and other irregularities on the surface of the concrete which had to be removed by grinding or sandblasting operations conducted by defendant. And there is evidence that as a result of the sandblasting operations, there was considerable pitting and scoring of the concrete surfaces on which plaintiff was required to work.

Plaintiff offered expert testimony to prove that two coats of plaster, consisting of a brushcoat and a 3/32-inch dash coat, as called for by the specifications, would not cover the irregularities and imperfections in the concrete surfaces as prepared by defendant. There is testimony by an ex-employee of defendant which gives substan-

tial support to plaintiff's contention that defendant was having serious difficulty in bringing the concrete surfaces up to specifications. This witness testified that at the time the concrete work was done he was defendant's construction superintendent on the job; that when the forms were removed "the concrete was in fair condition, except, when we started sandblasting, it opened a lot of voids, and that required a lot of filling"; that in his opinion a 3/32-inch dash coat of stucco would not have been sufficient to cover the imperfections, and that his estimate of the cost of putting the concrete in shape so that the imperfections would be satisfactorily covered by the specified dash coat "would run around ten to twelve cents a square foot." The witness testified to conversations with plaintiff's representatives in which various methods of preparing the concrete surfaces for the application of plaster were discussed.

In June, 1956, plaintiff's employees prepared a number of samples of external stuccoing on a wall of one of the buildings which defendant had constructed. Among these samples were examples of both hand and machine application, including one consisting of a brush coat and a dash coat applied by hand as called for in the specifications. When these several samples were submitted to the architect for his approval, he rejected all except one which had been prepared by machine application with *three* coats of plaster. This sample had been prepared by the application of a machine-applied base or "float" coat of plaster considerably thicker than the dash coat called for in the specifications, followed by two machine applied dash coats.

In late July or early August defendant requested a bid from plaintiff for preparing the external concrete surfaces for the admitted purpose of avoiding any dispute as to responsibility for preparing the concrete surfaces. On August 18, 1955, plaintiff replied by letter with an offer to apply a "leveling coat" of plaster to the external concrete surfaces at an additional cost of $11,368. Defendant did not immediately respond to this offer. However, on September 28, 1955, defendant wrote to plaintiff as follows:

"With reference to your letter of August 18, 1955, regarding application of a leveling coat to exterior concrete surfaces, this is to advise that no such change was requested or authorized by this office.

"Subsequent to receipt of your letter the architect inspected the concrete surfaces of the buildings to receive dash coat and has approved the surfaces as fully complying with the requirements for preparation of concrete surfaces outlined in Section E of the contract specifications.

"The architect, at the same time, selected and approved one of the samples that you applied over said surfaces. This application of stucco dash coat will be applied by you in strict accordance with the specifications, particularly, Section K, and must meet with the architect's approval. Earlier in the year the architect gave conditional approval of a machine application for the dash coat, provided that such application first be approved by him. If it is impossible for you to secure a satisfactory and approved job, using mechanical methods, it may be necessary to revert to hand methods outlined in the specifications, which is your responsibility under the terms of our subcontract."

Plaintiff replied the following day as follows: "In accordance with our subcontract for plastering on the above mentioned construction, we are now, and have been for some time, ready to proceed with the application of dash coat of plaster on exterior concrete walls but have been unable to do so because surfaces have not been prepared for plastering. Pursuant to our contract and the specifications, we do hereby report to you that the concrete surfaces to be plastered have not been prepared for plastering as specified in the section of specifications on concrete Portland Cement. This surface preparation to be done is a part of Portland Cement concrete work as set forth in Section E, Paragraph 1–G and Section E, Paragraph 77 of specifications. This report is hereby given you pursuant to Section K, Paragraph 48 of specifications.

When surfaces have been prepared, we shall proceed forthwith with the dash coat. Delay on your part is preventing us from proceeding and is resulting in additional costs to us in performance of our subcontract."

The foregoing assertions by plaintiff that the concrete surfaces were not properly or adequately prepared provoked a reply from defendant on October 4, 1955, in which defendant insisted that the concrete surfaces fully complied with the requirements of section "E" of the specifications, and proceeded to identify the buildings which were or would be ready to receive the plaster. The letter concluded: *"You are herewith requested to proceed with your work as directed* and cooperate in a proper manner to complete this job to our mutual advantage and preclude any further delays." (Emphasis added.)

Plaintiff replied to the letter of October 4 by letter dated October 13, 1955, stating: "Pursuant to the request contained in your letter of October 4, 1955, we are 'proceeding with the work as directed' by you. Before we can properly apply the dash coat as provided in the specifications, it is necessary that certain preparatory work be done to put the surfaces in a condition to receive the dash coat. At your request, we have begun such preparation, which consists of applying a stucco float finish to cover imperfections and irregularities in the concrete. Obviously there is a dispute between us concerning responsibility for doing the work above described, and it is our contention that such preparatory work is not a part of the plastering specifications. However, at your request we are proceeding with the work. The dispute can be resolved upon completion of the contract. In the meantime for our own protection, we are treating this preparatory work as extra work and will bill you accordingly."

It does not appear that defendant made any reply to the last quoted communication. Plaintiff thereafter proceeded with the plastering of the exterior walls of the four buildings utilizing the base or "float" coat described above followed by the application of two "dash" coats. In other words, plaintiff followed the method of application used in producing the sample which the architect had approved.

Both in the trial court and on this appeal, defendant has insisted most vigorously that the exterior plastering work for which plaintiff is compensated by the judgment at bar was neither requested by defendant nor necessitated by defective concrete surfaces, but was required by the inspector and architect as a condition of granting plaintiff's request for permission to apply the plaster by a machine method in lieu of the hand method called for in the specifications. This contention centers upon an issue of fact and constitutes an attack upon the trial court's Finding of Fact No. IX which reads as follows: "In addition to the work required of plaintiff under the terms of said subcontract and at the request of the defendant, J. C. Boespflug Construction Company, the plaintiff performed extra services and supplied extra materials consisting of an additional coat of cement plaster to all of the exterior concrete surfaces of the buildings at Westchester High School. By reason of said extra work, plaintiff's costs were increased and the reasonable value of said labor and materials is the sum of $8,135.96. Said sum became due and payable on September 16, 1956."

[1] Our review of the record convinces us that the challenged finding is amply sustained by substantial evidence.

It is clear from the recited evidence that as late as mid-October, 1955, plaintiff and defendant were in disagreement as to what performance by plaintiff would be necessary in order to produce exterior wall surfaces which would conform to the requirements of the specifications and meet with the approval of the architect. There was abundant evidence that the concrete surfaces as they appeared in August were quite unsuitable to receive the application of plaster. Defendant's request for plaintiff's bid on the job of preparing the concrete could be construed most reasonably as indicating defendant's recognition that extra work was necessary. It bears repetition that the

architect previously had rejected the sample of stucco work consisting of two coats applied in the manner prescribed in the original specifications and had approved a three-coat sample applied in the manner later followed by plaintiff in completing the work. It may be inferred from the evidence that defendant was fully informed concerning the architect's declarations in this regard. Defendant was advised by plaintiff's letter of October 13 that plaintiff considered itself under direction to apply the plaster in the manner which the architect had approved. In these circumstances, particularly in view of the urgency of the situation then existing, the last paragraph of defendant's letter of October 4 instructing plaintiff to proceed "as directed" was susceptible to interpretation as a demand that plaintiff proceed without further delay to apply the stucco in a manner that would satisfy both the architect and the specifications.

[2–5] Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract. Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council, 128 Cal.App.2d 676, 683, 276 P.2d 52; City Street Imp. Co. v. Kroh, 158 Cal. 308, 321, 323, 110 P. 933; see 6 Cal.Jur. 370, § 224. Extra work may be performed by the contractor for the owner (Punton v. Sapp Bros. Construction Co., 143 Cal.App.2d 696, 701, 300 P.2d 271; Parkford v. Union Drilling Co., 118 Cal. App. 538, 544, 5 P.2d 440) or by the subcontractor for the general contractor. Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council, supra, 128 Cal. App.2d 676, 683–685, 276 P.2d 52. Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered. Parkford v. Union Drilling Co., supra, 118 Cal. App. 538, 544, 5 P.2d 440; 17 C.J.S. Contracts § 371 h, p. 854. In the instant case, as we have pointed out, the finding that extra work was required by the defendant is supported by substantial evidence to be found in the circumstances, in the communications attending the controversy and in the construction apparently placed on the contract by the parties as indicated by their conduct. Cf. Wyman v. Hooker, 2 Cal. App. 36, 41, 83 P. 79; Punton v. Sapp Bros. Construction Co., supra, 143 Cal.App.2d 696, 701, 300 P.2d 271; Frank T. Hickey, Inc. v. Los Angeles Jewish Community, Council, supra, 128 Cal.App.2d 676, 681–683, 276 P.2d 52. Considering all the circumstances appearing from the record, it was not unreasonable for the trial judge to conclude that the extra work on the building was done at defendant's direction, that it was necessitated by imperfect performance of concrete work for which defendant was responsible and that defendant was fully aware that the architect's requirements could not be fulfilled without doing the extra work. See Bavin & Burch Co. v. Bard, 81 Cal.App. 722, 728–729, 255 P. 200; Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council, supra; 9 Cal.Jur.2d 296, § 13. The resolution of these purely factual questions is within the exclusive province of the trier of the facts. See Greenwald v. Royal Indemnity Co., 112 Cal.App.2d 183, 185, 245 P.2d 1115; Lowry v. Law, 27 Cal.App. 483, 492, 150 P. 660. Since the findings are supported by substantial evidence this court is without power to substitute its deductions for those of the trial judge. Primm v. Primm, 46 Cal.2d 690, 693–694, 299 P.2d 231; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; New v. New, 148 Cal.App.2d 372, 383, 306 P.2d 987.

[6, 7] Defendant contends that a provision of the subcontract requiring a written change order specifying any extra work to be done bars any recovery by plaintiff. Section 12 of the subcontract provides as follows: "No claims for extra work * * * will be recognized or paid for unless agreed to in writing before the work is done * * * in which writing shall be specified in detail the extra work or changes desired, * * *." Since no written authorization of this character was given, it is defendant's argument that

plaintiff was required to plead and prove a waiver of this condition. See 25 Cal.Jur. 931, § 6. It is settled, however, that this requirement of pleading is satisfied by the allegation of facts which would constitute a waiver. Estrada v. Queen Ins. Co., 107 Cal.App. 504, 508, 290 P. 525. In the instant case the complaint incorporated the subcontract, including the requirement of a writing in connection with any extra work, and alleged "that in addition to the work required to be done by plaintiff under the terms of said subcontract, and at the special instance and request of the defendants, the plaintiff applied a leveling coat of cement plaster to the * * * buildings * * *." This pleading of a waiver is sufficient. Estrada v. Queen Ins. Co., supra, 107 Cal.App. 504, 508, 290 P. 525.

[8] The second phase of defendant's argument on this point is that the evidence is insufficient to sustain the finding of a waiver by defendant of the required writing. However, we have found the evidence sufficient to support the finding that the extra work was done at defendant's special instance and request. Plaintiff previously had submitted a written offer to do this work for a specified amount. Defendant thereafter directed plaintiff to proceed without referring to the necessity of compliance with the requirement of section 12 of the subcontract. It has been held that proof of similar conduct is sufficient to support the finding of a waiver. Wilson v. Keefe, 150 Cal.App.2d 178, 181, 309 P.2d 516; Cf. Frank T. Hickey, Inc., v. Los Angeles Jewish Community Council, supra, 128 Cal.App.2d 676, 682–683, 276 P. 2d 52; and see 9 Cal.Jur.2d 296, § 13. As stated in Wyman v. Hooker, 2 Cal.App. 36, 41, 83 P. 79, 81: "The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a separate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates."

It was a purely factual question whether plaintiff adequately complied with the contractual provision requiring it to report to the contractor any surfaces not properly prepared before starting to plaster. It is implicit in the findings that the trial court resolved this issue in plaintiff's favor. Apart from the written communications from which we have quoted in our recital of the evidence, the record reveals that there were various discussions between the parties during the summer of 1955 in which the imperfections in the concrete surfaces were extensively discussed. Obviously, we cannot say that this evidence was insufficient to support a finding that the condition under discussion was adequately fulfilled. The same disposition must be made of defendant's argument that the extra work was occasioned solely by the change from the hand method to the machine method of application.

While it is true that the architect was constituted "the judge of the quality of materials and workmanship", his approval of the concrete surfaces could not properly be regarded as a binding adjudication of the issues which the trial court was called upon to decide in this case. There was no reason to believe that the architect as representative of the school district would ultimately have accepted buildings which failed to measure up to prescribed standards. It seems reasonable to conclude that as of mid-October, 1955, neither plaintiff nor defendant could predict with assurance whether or not the architect would accept the buildings after an application of the stucco in the manner provided by the original specifications. Indeed, the architect's rejection of a sample prepared in that way was a fact sufficient to support a finding that he probably would not have accepted them. At that time both plaintiff and defendant were faced with the necessity of making immediate decisions on the basis of their respective evaluations of the requirements of the specifications and of the conditions presented. Completion time was running out, and there appeared to be ample basis for apprehension of substantial liabilities in the event of further delay. It was within the sole province of the trial court to determine the factual questions

upon which liability here depended: what quality of performance was being demanded of plaintiff; what methods were appropriate or essential to accomplish acceptable performance; whether extra work was necessary, and, if so, whether it was necessitated by faulty concrete surfaces or by plaintiff's choice of method, and whether plaintiff reasonably complied with the conditions on its part to be performed.

[9] "It is generally held that the existence of an implied contract is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court." Medina v. Van Camp Sea Food Co., 75 Cal.App.2d 551, 555–556, 171 P.2d 445, 448; Caron v. Andrew, 133 Cal.App.2d 412, 416, 284 P.2d 550.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

167 Cal.App.2d 345

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alfred E. AMADO, Defendant and Appellant.

Cr. 6405.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1959.

Rehearing Denied Feb. 6, 1959.

Hearing Denied March 25, 1959.

Defendant was convicted of unlawful possession of heroin and from the judgment of the Superior Court of Los Angeles County, Thomas L. Ambrose, J., and from a nonexistent verdict, the defendant appealed. The District Court of Appeal, Vallée, J., held, inter alia, that defendant was not deprived of due process on ground that his counsel wilfully failed to present defense of unlawful search and seizure and failed to ask arresting officer the names of informers, where a counsel of defendant's choice was substituted for public defender after arraignment in the Superior Court, no showing was made that defendant's representation was inept or incompetent, defendant made no complaint to the court with respect to his counsel's representation, arrest and consequent search and seizure were not made solely on information received from the informers, and counsel might have concluded that no purpose would be served in seeking disclosure of identity of informers.

Appeal from nonexistent verdict dismissed, and the judgment affirmed.

1. Criminal Law ⇐641(1)

Handling of defense by counsel of accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such lack of diligence and competence as to reduce trial to a farce or sham.

2. Criminal Law ⇐1144(10)

It is presumed that attorney has been faithful to the best interests of his client.

3. Criminal Law ⇐1137(8)

Under ordinary circumstances a defendant may not complain for the first time on appeal of claimed inept conduct of trial counsel of his own choosing.

4. Witnesses ⇐216

Disclosure of identity of an informer is not required where there was reasonable cause for search and seizure apart from informer's communication which led police to suspect the defendant.

5. Witnesses ⇐216

Disclosure of identity of informer is not required where informer is not a material witness on issue of guilt.

6. Constitutional Law ⇐268

Defendant convicted of unlawful possession of heroin was not deprived of due process on ground that his counsel wil-

fully failed to present defense of unlawful search and seizure and failed to ask arresting officer the names of informers, where a counsel of defendant's choice was substituted for public defender after arraignment in the superior court, no showing was made that defendant's representation was inept or incompetent, defendant made no complaint to the court with respect to his counsel's representation, arrest and consequent search and seizure were not made solely on information received from the informers, and counsel might have concluded that no purpose would be served in seeking disclosure of identity of informers. U.S.C.A.Const. Amend. 14, § 1.

7. Criminal Law ⇐1131(4)

An appeal from a nonexistent verdict would be dismissed.

Alfred E. Amado in pro. per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In a nonjury trial defendant was convicted of unlawful possession of heroin. He appeals from the judgment. The cause was submitted on the transcript of the preliminary hearing, each side reserving the right to offer additional evidence. Defendant did not testify or produce any evidence in his behalf.

On January 31, 1958 Deputy Sheriff Velasquez, acting on information he had received from two informers to the effect that defendant was using the house at 1821 East 43rd Street, Los Angeles, for the purpose of selling narcotics, went to that location. On arriving, Velasquez and Officer Vega went to the back door. The door itself was open but the screen door was closed. As they approached the door Velasquez saw defendant in the kitchen. On seeing the officers, defendant "made a movement toward his pocket and started stepping backwards and put a white piece of paper —looked to me like paper—in his mouth and started walking away from the kitchen." Velasquez immediately opened the door, entered the house, and arrested defendant. He searched defendant's person and in a trouser pocket found two gelatin capsules containing heroin. As the capsules were being removed from his pocket defendant called to his wife in Spanish that two capsules of heroin had been found in his pocket. The officers then took defendant into the bedroom and asked him for his "outfit." Defendant went to a dresser drawer and handed Velasquez a spoon, an eye dropper, and a box of tissue containing a syringe with a brownish liquid in it.

Later the same day defendant told Velasquez the narcotics found on his person were his; he had purchased them the day before; he had them for his own use; he was not in the business of selling narcotics; and he was an addict. The officers did not have a warrant for defendant's arrest or a search warrant.

Defendant contends in effect that he was denied a fair trial in violation of his constitutional rights because, so he asserts, his counsel wilfully and knowingly failed to present certain defenses that were available to him. He argues that his counsel failed to prepare his defense according to the facts and the law; that he failed to raise the defense of unlawful search and seizure; and that he failed to ask Velasquez the names of the informers.

[1] At the preliminary hearing defendant was represented by the public defender. The public defender did not raise any question of illegal search and seizure or seek disclosure of the informers. After arraignment in the superior court counsel of defendant's choice was substituted. "The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a 'farce or a sham.'" People v. Wein, 50 Cal.2d 383, 410, 326 P.2d 457, 473.

[2–5] It is presumed that an attorney has been faithful to the best interests of his client. No showing is made that defendant's representation was inept or incompetent. Defendant made no complaint to the court with respect to his counsel's representation. If he felt his counsel was incompetent or prejudiced against him as he now asserts, he should have so informed the trial court. Under ordinary circumstances a defendant may not complain for the first time on appeal of claimed inept conduct of trial counsel of his own choosing. People v. Comstock, 147 Cal.App.2d 287, 299, 305 P.2d 228. Counsel may well have concluded that the defenses of unlawful arrest and illegal search and seizure were not available to defendant. The record indicates they were not. The arrest and the consequent search and seizure were not made solely on information received from the informers. The officers before entering the house observed furtive conduct on the part of defendant, giving them reasonable cause to make the arrest and search. People v. Cantley, 163 Cal.App.2d 762, 329 P.2d 993. When defendant saw the arresting officers approach the back door he made a movement toward his pocket, started stepping backwards, put a piece of white paper in his mouth, and started walking away from the kitchen. People v. Andrews, 153 Cal.App.2d 333, 337–338, 314 P.2d 175. Counsel also may have reasonably concluded that no purpose would be served in seeking disclosure of the identity of the informers. The informers were neither participants in nor eyewitnesses to defendant's arrest. Disclosure of the identity of an informer has not been required where there was reasonable cause for a search and seizure apart from the informer's communication which led the police to suspect the defendant. People v. Williams, 51 Cal.2d 355, 333 P.2d 19. Disclosure is not required where the informer is not a material witness on the issue of guilt. People v. McShann, 50 Cal.2d 802, 808, 330 P.2d 33. There is nothing in the record to indicate that any information might have been elicited from either informer which would be relevant or helpful to the defense of defendant.

[6] Defendant has not made that type of showing which alone would compel the conclusion that he was deprived of due process within the meaning of the constitutional guarantees.

[7] Defendant also appeals from a nonexistent verdict. This appeal will be dismissed.

The appeal from the nonexistent verdict is dismissed; the judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 154

R. W. AGNEW, Plaintiff and Appellant,

v.

John A. CRONIN, Defendant and Respondent.

Civ. 23323.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1959.

Rehearing Denied Feb. 4, 1959.

Hearing Denied March 11, 1959.

Damage action. The Superior Court, Los Angeles County, Walter C. Allen, J., entered certain orders in regard to a memorandum of costs and damages claimed by plaintiff in a successful mandamus proceeding which he instituted in connection with his damage suit and plaintiff, deeming such orders unsatisfactory, appealed. The District Court of Appeal, Fox, P. J., held that there was no provision in law for allowing as costs of a mandamus proceeding, items covering cost of employment of a stenographer to type various and sundry documents that plaintiff served and filed or otherwise used during the course of the mandate proceeding, in absence of any

showing that the stenographer was an official court reporter, or that any of the documents prepared by her were prepared pursuant to court order.

Orders affirmed.

1. Mandamus ⇐190

A successful petitioner in a mandamus proceeding is entitled to recover his costs. West's Ann.Code Civ.Proc. § 1095.

2. Costs ⇐2

The term "costs" includes only taxable costs.

See publication Words and Phrases, for other judicial constructions and definitions of "Costs".

3. Mandamus ⇐190

There was no provision in law for allowing as costs of a mandamus proceeding items covering cost of employment of a stenographer to type various and sundry documents that prevailing party served and filed or otherwise used during the course of the mandate proceeding, in absence of any showing that a stenographer was an official court reporter, or that any of the documents prepared by her were prepared pursuant to court order. West's Ann.Code Civ.Proc. § 1095.

4. Mandamus ⇐190

Successful petitioner in a mandamus proceeding was not entitled to recover as costs fee of an attorney for legal services rendered. West's Ann.Code Civ.Proc. § 1095.

5. Mandamus ⇐190

Loss of time by successful petitioner in mandamus proceeding, in connection with the proceeding, and asserted damages for mental pain and anguish suffered by him in attempting to require respondent to answer certain questions which he refused to answer when his deposition was taken in a damage action, were not allowable as costs of the mandamus proceeding. West's Ann. Code Civ.Proc. § 1095.

R. W. Agnew, in pro. per.

Montgomery G. Rice, Los Angeles, for respondent.

FOX, Presiding Justice.

Plaintiff brought an action for damages against John A. Cronin and others. See Agnew v. Cronin, 148 Cal.App.2d 117, 306 P.2d 527. Thereafter plaintiff sought to take the deposition of defendant Cronin, during the course of which Cronin refused to answer certain questions. Plaintiff thereupon filed a petition for a writ of mandate to compel Cronin to answer the questions. This court granted the petition (see Agnew v. Superior Court, 156 Cal.App. 2d 838 at page 841, 320 P.2d 158, at page 160) and ordered that plaintiff "shall recover his costs". Plaintiff filed in this court, prior to the remittitur being issued, a request for allowance of his costs and damages, and that the judgment be modified so as to include such items. Cronin filed a notice of motion to tax costs. This court thereupon entered the following order: "Petitioner's request to fix costs and respondent's motion to tax costs, are denied without prejudice to the making of appropriate motions in the superior court in the case of Agnew v. Cronin, et al., No. 65435."

Thereafter Agnew filed in the trial court a memorandum of costs and damages claimed by him in the mandamus proceeding. This memorandum consists of 15 items totaling $652.50. Item 1 is fee for filing petition for writ of mandate, $7.50; Item 2, notary fee for verifying petition for writ of mandate, $.50; Item 3, service fee and mileage for serving copy of alternative writ of mandate on the superior court, $1.35; Items 4, 5, 6, 10, 11, 12, 14 and 15 cover charges for typing various papers and documents and copies thereof that were filed in connection with the mandamus proceeding; Item 7 represents notary public fee for typewriting citation to superior court re refusal of Cronin to answer questions at deposition hearing, $7.50; Item 8 is for "Legal advice and legal research work from attorney Wilbur F. Littlefield for his services concerning R. W. Agnew [petitioner] obtaining a writ of mandate in order that John A. Cronin be compelled to answer questions re deposition." Item 9 is for time

lost by Agnew in making trips, holding conferences and investigating possibility of obtaining a writ of mandate to compel Cronin to answer questions at deposition hearing; Item 13 is for "Mental pain, grief, distress, torment, worry, anguish, anxiety, annoyance, inconvenience, discomfort, and headaches suffered by R. W. Agnew in attempting to require John A. Cronin to answer questions at his deposition which he refused to answer."

Cronin, in due course, filed a motion to tax costs in which he sought to have stricken all of the above mentioned items except Items 1, 2, and 3.

Agnew filed notice of motion to have his costs and damages fixed in accordance with the above mentioned memorandum. At the hearing on these two motions the court taxed the costs at $16.85, this being the total of Items 1, 2, 3 and 7. The court granted Cronin's motion to disallow, and ordered stricken all other items. It is from these orders that Agnew appeals.

[1, 2] By the terms of section 1095, Code of Civil Procedure, a successful petitioner in a mandamus proceeding is entitled to recover his costs. It was pursuant to this authority that we held in Agnew v. Superior Court, 156 Cal.App.2d 838, at page 841, 320 P.2d 158, at page 160, that "Petitioner shall recover his costs". But it will be noted that we stated "costs"—nothing more. As said in Pezel v. Yerex, 56 Cal. App. 304, at page 311, 205 P. 475, 478, "The term 'costs' has a well-defined legal meaning, and includes only taxable costs, that is, those expenses which are incurred by parties in prosecuting or defending actions or proceedings and which may be taxed against the losing party." Costs are defined by Mr. Justice Vallée in Re Estate of Bevelle, 81 Cal.App.2d 720, 722, 185 P.2d 90, 92, as follows: "The term 'costs' means those fees and charges which are required by law to be paid to the courts or some of their officers, or the amount of which is expressly fixed by law." This definition is based upon and supported by Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 274, 83 P.2d 503, and Blair v. Brownstone Oil & Refining Co., 20 Cal.App. 316, 128 P. 1022. In Estate of Johnson, 198 Cal. 469, 471, 245 P. 1089, 1090, it is pointed out that "The right to recover costs exists solely by virtue of statute. Consequently an award of costs can be justified only if permitted by some statutory provision, and the measure of the statute is the measure of the right." To the same effect see Moss v. Underwriters' Report, Inc., supra, and Gerstein v. Smirl, 70 Cal.App.2d 238, 239, 160 P.2d 585.

Applying these principles to the items here involved it is clear that the trial court ruled correctly in disallowing and striking each of the disputed items and in taxing the costs at $16.85.

[3] There is no provision in law for allowing as costs the items (4, 5, 6, 10, 11, 12, 14 and 15) covering the employment of Helen Pattinson to type various and sundry documents that plaintiff served and filed or otherwise used during the course of the mandate proceeding. Miss Pattinson was not an official court reporter and it does not appear that any of these documents were prepared pursuant to any court order. The work of Miss Pattinson was such as is performed every day in any law office by the stenographic personnel. She was simply the private employee of Agnew just as any stenographer is an employee of the person for whom she works.

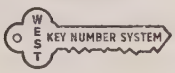
[4] By item 8 Agnew seeks to recover as costs the fee of Attorney Littlefield for the legal services he rendered. Attorney's fees in a mandate proceeding may not be recovered as costs. Holbrook v. Board of Education, 113 Cal.App.2d 840, 249 P.2d 29.

[5] Item 9 relates to loss of time by Agnew in connection with the mandate proceeding, and item 10 to asserted damages for mental pain and anguish suffered by him in attempting to require Cronin to answer questions which he refused to answer when his deposition was taken. There is no provision in law for allowing either of these items as costs.

No useful purpose would be served by analyzing the multitude of cases cited by plaintiff. The principles that are decisive of this appeal are simple and clear, and their application demonstrates its lack of merit.

The orders appealed from are affirmed.

ASHBURN and HERNDON, JJ., concur.



167 Cal.App.2d 337

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Julio Marcalli CRUZ and Lawrence Ortiz, Defendants and Appellants.

Cr. 3531.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1959.

Hearing Denied March 25, 1959.

Defendants were convicted of kidnapping and rape and from the judgments of the Superior Court, Santa Clara County, M. G. Del Mutolo, J., the defendants appealed. The District Court of Appeal, Draper, J., held that where rape occurred about 1 o'clock a. m. when defendants seized prosecutrix on a sidewalk, placed her in their automobile and drove about for some time, alleged error in admission of evidence that about 11:30 o'clock the same night defendants in their automobile followed an automobile driven by an unaccompanied woman from a point in downtown for a considerable distance and that when such automobile turned into a lonely road outside city defendants twice attempted to block its progress by forcing it off the road, was not prejudicial in view of defendants' confessions which had been recorded and played to jury, other admissions by defendants and in view of overwhelming evidence of guilt.

Affirmed.

Criminal Law ⇐1169(1)

In prosecution for kidnapping and rape which occurred about 1 o'clock a. m. when defendants seized prosecutrix on a sidewalk, placed her in their automobile and drove about for some time when rape occurred, alleged error in admission of evidence that about 11:30 o'clock the same night defendants in their automobile followed an automobile driven by an unaccompanied woman from a point in downtown for a considerable distance, and that when such automobile turned into a lonely road outside city defendants twice attempted to block its progress by forcing it off the road, was not prejudicial in view of defendants' confessions which had been recorded and played to jury, other admissions by defendants and in view of overwhelming evidence of guilt. West's Ann.Pen.Code, §§ 207, 261(3).

Peter M. Nakahara, San Jose, for appellants.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

A jury found both defendants guilty of kidnapping (Pen.Code, § 207) and of rape (Pen.Code, § 261(3)). They appeal from the ensuing judgment.

At about 1 o'clock a. m. defendants seized prosecutrix upon a public sidewalk in San Jose, placed her in their car, and drove about for some time. Each then accomplished an act of sexual intercourse with her, while the other forcibly held her. Some portions of the testimony of appellants suggest that prosecutrix did not object either to being placed in the car or to the acts of intercourse. However, there is ample testimony to support the implied

findings of the jury against appellants upon these issues.

The sole contention on appeal is that the trial court erred in admitting testimony as to an event shortly preceding the seizing of prosecutrix. This evidence indicates that at about 11:30 o'clock the same night defendants, in their automobile, followed a car driven by an unaccompanied woman (not the prosecutrix) from a point in downtown San Jose for a considerable distance. When this car turned into a lonely road outside the city, defendants twice attempted to block its progress by forcing it off the road. The woman driver was able to maneuver her car away, and drove to a fire station where she summoned help and frightened defendants away. This evidence was admitted over objection, and the jury was admonished that it was admitted "solely * * * for the purpose of showing, if it does show, the frame of mind or a design or a common purpose on the part of the defendants in connection with the offense with which they are charged."

Appellants point to People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546, and like cases, for the rule that a similar offense may be proven only when its circumstances closely parallel those of the offense currently charged. That rule is clear, and it seems likely that the incident of 11:30 p. m. is not admissible as a "similar offense" in the strict sense. However, it might well show a frame of mind or intent which could be inferred to have continued to, and have direct bearing upon, the occurrence at 1 a. m. (see People v. Tolson, 109 Cal. App.2d 579, 241 P.2d 32). Although the issue is not directly argued on appeal, the real question is whether the acts of 11:30 and following do connote an intent to kidnap a woman for purpose of rape. This point may, on all the evidence, be fairly debatable. However, we do not find it necessary to detail the testimony to explore this question, since we are satisfied that the admission of the evidence, even if error, was not prejudicial.

Two confessions by defendant Cruz and one by defendant Ortiz had been recorded and were played to the jury. There was testimony of still other admissions by defendants. Their own testimony on the witness stand was weak. In view of the overwhelming evidence of guilt, it is clear that appellants could have suffered no prejudice by reason of the testimony as to the events preceding the offenses charged. People v. Watson, 46 Cal.2d 818, 299 P.2d 243.

Judgments affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

167 Cal.App.2d 282

Laurance Henderson DONNALLY, Plaintiff, Cross-Defendant and Appellant,

v.

Hertha Therese BLANKENSTEIN, Defendant, Cross-Complainant and Respondent.

Civ. 18245.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1959.

Proceeding on application by mother for order amending custody award to take physical custody of child from father and award it to mother. The Superior Court, City and County of San Francisco, Orla St. Clair, rendered judgment for mother, and father appealed. The District Court of Appeal, Dooling, J., held that where custody had been awarded to father on determination that if all things had been equal custody would have been awarded to mother, mother had established herself in responsible position in new community in Canada as teacher when she applied for order amending custody award, and father, although he held a Ph.D. degree, earned approximately $100 per month, award of

custody of child to mother was not an abuse of discretion.

Affirmed.

1. Bastards ⇐10

The effect of legitimation of child under Civil Code is to give both parents the same rights in relation to child as if child had been born in wedlock. West's Ann.Civ. Code, § 230.

2. Parent and Child ⇐2(3.1)

As between parents with equal rights to custody of child, the paramount consideration is the best interests of the child.

3. Parent and Child ⇐2(3, 3.3, 3.6)

In determining whether custody of child should be with father or mother, fact that child had lived for the three years of her life with father and his wife and knew no other home, that, if custody were awarded to mother, the child, an American citizen by birth, child would be taken to foreign country to live, and fact that mother was an unmarried woman would be weighed by court.

4. Infants ⇐19.3(7)

Court in custody cases has a broad discretion in determining what is for the best interests of child and its determination will not be disturbed unless record shows a clear abuse of that discretion.

5. Parent and Child ⇐2(3.5)

Where custody of child had been awarded to father rather than unmarried mother on determination of court that if all things had been equal custody would have been given to mother, mother, who three years later, applied for custody, had established herself in a responsible position in new community in Canada as teacher, and father, although he held a Ph.D. degree, earned approximately $100 per month, award of custody of child to mother was not an abuse of discretion. West's Ann. Civ.Code, § 138(2).

6. Parent and Child ⇐2(3)

Fact that child, an American citizen by birth, would live abroad if custody were awarded to mother was not controlling in determining whether custody of child should be awarded to mother or to father, who lived in United States. West's Ann. Civ.Code, § 138(2).

Philip Adams, Reginald G. Hearn, San Francisco, for appellant.

Lange & Rockwell, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff, the father of the minor child Laura Helen-Christa Donnally, appeals from an order of the court amending a custody award to take the physical custody of the child from appellant and award it to the defendant-respondent mother.

Appellant and his present wife were divorced in Nevada in October, 1953. After this divorce appellant went to London, England where appellant met the respondent, a German national. The child was conceived in London and when appellant's divorced wife learned of this she went to London and with the cooperation of appellant arranged to bring respondent to San Francisco where the child was born on December 23, 1954.

Respondent, who had only a temporary visitor's visa for this country, went to Canada shortly after the child's birth and has resided in British Columbia ever since. When respondent left the hospital after her child's birth the baby was taken home by appellant's divorced wife. In February 1955 appellant and his divorced wife were remarried and on February 24, 1955 appellant filed this action, naming respondent as defendant, in which he sought a decree of the court adjudging the child to be the legitimate child of appellant and respondent under the provisions of section 230 Civil Code and for such order for the custody of said child as might appear to the court to be in the child's best interest. Respondent filed an answer and cross-complaint in which she joined with appellant in asking the court to legitimate the child, but

praying that her custody be awarded to respondent.

On March 25, 1955 an order was made and entered by the court which recites that the matter came on regularly for hearing, testimony both oral and documentary was received and the court finds that all of the allegations of plaintiff's complaint are established. This order concludes:

"It Is Hereby Ordered, Adjudged and Decreed:

"1. That Laura Helen-Christa Donnally is the legitimate child of Laurance Henderson Donnally and Hertha Therese Blankenstein."

At the same time the court made an order reserving the decision as to the permanent custody of the child and committing her to the custody of appellant's wife until further order of the court.

After further hearing on the matter of permanent custody and the receipt of various reports by court investigators appointed pursuant to stipulation of the parties an order was made and entered on November 20, 1956, awarding the custody jointly to appellant and respondent "and until further order of this Court, the physical care and custody of said infant" was awarded to appellant. In connection with this order the court made findings of fact which, after reciting that respondent was living alone in Vancouver and working and had no home to which she could take the child while appellant had remarried and had a home, found further that: "in the present period the child ought to be permitted to remain in the home where it is. When the child becomes three or four years old, perhaps the mother's position will have changed and she can then apply for a modification at that time. * * * I was not greatly impressed by the father's attitude on some things. * * * If it was between two people, neither of whom had a home, of course, the mother would prevail * * * the Court does not find that the mother is unfit, but the Court finds for the present it is the best interest of the child (to remain with the father)."

On December 16, 1957, respondent secured from the court an order to show cause why the previous custody order should not be modified to give respondent physical custody and control of her child. After a hearing the order herein appealed from was made. It continues joint legal custody in the two parents but gives respondent the physical custody subject to reasonable visitation rights in appellant and provides that respondent "may take the minor * * * to the mother's residence in British Columbia, Canada, for the purpose of having said minor permanently reside with her said mother." It further orders that "except upon further order of this Court or for the purposes of temporary visitation on the part of the father with said minor here in California, the parties * * * are restrained from removing said minor from the territorial limits of the province of British Columbia."

In support of her application respondent showed that while supporting herself by working she had attended the University of British Columbia and secured a teacher's certificate; that she had obtained employment as a teacher of mathematics, physics and physical education in Prince Rupert, British Columbia at a salary of $320 per month; that she was living in the home of a Mr. and Mrs. Greissel who had two sons 10 and 14 and that Mrs. Greissel was willing to care for the child during her teaching hours. There was a report from the British Columbia Department of Health and Welfare that respondent is treated by the Greissels as one of the family; that the Greissels are a relaxed and friendly couple with experience in foster care of children and their home is adequate in every way. It further appeared that the Inspector of Schools knows that respondent is not married and is seeking the custody of her child. He has found her steady and dependable and her service as a teacher is very satisfactory. She has participated actively in community affairs, sings in the church choir, plays violin in the local symphony orchestra and is active in sports. The British Columbia agency commented on her

maturity, intelligence and ability to plan for herself and the child.

At the time of the trial appellant was 56 years old and his wife 50, while respondent was 34.

[1] The effect of the legitimation of the child under section 230, Civil Code is to give both parents the same rights in relation to the child as if the child had been born in wedlock. In re Navarro, 77 Cal. App.2d 500, 175 P.2d 896; Strong v. Owens, 91 Cal.App.2d 336, 205 P.2d 48. Appellant asks us to reconsider the holding of these cases. We are satisfied that they correctly state the law (despite a strong dissenting opinion in Navarro the Supreme Court denied a hearing, 77 Cal.App.2d at page 520, 175 P.2d 896).

[2] Appellant attacks the present order as an abuse of discretion. As between parents with equal legal right to custody the paramount consideration is the best interests of the child. Holsinger v. Holsinger, 44 Cal.2d 132, 135, 279 P.2d 961; Clarke v. Clarke, 35 Cal.2d 259, 262, 217 P.2d 401. Appellant argues that respondent has failed to show a change in circumstances since the previous custody order was made. In this we are satisfied that appellant takes too narrow a view of the changed-circumstances rule. The court at the previous hearing found that if all things had been equal as to the ability of the parents to furnish the child a home the child should have been awarded to the mother and suggested the present application for modification when the mother's position in this respect was changed. The mother satisfied the court on this hearing that her circumstances were so changed that she can now give her child an adequate home. We cannot hold that the very change in circumstances which the court contemplated in making its first order might justify its future modification does not satisfy this court-made rule. To do so would tie the court's hands where it felt that the best interests of the child would otherwise be served by awarding it to one parent but, as in this case, it awarded it to the other solely because the one to whom the award was made had a proper home which the other by fortuity at that time could not furnish for the child.

[3–6] The fact that the child had lived for the three years of her life with appellant and his wife and knew no other home is a factor which the court should weigh (Fine v. Denny, 111 Cal.App.2d 402, 244 P.2d 983; Norton v. Norton, 112 Cal.App. 2d 358, 245 P.2d 1108; Frazier v. Frazier, 115 Cal.App.2d 551, 252 P.2d 693), as is the fact that under the present order the child, an American citizen by birth, will be taken to a foreign country to live (see Gantner v. Gantner, 39 Cal.2d 272, 280, 246 P. 2d 923) and the further fact that respondent is an unmarried woman. The court however in these cases has a broad discretion in determining what is for the best interests of the child and its determination will not be disturbed unless the record shows a clear abuse of that discretion. Holsinger v. Holsinger, supra, 44 Cal.2d at page 135, 279 P.2d 961. The respective ages of the parents (when the child reaches majority appellant will be 73), the preference of the law that children of tender years should be awarded to the mother (Civ.Code, § 138 (2)), the energy, initiative and adaptability shown by the mother in establishing herself in a responsible position in a new community in such a relatively short time as compared to the father's lack of those qualities (although he holds a Ph.D. degree, on July 30, 1956 an investigator reported that appellant's earnings were approximately $100 per month), and the previous determination of the court that if all things had been equal custody should have been given to the mother were all factors which support the present order of the court. The fact that the child will live abroad is not controlling. Gantner v. Gantner, supra, 39 Cal.2d at page 280, 246 P.2d 923. It is suggested that respondent might take the child back to Germany. She testified that she intended to live permanently in Canada and her present hard-earned position of security in British Columbia makes it appear highly unlikely that she would leave that security for the uncertainties of her former country.

It was the function of the trial court to weigh the various factors and determine what would be for the best interests of the child. We can find no abuse of discretion in its determination of that question.

Order affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

167 Cal.App.2d 355

Fred McCALL, Frank Noblitt, copartners doing business under the firm name and style of McCall & Noblitt, Plaintiffs, cross-defendants and Respondents,

v.

Raymond E. SCHNACKENBERG et al., Defendants, cross-complainants and Appellants.

Civ. 5780.

District Court of Appeal, Fourth District, California.

Jan. 26, 1959.

Action to recover for fertilizer sold wherein defendant cross-complained for loss in crop of potatoes allegedly due to failure to furnish fertilizer when requested. Verdict for the defendant and from an order of the Superior Court of Riverside County, Edward P. Fogg, J., granting plaintiff a new trial, the defendants appealed. The District Court of Appeal, Mussell, J., held that the trial court properly granted a new trial for insufficiency of evidence to sustain the verdict.

Order affirmed.

1. New Trial ⇐71

A trial court in considering a motion for new trial is not bound by the rules of conflicting evidence.

2. Appeal and Error ⇐979(2)

When a motion for new trial is granted for the insufficiency of evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere.

3. New Trial ⇐68

In action to recover for fertilizer sold to raise crop of potatoes wherein defendants counterclaimed alleging that because of the delay of plaintiffs in failing to furnish fertilizer high grade potatoes would have been produced by the defendants in place of a quantity of poor quality potatoes, where other growers in the area suffered a crop loss in that year and there was no testimony as to what profits would have been realized by defendant had he obtained delivery of the fertilizer when he first requested it, granting plaintiff's motion for new trial after verdict for the defendant was not an abuse of discretion.

Harold M. Fagin, Riverside, for appellants.

Hennigan, Ryneal & Nixen, by J. David Hennigan, Riverside, for respondents.

MUSSELL, Justice.

This action was commenced in the Municipal Court of Riverside Judicial District. McCall and Noblitt, plaintiffs therein, sought judgment against defendant Schnackenberg and his wife for fertilizer sold and delivered to them. Defendants filed a general denial and cross-complaint, and alleged that in March, 1953, plaintiffs orally agreed to furnish all the fertilizer that defendants would need to fertilize approximately 25 acres of potatoes and to assist in the supervision and in the planting and raising of said crop; that they failed to deliver the fertilizer as agreed and that by reason of the delay of plaintiffs in delivering said fertilizer defendants' potato crop was damaged in the sum of $5,000. The cause was transferred to the Superior Court and a jury trial was had therein, resulting in a verdict in favor of the defendants and cross-complainants and against

McCall and Noblitt for the sum of $3,000. On August 1, 1957, the trial court granted a new trial on motion of plaintiffs "on the ground of insufficiency of the evidence to justify the verdict and for excessive damages appearing to have been given under the influence of passion or prejudice". Defendant and cross-complainant Schnackenberg and his wife appealed from the order granting the new trial.

A second amended cross-complaint was filed by the Schnackenbergs in which they alleged that but for the delay of plaintiffs in failing to furnish fertilizer as agreed, 10,000 sacks of No. 1 and No. 2 potatoes would have been produced by the cross-complainants in place of a similar number of poorer quality potatoes; that the demands in the cross-complaint all arise out of the sale of fertilizer to cross-complainants during 1953; that cross-defendants falsely represented that they had been paid for only 227 bags of fertilizer when in fact they had been paid for 260 sacks; that cross-defendants stated that 1,475 sacks of culls owned by cross-complainants were worthless and had no value when in fact they did have a value of approximately $147.50; that cross-defendants fraudulently misgraded 1,020 sacks of potatoes.

The complaint herein involved facts which are not disputed. In September, 1953, at the request of appellants, respondents delivered to appellants 800 100-pound sacks of ammonium sulfate to be paid for at a price of $61.25 per ton, if paid within ten days of invoice, otherwise at $65 per ton, plus 50 additional sacks of sulfate at an agreed price of $65 per ton. $1,800 was paid in ten days of invoice, leaving a balance due of $851.50. No finding of the jury was made as to the issues in the complaint.

As to the cross-complaint the evidence shows that in the spring of 1953 Schnackenberg informed respondent McCall that he wanted to raise potatoes on his land. McCall referred him to persons who might assist him in financing the crop and Schnackenberg entered into a contract and crop mortgage with Alfred W. Chase and Sam Plone Potatoes, Inc., to advance the necessary funds. Chase paid to Schnackenberg a sum to cover 260 sacks of fertilizer. Some fertilizer was supplied and used in the planting of the potatoes and it was agreed that Schnackenberg would take delivery of the balance later. A total of either 167 or 227 sacks was delivered to cross-complainant Schnackenberg and he claims that the failure to deliver the balance of the 260 sacks amounted to actionable fraud. However, cross-complainants' credit on 260 sacks was applied to the purchase of insecticide which was obtained and sprayed on the potatoes. As the time for harvest approached the weather was hot and the potato market was low. Schnackenberg refused to release Chase from his obligation to harvest the crop and pursuant to his contract and mortgage Chase had the potatoes harvested, processed and graded by Sam Plone Potatoes, Inc. The potatoes were graded under the supervision of the Riverside Agricultural Inspector and some 14,750 pounds were rejected as culls. The potatoes were shipped to Los Angeles and there some of the No. 2 potatoes were rejected as having an unduly large number of poor quality potatoes resulting from grass roots, insect damage, and other items. The net result to Schnackenberg was that his crop resulted in a loss to him. Other growers in the area likewise suffered a crop loss in that year and area. There was no testimony as to what profits would have been realized by Schnackenberg had he obtained delivery of the 260 sacks of fertilizer when he first requested it.

The trial court in its opinion and order granting a new trial stated that he could find no evidence of sufficient probative value to justify the verdict for defendants and cross-complainants on their cause of action for alleged breach of contract to deliver fertilizer and to supervise the growing of the spring potato crop; that there was insufficient evidence to show that these potatoes were damaged by any failure of plaintiffs to deliver the fertilizer when requested; that Noblitt made none of the alleged representations and was not guilty

of fraud; that he had searched the evidence in vain for anything that might justify a verdict of $3,000 against McCall and could find none; that the evidence clearly indicated that defendants and cross-complainants were indebted to plaintiffs in the sum of $851.50, which sum the jury should have deducted from any damages awarded.

[1–3] The state of the record herein is such that we cannot say that the trial court erred or abused its discretion in granting the motion for a new trial on the ground of insufficiency of the evidence. The rules applicable to an appeal from such an order are well settled. The trial court in considering a motion for new trial is not bound by the rules of conflicting evidence. When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. In re Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692. In Van Ostrum v. State, 148 Cal.App.2d 1, 5, 306 P.2d 44, 47, the court said:

"Concerning an order granting the motion upon the ground of excessive damages, it is said in Strosk v. Howard Terminal Co., 129 Cal.App.2d 797, 802, 277 P.2d 828: '"Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that, when there is material conflict of evidence regarding the extent of damage, the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict." Doolin v. Omnibus Cable Co., 125 Cal. 141, 144–145, 57 P. 744 * * *.'"

In Edler v. Sepulveda Park Apts., 141 Cal.App.2d 675, 676–677, 297 P.2d 508, 509, the court said:

"Upon motion for new trial it is the function of the trial judge to make an independent appraisal of the evidence, including all permissible inferences, and to exercise a sound judicial discretion in determining whether the verdict effects a miscarriage of justice, and a reviewing court cannot disturb the order unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if sustainable on any ground."

The order granting a new trial is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a corporation, Plaintiff and Respondent,

v.

REPUBLIC INDEMNITY COMPANY OF AMERICA, a corporation, Defendant and Appellant.*

Civ. 23169.

District Court of Appeal, Second District, Division 1, California.

Jan. 14, 1959.

Hearing Granted March 11, 1959.

Action for declaratory relief brought by insurer of automobile driver against insurer of garage, which had permitted driver to use garage's automobile while driver's automobile was being repaired, to have insurers' respective obligations under their liability policies determined with respect to judgment entered against driver and garage in personal injury action

* Opinion vacated 341 P.2d 675.

arising out of accident involving garage's automobile. The Superior Court of Los Angeles, John J. Ford, J., rendered judgment for driver's insurer, and garage's insurer appealed. The District Court of Appeal, Lillie, J., held that where policy of driver's insurer covered nonowned automobile used by driver as excess insurance with proviso that its coverage became primary in event there was no other insurance covering vehicle, but excess provision in policy of garage's insurer was limited to nonowned vehicles used by garage, garage's insurer's coverage of the use of automobile was not excess and driver's insurer was entitled to have garage's insurer satisfy entire judgment.

Affirmed.

1. Insurance ⇐146(1), 152(3)

Automobile liability policies would be viewed in light of established rules and statutes in effect at time of automobile accident.

2. Insurance ⇐435.9

Under financial responsibility statutes in effect on March 27, 1956, when accident involving insured automobile occurred, every policy of motor vehicle liability insurance covered vehicle owned by named insured but driven by someone else with named insured's permission. West's Ann. Vehicle Code, §§ 402, 415.

3. Insurance ⇐138(1)

All restrictive endorsements on policy are subject to the law and public policy and if any coverage restriction contravenes the same, it is null and void.

4. Insurance ⇐435.8

Endorsement on automobile liability policy restricting coverage to named insured was void where it contravened existing law. West's Ann.Vehicle Code, §§ 402, 415.

5. Insurance ⇐435.23

Where policy issued to garage was entitled comprehensive liability policy, general-automobile, provided for compliance with motor vehicle financial responsibility act, and covered personal injury and property damage arising out of ownership, maintenance or use of any automobile, policy was a motor vehicle liability policy notwithstanding fact that it provided other coverage and that insurer attempted to limit its coverage by numerous attached endorsements.

6. Insurance ⇐435.23

Former rule of law extending protection under motor vehicle liability policies to persons driving insured's automobile with permission did not limit permissive user to any particular person or class of persons but applied to protection of all persons driving insured's automobile with permission and motor vehicle liability policy issued to garage covered vehicle lent by garage to a customer. West's Ann. Vehicle Code, §§ 402, 415.

7. Insurance ⇐604

Former rule that all motor vehicle liability policies covered vehicles described in policies when driven by any person with named insureds' permission was applicable to controversy between insurer of driver and insurer of garage which lent automobile to driver, in determining whether garage's insurer was liable to insurer of driver for any part of judgment entered against driver and garage. West's Ann. Vehicle Code, §§ 402, 415.

8. Insurance ⇐435.9

Where endorsement restricting liability of automobile insurer to automobiles operated by named insured was contrary to law, coverage would be extended to party who drove automobile with permission of insured notwithstanding allegation that premium charged insured did not include any driver other than insured. West's Ann.Vehicle Code, §§ 402, 415.

9. Insurance ⇐512½

Rights and duties of insurers under their policies in situation where one insurer's policy covers automobile driver and another insurer's policy covers automobile owner do not arise out of a contract with each other, since there is no contractual

agreement between them, but their obligations are the result of the express provisions of their respective policies.

10. Insurance ⇐512½

Automobile owned by garage and driven with its permission by named insured as temporary substitute automobile became a "not-owned" automobile within insured's liability policy to effect that insurance should be excess insurance over any other collectible insurance with respect to automobile not-owned by named insured and temporarily used when described automobile was withdrawn because of repair and insurer's coverage on garage's automobile became excess over and above any other insurance. West's Ann.Vehicle Code, §§ 402, 415.

11. Insurance ⇐512½

Where excess insurance provision of automobile liability policy covered insured garage only in permissive use of an automobile not owned by it, insurer's coverage of automobile owned by garage and driven by customer while his automobile was being repaired constituted primary insurance. West's Ann.Vehicle Code, §§ 402, 415.

12. Insurance ⇐512½

Where policy of automobile liability insurer of driver of automobile which was used with permission of garage while driver's automobile was being repaired, covered nonowned automobile used by driver as excess insurance with proviso that its coverage became primary in event there was no other insurance covering vehicle, but excess provision in policy of liability insurer of garage was limited to nonowned vehicles used by garage, garage's coverage of automobile was primary coverage and driver's insurer's coverage of use of automobile was excess and driver's insurer was entitled to have garage's insurer satisfy judgment entered against driver and garage in personal injury action arising out of accident involving garage's automobile. West's Ann.Vehicle Code, §§ 402, 415.

Wyman & Finell, Marvin Finell, Beverly Hills, for appellant.

Parker, Stanbury, Reese & McGee, Raymond G. Stanbury, Los Angeles, for respondent.

LILLIE, Justice.

A stipulated judgment in the sum of $5,000 was entered against John M. Steinberg and Max Barish, Inc., an automobile dealer and garage, hereinafter referred to as Barish, in a personal injury action arising out of an automobile accident on March 27, 1956, in which several persons were injured. It involved a car owned by Barish and driven with its permission by Steinberg. Steinberg was insured by American Automobile Insurance Company, plaintiff herein, and Barish by a policy issued by defendant Republic Indemnity Company of America. Plaintiff filed this action for declaratory relief to have their respective obligations under the two policies of liability insurance determined. The lower court held that Republic's policy provided primary insurance to the full extent of the stipulated judgment and the policy issued by American provided only excess coverage; and ordered Republic to satisfy the entire obligation. It is from this judgment defendant appeals.

Both policies, in standard form, were issued prior to March 27, 1956. American not only covered Steinberg's own car, but also his use of a non-owned vehicle as a "temporary substitute" automobile. Republic's policy, however, contained Special Endorsement No. 4, which provided: "with respect to any automobile used with the permission of the named insured by a customer of the named insured, such insurance as is afforded by the policy applies only to the named insured."

Republic contends that this endorsement excluded coverage of the automobile owned by Barish and driven by Steinberg who, as its customer, was permitted to use the same while Barish repaired Steinberg's car, thereby relieving it from liability un-

der the policy; and in any event its policy provides only excess or, at most, pro rata coverage with the American policy. American submits that the endorsement is invalid as against public policy; that by operation of law, all permissive drivers were included in Republic's policy as insureds; that Republic's insurance on the Barish car constituted primary coverage and appellant is liable to the full extent of the judgment.

The issue is twofold—whether Republic's policy covered the Barish car, used with its permission by Steinberg and, if so, to what extent.

[1] Since the accident occurred in 1956, the policies must be viewed in the light of established rules and statutes then in force and effect. Section 415, Vehicle Code, a part of the Financial Responsibility Law, then required that every policy of motor vehicle liability insurance issued pursuant to the law "shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured." As to liability, section 402 provided that "(e)very owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence" in its operation "by any person using or operating the same with the permission, express or implied, of such owner * * *".

In 1957, before the amendment of section 415, the Supreme Court decided the case of Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 307 P.2d 359, controlling here. Confronted with the contention that the policy excluded coverage when a vehicle owned by the insured was driven by someone else, but with his permission, the court, after discussing public policy as reflected in sections 402 and 415, concluded "* * * that section 415 must be made a part of every policy of insurance issued by an insurer since the public policy of this state is to make owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles. * * * We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the Vehicle Code." 48 Cal.2d 39, 307 P.2d 364.

[2] Republic seeks to avoid the effect of this decision by claiming that it dealt only with an interpretation of the particular insurance policy there under consideration and does not apply to all policies. It is clear from a reading of the opinion that the court extended its ruling to every policy of motor vehicle liability insurance. A similar contention was rejected by the court in Bonfils v. Pacific Auto. Ins. Co., 165 Cal.App.2d 152, 331 P.2d 766, at page 769: "The cited language from the opinion in the Wildman case is directed to '*every* policy of insurance issued by an insurer'; this declaration was reiterated therein where the court said: 'Inasmuch as sections 402 and 415 of the Vehicle Code set forth the public policy of this state such laws must be considered a part of *every* policy of liability insurance even though the policy itself does not specifically make such laws a part thereof'; and again where it is stated: '* * * said sections were intended by the Legislature to be, and are, a part of *every* policy of motor vehicle liability insurance issued by an insurance carrier authorized to do business in this state.' * * *. Every motor vehicle liability policy of insurance issued in this state, by virtue of law, covers both the owner of the subject automobile and every person using the same with the owner's consent; any omission of an express provision in such a policy resulting in a failure to effect this dual coverage is supplied by implication of law; by the same standard, any provision therein which expressly excludes such coverage, being contrary to public policy, is rendered ineffectual by law."

Republic further argues in support of the validity of Special Endorsement No. 4 that restrictive endorsements excluding coverage have always been recognized, citing numerous authority therefor. It cannot be denied that the right of an insurer to limit its coverage has been repeatedly upheld. Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal.2d 423, at page 432, 296 P.2d 801, at page 806, 57 A.L.R.2d 914, sets forth the general rule: "An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected."

[3, 4] Recognizing this rule the court in the Wildman case, however, excepted therefrom the restrictive endorsement that contravenes the law or public policy, disapproved any endorsement excluding coverage of a permissive user of an insured's automobile; and rejected, as without merit, the contention that the company had the right in this kind of circumstance to limit its coverage. The court in Bonfils v. Pacific Automobile Ins. Co., 165 Cal. App.2d 152, 331 P.2d 766, 768, was faced with the same argument. Conceding that an insurer has the right to limit its coverage, the court therein stated: "However, any such limitation must conform to the law; if contrary to public policy it is void." It is clear that all restrictive endorsements are subject to the law and public policy and if any coverage restriction contravenes the same, it shall be null and void. In issuing its policy, Republic not only impliedly agreed to conform to the law, but expressly provided that "(s)uch insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law * * * which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder * * *" (Condition 8).

Republic finally contends that its policy was neither a "motor vehicle liability policy" under the Wildman decision or the Financial Responsibility Law, nor so intended by either the insured or insurer. It claims that Special Endorsement No. 4 relates only to the garage operation of Max Barish, Inc., and as to vehicles owned and used by Barish it was solely a general liability policy intended to cover only the operation of an automobile agency and garage in which the ownership of certain vehicles was covered under specifically designated circumstances, and then only incidental to the general liability. Republic denies that the rule in the Wildman case applies to that portion of the policy pertaining to the use of automobiles in connection with the operation of the garage.

[5–7] Republic's policy is entitled "Comprehensive Liability Policy (General-Automobile) Pacific Coast," was issued to Max Barish, Inc., and provides for compliance with the motor vehicle financial responsibility act (Condition 8). Although it provides other coverage, it is obvious that the policy also covers personal injury and property damage "arising out of the ownership, maintenance, or use of *any* automobile." (Emphasis added.) Insuring Agreement 1(A), (C). Reference to motor vehicle liability runs throughout the terms, conditions and provisions of this policy to such an extent that it would be burdensome to here relate them, and although Republic has attempted to limit its coverage by numerous attached endorsements, it is apparent that it constitutes a motor vehicle liability policy. Republic attempts to make a distinction between the permissive use of a vehicle lent to a friend or member of the insured's family, and the permissive use of a vehicle lent by the garage operation of the insured to a customer thereof, in its claim that the latter was not contemplated under its policy and no premium was paid therefor. Whether the permissive use of the Barish owned auto-

mobile is to a family member, a friend, or by way of a loan to a garage customer, is of little import insofar as concerns the protection the public has a right to expect. The Wildman decision did not limit the permissive user to any particular person or class of persons, but applied the rule of protection to all persons driving the insured's car with permission. Said the court at page 37 of 48 Cal.2d, at page 363 of 307 P.2d: "* * * the policy must be construed as extending coverage to persons suffering bodily injury or property damage caused by the vehicle in question when it was being driven by the named insured, or members of their immediate family, and *also by someone else* driving the vehicle with the consent and permission of the named insured." (Emphasis added.) 48 Cal.2d 31, 307 P.2d 359. Republic contends, however, that its policy does not deprive the public of protection because Steinberg was covered by American's policy and the persons injured were already protected. This argument is met by public policy considerations, the provisions of the automobile Financial Responsibility Law and the basic protection guaranteed thereunder for the benefit of drivers and owners of motor vehicles as well as the public who might suffer injury. Bonfils v. Pacific Auto. Ins. Co., 165 Cal.App.2d 152, 331 P.2d 766; Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 307 P.2d 359, supra. The position advanced by Republic, that the rule for the benefit of the public developed in the Wildman case, arose out of a dispute between one injured and the insured and does not apply to a controversy between two insurers, finds no support in the law in this state. Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal.2d 423, 296 P.2d 801, and Oil Base, Inc. v. Transport Indem. Co., 143 Cal.App.2d 453, 299 P.2d 952. Forecasting the rule in the Wildman case, the court in Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal.2d 423, 296 P.2d 801, involving a dispute between two insurance companies, discussed at length the financial responsibility statute, and the protection the public has the right to expect.

[8] Republic's suggestion that it is unfair to extend the coverage because the premium charged Barish did not include any driver other than the insured, we deem to be without merit particularly where the endorsement restricting liability is contrary to the law with which the insurer is bound to comply.

Even though the accident occurred March 27, 1956, before the 1957 amendment to section 415, Republic argues that neither section 415 then in effect, nor the Wildman decision is controlling. It reasons that, although the Supreme Court there held that sections 402 and 415 were "intended by the Legislature to be, and are, a part of every policy of motor vehicle liability insurance," when section 415 was amended in 1957 the legislature expressed its disapproval of the court's holding by amending the definition of "motor vehicle liability policy" to include only policies "certified as provided in section 414"; and that contrary to the Supreme Court's ruling in the Wildman decision, the legislature actually never intended section 415 be read into any policy of liability insurance except those "certified." It is conceded that Republic's policy was not certified. The Supreme Court was explicit in its pronouncement that sections 402 and 415 be read into "every policy" of motor vehicle liability insurance (Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 307 P.2d 359; Bonfils v. Pacific Automobile Ins. Co., 165 Cal.App.2d 152, 331 P.2d 766). We cannot construe therein any limitation to certified or any other particular type of motor vehicle liability policy. Since the 1957 amendment is not retroactive, and the policies in question must be construed under the law as it existed on March 27, 1956, we are not constrained to discuss further the tenuous position advanced.

Having concluded Special Endorsement No. 4 to be null and void as contrary to public policy and to the law in force in 1956, and Republic's policy, by operation

of law, to extend coverage to the car owned by Barish in the permissive use by Steinberg, we are now concerned with Republic's dual claim that its coverage is excess only, and if not, at most, the loss should be borne by the two carriers on a pro rata basis. It is based primarily on American Auto. Ins. Co. v. Seaboard Surety Co., 155 Cal.App.2d 192, 318 P.2d 84; Peerless Casualty Co. v. Continental Cas. Co., 144 Cal.App.2d 617, 301 P.2d 602, and equitable considerations arising out of the fact that it received no premium from Barish for covering Steinberg's operation of one of its cars, and American did receive consideration for covering Steinberg's use of the car as a "temporary substitute" vehicle.

Both policies contained the same "excess" provision. American's policy issued to Steinberg provided that "insurance under this policy shall be excess insurance over any other valid and collectible insurance, with respect to (1) temporary substitute automobiles under Insuring Agreement IV * * *." Insuring Agreement IV defined a "temporary substitute automobile" as one "not owned by the named insured * * * while temporarily used as a substitute for the described automobile when withdrawn from normal use because of its breakdown, repair, servicing, * * *." Republic's policy on Barish provided that the "insurance under this policy with respect to loss arising out of the maintenance or use of * * * any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured * * *."

[9–11] Obviously, the rights and duties of insurers under their policies in a situation of this kind do not arise out of contract with each other, since there is no contractual agreement between them. Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal.2d 423, 296 P.2d 801; American Auto. Ins. Co. v. Seaboard Surety Co., 155 Cal.App.2d 192, 318 P.2d 84. Their obligations are the result of the express provisions of their respective policies. Insurers, in formulating the provisions of their policies have made every effort to avoid inequities growing out of conflicts where double coverage exists. Realizing insurance companies to be contentious by nature, reasonable constructions of these provisions relating to other insurance covering the same risk have been indulged by our courts with a view to aiding the industry itself in designating and determining liability under various types of coverage and avoid unnecessary litigation. It is clear from the terms of American's policy that the car owned by Barish and driven with its permission by Steinberg as a "temporary substitute automobile" fell squarely within its "excess" provision. The car became a "not-owned" vehicle as to Steinberg and accordingly, American's coverage thereon became excess over and above any "other valid and collectible insurance." Having already concluded that by operation of law Republic's policy included the automobile owned by Barish and used by Steinberg, its coverage thereof could not be included within the "excess" provision of Republic's policy because it covers Barish *only* in the permissive use of an automobile "non-owned" by it. The "excess" provision in Republic's policy obviously does not cover a vehicle owned by Barish and permissively used by another. Therefore, it is apparent that Republic's coverage of the Barish automobile driven by Steinberg constitutes primary insurance.

We are not here confronted with the problem arising out of a conflict between primary insurers as to whose coverage comes first when each, in order to escape liability under the primary coverage it originally issued, seeks to take advantage of an escape clause dependent upon the existence of another policy. By the very terms of American's policy, its coverage on the non-owned automobile used by Steinberg was originally issued as excess insurance, with the proviso that its coverage becomes primary in the event there is no other insurance covering the vehicle. Since by its terms the excess provision in

Republic's policy is limited to "non-owned" vehicles used by Barish, the provision is not here effective. Therefore, if Republic is to avoid liability on its primary coverage, it must resort to the fortuitous existence of another policy, which it cannot do because American's coverage originally issued as excess does not go into effect and become "other valid and collectible insurance" until Republic's primary insurance is exhausted.

[12] That Republic's coverage of the car is primary, and American's coverage of its use is excess, is borne out by authority in this state, as well as in other jurisdictions, that as between insurers, in the common situation in which the insured is driving a vehicle he does not own, it is the coverage on the car that is primary and the coverage on the driver that is excess. The leading case in California, Pleasant Valley Lima Bean Growers and Warehouse Ass'n, v. Cal-Farm Ins. Co., 142 Cal.App. 2d 126, 298 P.2d 109, represents a declaratory relief action brought by an insured to determine obligations between two insurers. One Nungary, injured while unloading a truck in a warehouse, sued the warehouse operator, Pleasant Valley Lima Bean Growers & Warehouse Association, and its employee, Croker, for damages. Cal-Farm had insured Brucker, the truck owner. United States Fidelity & Guaranty Company issued a policy to Pleasant Valley. The court held that Pleasant Valley and Croker were also covered under the Cal-Farm policy as additional insureds; that Cal-Farm had a primary obligation to defend and pay any judgment in the Nungaray damage action and that United's policy on Pleasant Valley provided only excess coverage in view of the clause making it such with respect to the use of a non-owned automobile. Said the court at page 136, of 142 Cal.App.2d, at page 115 of 298 P.2d: "Turning to the policies of insurance themselves, we find that both contain 'other insurance' clauses. United's 'other insurance' clause provides that its liability shall be proportionate to other valid and collectible insurance, save that in the case of loss arising out of the use of a non-owned automobile, its insurance shall be *excess* insurance only. As the truck involved in the accident was not owned by Pleasant Valley, United's insured, United's policy is excess insurance as to Pleasant Valley, and Cal-Farm's duty to defend Pleasant Valley and pay judgment in the Nungaray action is primary to the obligation of United. * * * Also, since United's coverage of Pleasant Valley is excess with respect to non-owned vehicles, there is no basis for apportionment with Cal-Farm's coverage of Pleasant Valley."

The court in the Pleasant Valley case recognized the distinction between the conflict created by two companies providing primary coverage in which each seeks to withdraw because of other insurance, and the conflict arising out of two policies, one contemplating primary coverage on the car and the other excess on the driver, by rejecting Air Transport Mfg. Co. v. Employers' Liability Assurance Corp., 91 Cal. App.2d 129, 204 P.2d 647, as "readily distinguishable" on its facts. The Air Transport case cited by Republic, but not applicable to the case at bar for those reasons, involved a policy that did not contain an excess clause which was rendered operative when its assured became involved in a loss arising out of a non-owned automobile, but did contain an escape clause by which the vehicle owner's insurer sought to entirely avoid liability when other insurance was in force. This case was also rejected by the court on the same theory, in a case similar to the instant one in a 1952 California decision, in Norris v. Pacific Indem. Co., Cal., 237 P.2d 666. Although this decision is not now the law because it was superseded by one of the Supreme Court on other grounds (Norris v. Pacific Indem. Co., 39 Cal.2d 420, 247 P.2d 1), it serves to point up the distinction the court there also recognized.

The rule in the Pleasant Valley case exists with equal force as settled law in other jurisdictions. Noteworthy is the Fifth Circuit decision in General Insurance Co. v. Western Fire & Casualty Co., 5 Cir., 241

F.2d 289. Western insured the car owner, General insured the driver, Mrs. Cutshall. The court held that Western's coverage on the car was primary, liable to the full extent of the limitation of its policy, and General's coverage on the driver was excess. Said the court at page 295: "With Western's policy effective, it is conceded that it was available to Lola Jones Cutshall as an additional assured. This automatically brought into play the provision in General's policy * * * which prescribed that the drive-other-car extension agreement * * * 'shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobile or otherwise.' The effect of this is that Mrs. Cutshall did not have insurance with respect to other vehicles driven by her until she had reasonably exhausted coverage available to her elsewhere * * * It is only when Western's policy has been exhausted that General becomes liable for the excess, and until that point is reached, Mrs. Cutshall, as named or additional assured, has no claim which she can assert."

Identical facts and policies were involved in Hardware Cas. Co. v. Massachusetts Bonding & Ins. Co., Sup., 129 N.Y.S.2d 304, in which a customer of a garage used a car owned by it while his own was being repaired. The court held that the garage's policy insuring the car was primary coverage and that issued to the driver using a non-owned vehicle was excess only. Other cases upholding the excess provision as to non-owned vehicles include Farm Bureau Mut. Auto. Ins. Co. v. Preferred Acc. Ins. Co., D.C., 78 F.Supp. 561; Benroth v. Continental Casualty Company, D.C., 132 F.Supp. 270; American Surety Co. of New York v. American Indemnity Co., 8 N.J.Super. 343, 72 A.2d 798; American Motorist Ins. Co. v. Weir, 132 Conn. 557, 46 A.2d 7; Manufacturers Cas. Ins. Co. v. Great American Ind. Co., D.C., 91 F. Supp. 18; Aetna Casualty & Surety Co. v. De Maison, D.C., 114 F.Supp. 106; United Services Automobile Association v. Russom, 5 Cir., 241 F.2d 296; Travelers Indemnity Co. v. State Automobile Ins. Co., 67 Ohio App. 457, 37 N.E.2d 198; Allstate Insurance Co. v. Urban, 15 Ill.App. 2d 386, 146 N.E.2d 387.

Our attention has been directed to Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 9 Cir., 195 F.2d 958, which appears to be contrary to the established line of Federal decisions. However, a careful reading thereof will disclose that nowhere in that opinion was any distinction made between a situation in which primary insurance is originally issued and then an attempt is made to withdraw the same to render it excess because other coverage exists, and the situation in which excess coverage is issued in the first instance, which becomes primary only if no other insurance exists. Perhaps with this distinction in mind, the California court in Peerless Cas. Co. v. Continental Cas. Co., 144 Cal.App.2d 617, at page 623, 301 P.2d 602, at page 607, recognized that as among the authorities the Oregon decision "stands alone." The Peerless case, relied upon by Republic for the proposition that it is doubtful an excess provision can be effective unless the primary coverage is designated, actually was concerned only with precedence between two primary insurers. There was an escape clause in one policy and a pro rata clause in another. The court held that the escape clause was ineffective and prorated the policies.

Having found under American's "excess" provision that it is liable only for that amount "over any other valid and collectible insurance" with respect to a "temporary substitute automobile," it follows under the authorities cited that until Republic's coverage on the Barish car is exhausted, American's insurance does not go into effect. Since the "excess" provision in Republic's policy is here inapplicable, and since its coverage of the Barish car is primary and no other insurance against the loss exists until Republic's coverage is exhausted, the pro rata clause in the Republic policy is of no effect.

Both policies contain identical pro rata clauses in connection with "other insurance": "If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance * * *."

On alleged equitable considerations and the authority of American Auto. Ins. Co. v. Seaboard Surety Co., 155 Cal.App.2d 192, 318 P.2d 84, Republic claims a proration of the loss with American. The Seaboard Surety Company case does not involve motor vehicle liability insurance or a non-owned car on which excess coverage was originally issued. It is clearly distinguishable on its facts as involving a conflict between two primary policies. Of particular interest therein is the court's reliance upon Air Transport Mfg. Co. v. Employers' Liability Assurance Corp., 91 Cal.App.2d 129, 204 P.2d 647, and Peerless Casualty Co. v. Continental Cas. Co., 144 Cal.App.2d 617, 301 P.2d 602, cases involving primary policies. Furthermore, it involved subrogation rights and not a rule governing the rights between insurers who are not trying to subrogate but to determine their respective liabilities.

Our courts have clearly recognized the confusion proration under the kind of policies involved in the case at bar would bring to the insurance industry. In Norris v. Pacific Indemnity Co., Cal., 237 P.2d 666, although no longer controlling, the court acknowledged that a pro rata contribution should be ordered only in the event there are two or more primary carriers. The court in Pleasant Valley Lima Bean Growers and Warehouse Ass'n v. Cal-Farm Ins. Co., 142 Cal.App.2d 126, 298 P.2d 109, supra, pointed up the situation between two insurers in which one issued primary coverage on the automobile, and the other excess on the driver and said, 142 Cal.App.2d at page 136, 298 P.2d at page 115. "Also, since United's coverage of Pleasant Valley is excess with respect to non-owned vehicles, there is no basis for apportionment with Cal-Farm's coverage of Pleasant Valley."

Since Max Barish, Inc., was the owner of the accident car, which under American's policy constituted a "temporary substitute" vehicle as to Steinberg, and originally subject to excess coverage; and under Republic's policy the car was originally covered by "valid and collectible" primary insurance, American, by virtue of its "excess" provision became responsible only for that amount over and above Republic's coverage which herein amounts to nothing since the judgment was limited to $5,000.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

167 Cal.App.2d 254

Daniel J. NACHT, Plaintiff, Cross-Defendant and Appellant,

v.

Lucille D. NACHT, Defendant, Cross-Complainant and Respondent.

Daniel J. NACHT, Plaintiff, Cross-Defendant and Respondent,

v.

Lucille D. NACHT, Defendant, Cross-Complainant and Appellant.

Civ. 17889, 17928.

District Court of Appeal, First District, Division 1, California.

Jan. 21, 1959.

Rehearing Denied Feb. 20, 1959.

Hearing Denied March 18, 1959.

Divorce action by husband. The wife cross-complained. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered order setting aside prior order denying husband's motion for entry of final decree, and wife appealed therefrom and from entry of final

decree. The husband appealed from order entered by Orla St. Clair, J., awarding the wife costs on her appeals. The District Court of Appeal, Peters, P. J., held that where trial court's order denying husband's request to enter final divorce decree was based on trial court's finding that husband and wife had become reconciled and such finding was supported by the evidence, trial court could not enter a contrary order the next day, based merely on his declaration that he had signed a formal order inadvertently; and also held that wife was entitled to costs and attorney's fees even if property settlement agreement contained a waiver of right to costs and fees, since by her appeals she was challenging continued existence of agreement and waiver.

Order in respect to costs affirmed and orders in respect to entry of final decree reversed.

1. Divorce ⇐156

If motion to enter final divorce decree is not contested, and if it does not appear that any acts of parties during period of interlocutory decree have occurred to change relationship or status of parties, entry of final decree is a mere "ministerial act" by the court; but where it appears that during the period of the interlocutory decree events have occurred that may have changed status or relationship of parties, such as condonation and resumption of marital relations, entry of final decree becomes "judicial act", and in such event court must judicially determine whether or not parties have become reconciled or whether prevailing party in divorce proceeding has condoned the acts forming the basis of the divorce, and if a reconciliation is found by the court, it must deny the entry of the final decree. West's Ann.Civ.Code, § 132; West's Ann.Superior Court Rules, rule 20.

See publication Words and Phrases, for other judicial constructions and definitions of "Judicial Act" and "Ministerial Act".

2. Divorce ⇐156

A "reconciliation", within rule that final divorce decree will not be entered if there has not been a reconciliation since entry of interlocutory decree, occurs when the circumstances show that the parties intended to reunite as husband and wife and when there has been an unconditional forgiveness by the prevailing party; isolated acts of intercourse do not necessarily establish a reconciliation; if, in fact, a reconciliation has occurred during the one-year period following interlocutory decree, the duration of the reconciliation is of no consequence, nor is it relevant that the parties again split up. West's Ann.Civ. Code, § 132.

See publication Words and Phrases, for other judicial constructions and definitions of "Reconciliation".

3. Divorce ⇐156

In determining whether there has been such a reconciliation since entry of interlocutory divorce decree as will prevent entry of final decree, "cohabitation" means "sexual intercourse" and also means living together in the same abode. West's Ann. Civ.Code, § 132.

See publication Words and Phrases, for other judicial constructions and definitions of "Cohabitation" and "Sexual Intercourse".

4. Divorce ⇐156

On motion to enter final divorce decree, the real question the trial court must determine is whether or not the parties have become reconciled since the entry of the interlocutory decree, and on this question the fact that they have engaged in sexual intercourse is evidence of a reconciliation but is not conclusive evidence of that fact. West's Ann.Civ.Code, § 132.

5. Divorce ⇐184(10)

On motion to enter final divorce decree, the trial court's determination as to whether or not a reconciliation has occurred, if the evidence or inferences thereon are conflicting, is binding on the appellate court.

6. Divorce ⇐156

Where trial court's order denying husband's request to enter final divorce decree was based on trial court's finding that husband and wife had become reconciled and such finding was supported by the evidence, trial court could not enter a contrary order the next day, based merely on his declaration that he had signed the first order inadvertently. West's Ann.Civ.Code, § 132; West's Ann.Code Civ.Proc. § 473.

7. Judgment ⇐304, 306

The trial court has the power to correct misprision in its decrees, or other clerical errors, but not judicial errors; this power exists not only under the statute but also independent of the statute. West's Ann.Code Civ.Proc. § 473.

8. Divorce ⇐182

Where trial court's order granted motion for entry of final divorce decree and wife applied to appellate court for writ of supersedeas and secured temporary stay enjoining enforcement of order and wife appealed from order, stay order did not prevent trial court from entertaining wife's motion for costs and attorney's fees, notwithstanding that stay order restrained trial court from "any further proceedings," since stay order was not intended to restrain proceedings that were in no way connected with entry of final decree.

9. Divorce ⇐182, 194

Where interlocutory divorce decree incorporated property settlement agreement, trial court first denied husband's motion for final divorce decree on ground that there had been a reconciliation and then granted husband's motion for final decree and wife appealed, she was entitled to costs and attorney's fees on appeal even if property settlement agreement contained a waiver of right to costs and fees, since by her appeal she was challenging continued existence of agreement and waiver.

10. Divorce ⇐182, 188, 200

The trial court, in a divorce proceeding, normally has the power to grant costs and fees and this power continues during pendency of an appeal. West's Ann.Civ. Code, § 137.

11. Husband and Wife ⇐278(1)

The wife may, in a settlement agreement, waive future right to costs and fees in divorce action.

12. Divorce ⇐188, 225

If a proper waiver has been made the trial court is without legal authority to make an award of costs and fees in divorce action.

13. Divorce ⇐189, 226

Where wife, in support of her motion for costs and fees on appeal in divorce action, averred her inability to pay and ability of husband to pay and at hearing counsel for wife stated to the court that wife was earning $266 a month and had two children by a prior marriage to support, and that husband was earning in excess of $1,000 a month and husband elected not to produce any evidence on the issue, it was proper to award costs and fees to wife based upon the showing made in the affidavits alone.

14. Divorce ⇐188, 226

The usual practice is to award wife costs and attorney's fees on appeal in divorce action after a hearing, and such fees can only be awarded after the contesting husband has had an opportunity to be heard.

Lange & Rockwell, San Francisco, for appellant & respondent Daniel Nacht.

George F. Jansen, San Francisco, for respondent & appellant Lucille Nacht.

PETERS, Presiding Justice.

These consolidated appeals grow out of a divorce proceeding. The wife appeals from an order setting aside a prior order of the court denying a motion of the husband for the entry of a final decree, and from the entry of the final decree (No. 17,928). The husband appeals from an order awarding the wife costs on her appeals (No. 17,889).

The parties were married on November 27, 1954. They separated five or six months later. The husband brought an action for divorce. The wife cross-complained. With the consent of the husband, the matter was submitted on the cross-complaint of the wife. On November 30, 1955, an interlocutory decree was entered in favor of the wife, which decree also incorporated a property settlement agreement. On November 29, 1956, the husband filed a notice of motion for entry of the final decree. The supporting affidavit of the husband averred that there had been no reconciliation between the parties and that since the interlocutory the "parties have not lived or cohabited together." This contested motion came before the trial court for hearing on December 5, 1956. The husband testified that he was an architect, with offices in Sacramento and San Francisco; that he lived in Sacramento; that his wife lived in Palo Alto; that since the entry of the interlocutory there had been no "reconciliation," nor had the parties "cohabited." On cross-examination he admitted that during the period of the interlocutory he had spent many week ends with his wife, and that on these occasions he had either stayed at a motel alone, gone back to his home in Sacramento to sleep, or sometimes spent the night or nights at his wife's house in Palo Alto. He denied sharing her bedroom, but conceded that on these occasions he had had sexual intercourse with her, finally admitting that this had occurred at least 20 times. The wife testified that after the interlocutory her husband visited her in Palo Alto every week end; that on these occasions he shared her bedroom; that they had intercourse on every visit; that during these visits they discussed going back to live together; that it was her understanding that they had become reconciled, and that she was to join him in Sacramento as soon as he could arrange things there. She further testified that she had unconditionally forgiven him for the cruelty which was the basis of the interlocutory.

The trial judge made several relevant comments about this testimony. While the wife was being cross-examined, the judge stated: "The Court: I have heard enough about it. I can't reconcile the testimony of the plaintiff here. His affidavit says that he never cohabited during the period, which, of course, is deliberate perjury. He admitted he's had intercourse with her about once a week ever since the granting of the interlocutory decree of divorce. And certainly that conduct, this Court views as being a tacit understanding of a reconciliation. At this time I will grant the motion to set aside the interlocutory decree of divorce."

When it was called to his attention that no motion to set aside the interlocutory had been made, the judge then told the attorney for the wife: "The Court: You are to prepare an order and see that it is filed, denying this man the right to secure a final decree of divorce. Then I would suggest you prepare a motion to set aside the interlocutory decree of divorce."

When the attorney for the husband asked if he could complete the cross-examination of the wife, the judge stated: "The Court: No, I have heard enough. * * * His testimony, and hers, is that they have cohabited on an average of once a week since the interlocutory decree of divorce, and nothing else—no conversations about reconciliation, or anything else; this court is of the opinion and so finds that in itself—his actions, he being the plaintiff in the original action—his actions and hers certainly indicate to this Court the proper finding [is] that there has been a reconciliation, by their conduct, and I therefore say that he is not entitled to a final decree of divorce. And when, as and if this motion is made to set aside the interlocutory, I will grant that motion, too."

On December 10, 1956, the wife, pursuant to the directions of the trial judge, noticed a motion for December 18, 1956, for an order to set aside the interlocutory and the property settlement. In the meantime, the wife's counsel, pursuant to the

directions of the trial judge and in precise accordance with the finding ordered by the trial judge at the hearing on December 5, 1956, prepared findings, conclusions and an order denying the husband's motion for entry of the final decree. These documents were signed and filed on December 17, 1956.

On the next day, December 18, 1956, the motion to set aside the interlocutory and the property settlement came on for hearing before the same judge. When informed of the nature of the motion the judge expressed the thought that he had no power to set aside the interlocutory and property settlement because they were over a year old. Counsel for the wife called the judge's attention to the fact that he had directed her to file the motion, but the judge repeated that he had no power to grant such a motion. Then the following occurred: "The Court: I denied the fact that he was entitled to a final decree of divorce at that time, but I can't see any reason now why he shouldn't have it. Mrs. Axelrod: If he was not entitled to it a week ago, your Honor, why is he entitled to it now? The Court: Because he is entitled to it, period. You may take your final decree. Mrs. Axelrod: Your Honor, there is no motion; we are not prepared to argue it. The Court: There is no argument necessary. I have said he may have his final decree. Mrs. Axelrod: We have had no notice of it. The Court: You are not entitled to notice. Mr. Lange: We have an affidavit on file, your Honor. The Court: That is sufficient for me."

On that same day, December 18, 1956, an "order" was entered in the minutes stating that the motion for a final decree had been granted. On the following day the wife petitioned the other division of this court for a writ of supersedeas and for a temporary stay to restrain the trial court from enforcing or entering that minute order. A temporary stay was granted restraining the court below from any action on the order. The wife also appealed from the order of December 18, 1956. The husband moved to dismiss that appeal on the ground that it was nonappealable. On February 13, 1957, the other division of this court vacated the stay order, denied the petition for supersedeas, and dismissed the appeal from the order.

While these matters were pending in the appellate court, and on January 31, 1957, the wife noticed a motion for costs and attorney's fees on the appeal then pending. Affidavits by both parties were filed and the motion was heard on February 6, 1957, by a different trial judge than had heard the proceedings of December 5th and 18th, 1956. At this hearing the trial judge was informed about the prior proceedings in the case, but no testimony was formally taken. The wife's counsel informed the court that her client was making $266 a month in take-home pay, while the husband was making over $1,000 a month. A memorandum of argument was filed by each party, and, on March 18, 1957, a minute book entry was made granting the wife's motion and allowing her $100 costs and $500 attorney's fees. Appeal No. 17,889, by the husband, is from this order.

In the meantime, after the entry of the orders of the other division of this court on February 13, 1957, on February 25, 1957, the judge who had directed the final decree to be granted entered his order "setting aside order denying motion for entry of final decree of divorce, and for entry of final judgment of divorce nunc pro tunc [December 19, 1956]." A final decree of divorce, *nunc pro tunc* as of December 19, 1956, was entered on this same day. The wife's appeals (No. 17,928) are from those orders.

Turning first to the wife's appeals, there are certain general principles that should be mentioned.

[1] Under the provisions of section 132 of the Civil Code the trial court, twelve months after the entry of an interlocutory decree of divorce, may enter a final decree, either on the motion of one of the parties or on its own motion. Rule 20 of the Rules for Superior Courts requires that the moving party must file an affidavit

averring, among other things, that since the interlocutory, the parties "have not become reconciled," and "have not lived or cohabited together." See also Angell v. Angell, 84 Cal.App.2d 339, 191 P.2d 54. If the motion to enter the final is not contested, and if it does not appear that any acts of the parties during the period of the interlocutory have occurred to change the relationship or status of the parties, the entry of the final decree is a mere ministerial act by the court. But where it is made to appear to the trial court that during the interlocutory events have occurred that may have changed the status or relationship of the parties, such as a condonation and a resumption of marital relations, the entry of the final decree becomes a judicial act. Lane v. Superior Court of Fresno County, 104 Cal.App. 340, 285 P. 860. In such event the court must judicially determine whether or not the parties have become reconciled, or whether the prevailing party in the divorce proceeding has condoned the acts forming the basis of the divorce. If a reconciliation is found by the court, it must deny the entry of the final decree.

[2] A reconciliation occurs when the circumstances show that the parties intended to re-unite as husband and wife (In re Estate of Abila, 32 Cal.2d 559, 197 P.2d 10; Nemer v. Nemer, 117 Cal.App.2d 35, 254 P.2d 661), and when there has been an unconditional forgiveness by the prevailing party. Angell v. Angell, 84 Cal. App.2d 339, 191 P.2d 54. Isolated acts of intercourse do not necessarily establish a reconciliation. Helbush v. Helbush, 209 Cal. 758, 290 P. 18. If, in fact, a reconciliation has occurred during the one-year period, the duration of the reconciliation is of no consequence, nor is it relevant that the parties again split up. In such a case neither is entitled to the final decree. Chester v. Chester, 76 Cal.App.2d 265, 172 P.2d 924; Lane v. Superior Court, 104 Cal. App. 340, 285 P. 860.

[3–5] At the December 5, 1956, hearing there was a discussion between the parties and the court as to whether "sexual intercourse" was synonymous with "cohabitation." That is one of the judicially recognized definitions of the term, but the term can also mean living together in the same abode. Garibaldi v. Garibaldi, 153 Cal.App.2d 170, 314 P.2d 89. The real question the trial court must determine on a motion to enter the final decree is whether or not the parties have become reconciled, since the entry of the interlocutory. On this question, the fact they have engaged in sexual intercourse is evidence of a reconciliation, but not conclusive evidence of that fact. The determination of the trial court as to whether or not a reconciliation has occurred, if the evidence or the inferences thereon are conflicting, is binding on the appellate court. Nemer v. Nemer, 117 Cal.App.2d 35, 254 P.2d 661; Ruggles v. Bailey, 15 Cal.App.2d 555, 59 P.2d 837; Slusher v. Slusher, 85 Cal.App. 2d 626, 193 P.2d 778; Small v. Small, 123 Cal.App.2d 870, 268 P.2d 63.

[6] In the instant case the evidence was, at least in part, conflicting. The wife testified that the parties had become reconciled and that she had unconditionally forgiven her husband. The husband, while admitting numerous acts of intercourse, denied that there had been a reconciliation. Thus, there certainly is evidence to support the order of December 17, 1956, denying the request to enter the final decree, and probably evidence to support the order of December 18, 1956, granting that request. The basic question presented on the appeals of the wife is whether or not the trial judge had the legal right to change his formal order of December 17, 1956, by simply declaring in his later order that the prior order had been signed "inadvertently."

[7] The rule applicable to this problem is easy to state but most difficult to apply. The rule is that the trial court has the power to correct misprisions in its decrees, or other clerical errors. This power exists not only under section 473 of the Code of Civil Procedure, but also independent of that statute. Meyer v. Porath, 113 Cal.

App.2d 808, 248 P.2d 984; In re Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508. But this power to change or modify its decrees extends only to clerical errors and does not empower the court to thus correct judicial errors. (See cases collected 29 Cal.Jur.2d § 99, p. 13.) The problem of whether a particular error is "clerical" or "judicial" is a somewhat difficult one. In Morgan v. State Bd. of Equalization, 89 Cal.App.2d 674, 682, 201 P.2d 859, 864, this court discussed the problem as follows: "From these cases, it appears that the rules to be followed in determining whether an error is clerical or judicial so that the court may have the power to correct it by amendment, are as follows: (1) No serious problem is involved where the correction is to include a matter inadvertently omitted, such as the grounds for granting a new trial, or where the error is plainly clerical. (2) The serious problem arises where the amendment is substantially different from the original order or substantially changes the rights of the parties. In such cases, if the court is purporting to correct a clerical error, it should say so, or there should be something in the record to show it. (3) Where there is conflicting evidence as to whether the error was clerical, the reviewing court will, probably accept the conclusion of the trial court. Bastajian v. Brown, supra, 19 Cal.2d 209, 120 P.2d 9. If the record shows clearly that there was no clerical error, the recital by the trial court will not be conclusive. In re Estate of Burnett, supra, 11 Cal.2d 259, 79 P.2d 89." See also Nathanson v. Murphy, 147 Cal.App.2d 462, 305 P.2d 710.

One of the leading cases on this subject is Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9. There the court was presented with the problem of whether the trial judge had the power to vacate an order which had been originally entered, and enter a different order. The court upheld the vacation there involved on the grounds that the declaration by the trial court that the order originally entered did not conform to the judgment of the court, was supported by other evidence in the record. The court stated (19 Cal.2d at page 215, 120 P.2d at page 12): "The trial court's finding upon conflicting evidence that a clerical error exists, and the nature thereof, is conclusive upon this court." The weight thus to be given the trial court's declaration of inadvertence was emphasized in the Nathanson case (147 Cal.App.2d at page 469, 305 P.2d at page 714). See also Makovsky v. Makovsky, 158 Cal.App.2d 738, 743, 323 P.2d 562. However, in both the Nathanson and Bastajian cases there was evidence supporting the trial court's declaration independent of the declaration found in the opinion. In the Nathanson case, 147 Cal.App.2d at page 470, 305 P.2d at page 715, it is said: "But in the instant case we are not dependent solely upon the statement of the trial judge that it was his intent not to allow interest. The judge's statement and the testimony of the reporter, reasonably interpreted, are to the effect that the judge not only had such intent, but expressed it at the hearing on March 26, 1953."*

In the present case, the trial judge declared in its later order that the December 17, 1956, order had been entered inadvertently. There is nothing in the record to support the finding of inadvertence except the declaration itself. The balance of the record demonstrates that at the December 5, 1956, hearing the trial judge was unequivocally of the opinion that the final decree should not be entered. At that time, the trial judge directed counsel for the wife to file a motion to set the interlocutory aside, and expressly made and directed the entry of a finding to the effect that the parties had become reconciled. That finding is supported by the evidence. The order of December 17, 1956, was in precise accord with the directions of the trial court made on December 5, 1956. Of course, the trial judge had the legal right and power to change his mind

* For another case where the record supported the trial court's declaration of inadvertence see Krouzian v. Hagopian, Cal.App., 334 P.2d 285.

before the entry of the order, and to reweigh the evidence. But the only "evidence" that the trial judge did so is his declaration in his order that the December 17, 1956, order had been entered "inadvertently." When this change of mind occurred does not appear. The record shows that on December 5, 1956, the trial judge believed and declared and found that the final decree should not be entered because the parties had become reconciled. The December 17, 1956, order so provided. There is nothing in the record to show the state of mind of the trial judge on December 17, 1956, except the order itself. There is certainly nothing in the record to show that a change of mind had occurred on or prior to December 17, 1956. We do know that by December 18, 1956, the trial judge had changed his mind. Now he believed the motion to enter the final decree should be granted. On that date he no longer believed that the husband had committed perjury in his affidavit by declaring that the parties had not become reconciled. He no longer believed that the numerous acts of intercourse constituted evidence of reconciliation. He now believed, and so declared, that the parties had not become reconciled. When did this change of mind occur? We do not know. We do know the state of the court's mind on December 5, 1956. We know that the order of December 17, 1956, correctly reflected that state of mind. Prior to December 18, 1956, the trial judge gave no indication that he had changed his mind. On December 18, 1956, he had changed his mind and declared that the order of December 17, 1956, had been entered "inadvertently." There can be no doubt at all that, if the December 17, 1956, order correctly reflected the trial judge's views, and that later the trial judge changed his mind on how the evidence should be evaluated, this would be an attempt to correct a judicial error and was not the correction of a mere clerical one. Egan v. Egan, 90 Cal. 15, 27 P. 22; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Maxwell v. Perkins, 116 Cal.App.2d 752, 255 P.2d 10. On the other hand, if prior to December 17, 1956, the trial judge had re-evaluated the evidence and had come to the conclusion that no reconciliation had occurred, as he had the legal right to do, then the December 17, 1956, order was entered "inadvertently" and the correction of December 18, 1956, was the correction of a clerical error. Carter v. Shinsako, 42 Cal.App.2d 9, 108 P.2d 27. Thus the question narrows down to this. A hearing is had. At that hearing the trial judge not only indicates how he has weighed the evidence, but expressly makes a finding on the vital issue and makes his ruling. The formal order reflecting those views is entered. Then, on the next day, the judge enters a contrary order, declaring that the earlier order had been entered inadvertently. There is nothing in the record to support this declaration of inadvertence except the declaration of the court itself. Everything else in the record points to the fact that the December 17, 1956, order correctly reflected the then views of the trial court. Can the judge, by merely declaring that a prior ruling was entered inadvertently, set that ruling aside and enter a different ruling? Will the appellate court, based on such a declaration alone conclusively presume that the change in mind occurred prior to the entry of the first order? We think not. The sanctity of judicial pronouncements cannot be made to depend on such insecure foundations. Once made, a judicial pronouncement cannot be set aside except as provided by law. Certainly it cannot be set aside by the judge who pronounced it simply changing his mind on the law or the facts. If a prior judgment or order is to be set aside there must be something more in the record to support the order than the mere declaration of the trial judge that the prior order was entered inadvertently. The court had no legal power to correct a judicial error in this fashion. The judge had no legal power to change his mind on the proper interpretation of the evidence after he had made a judicial ruling on that question. In our opinion, before a formal ruling can be set aside and a contrary ruling made

on the ground of inadvertence, there must appear in the record something to support the finding of inadvertence other than the declaration of the court to this effect. The record here discloses no such showing. We are of the opinion that the trial court was attempting to correct in this fashion a judicial ruling and not trying to correct a mere clerical error. This it had no power to do. The orders appealed from must be reversed.

[8] We turn now to a consideration of the husband's appeal. To understand his contentions several dates must be emphasized:

December 18, 1956—the trial judge enters an order to the effect that the motion for the entry of the final decree should be granted.

December 19, 1956—the wife applies to the appellate court for a writ of supersedeas and secures a temporary stay restraining the enforcement of the order. The wife also appealed from the order of December 18, 1956.

January 31, 1957—the wife noticed a motion for costs and attorney's fees on that appeal.

February 6, 1957—motion heard by court.

February 13, 1957—the appellate court denied supersedeas, dissolved the stay order, and dismissed the appeal.

February 25, 1957—orders entered from which the wife has successfully appealed.

February 27, 1957—wife files notice of appeal from those orders.

March 18, 1957—court enters order allowing costs on appeal.

The husband contends that the court had no authority to entertain the motion for costs and fees, even though the appeal was then pending, because of the stay order issued on December 19, 1956, in connection with the petition for a writ of supersedeas. That stay order provided: "It Is Hereby Ordered that the Superior Court of the City and County of San Francisco, State of California, and the Clerk of said Court desist and refrain from taking any further proceedings therein and from enforcing or attempting to enforce or enter said order, and that all proceedings of said Superior Court on said order be and the same are hereby stayed until further order of this Court * * *"

This stay remained in effect until February 13, 1957, when it was vacated. The wife filed her motion for costs and fees on January 31, 1957, and the motion was heard on February 6, 1957. On those dates the stay order was still in effect. It is the theory of the husband that the stay order restrained the trial court from taking any action in the proceeding relating to the application for the final decree, and therefore it had no power to entertain the motion for costs and fees.

The problem thus presented depends, obviously, upon the proper interpretation of the stay order. Properly interpreted we do not think that the stay order prohibited any and all action by the trial court in connection with the proceeding. It was issued in connection with an application for supersedeas which was aimed at preventing the entry of the final decree. In our opinion that is what the stay order restrains. It is true that the stay order states that it restrains the trial court from "any further proceedings" in the matter, but that language must be read in the light of the balance of the order which relates only to the entry of the final judgment. We cannot assume that the appellate court, by its stay order, was intending to restrain proceedings that were in no way connected with the entry of the final decree. We cannot assume that the appellate court, to protect its jurisdiction while it considered that application, intended to do anything more than restrain action that might affect that jurisdiction. Obviously, there was no necessity in order to protect its jurisdiction for the appellate court to restrain a purely collateral proceeding such as a motion for costs and fees. We think that it did not do so.

[9] The husband next contends that, by the terms of the property settlement agreement incorporated into the interlocutory decree, the wife waived her rights to costs and fees on appeal.

[10–12] Of course, the trial court, in a divorce proceeding, normally has the power to grant costs and fees, this power continuing during the pendency of an appeal. § 137, Civ.Code; McCahan v. McCahan, 47 Cal.App. 173, 190 P. 458. It is equally well settled, however, that the wife may, in a settlement agreement, waive her future right to costs and fees. Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Viera v. Viera, 107 Cal.App.2d 181, 236 P.2d 632; Spreckels v. Spreckels, 111 Cal.App.2d 529, 244 P.2d 917. If a proper waiver has been made the trial court is without legal authority to make an award of costs and fees. Patton v. Patton, 32 Cal.2d 520, 196 P.2d 909; Grolla v. Grolla, 151 Cal.App.2d 253, 311 P.2d 547.

The husband contends that in the property settlement here involved the wife waived her right to such costs and fees. In this respect the husband relies on several provisions of the agreement, the strongest in his favor being Paragraph IV, which reads as follows: "Second party shall pay to First Party the sum of $600.00 at the rate of $100.00 per month commencing November 22, 1955, in full settlement and satisfaction of her rights in and to any property that is now or may hereinafter be claimed to be community property and in full satisfaction of her past, present and future rights to alimony, support or maintenance, it being understood that such payment, is intended to forever settle and adjust the property rights and financial obligations of each of the parties hereto with each other in all respects."

While this provision, in our opinion, does not amount to a clearcut waiver of costs and fees on appeal, the wife concedes that, for the purposes of this appeal, if the property settlement is legally effective, the trial court had no power to award costs and fees on appeal. It is her theory that the evidence shows a reconciliation, and that such reconciliation normally effects a rescission of the property settlement agreement. Lamb v. Lamb, 131 Cal.App.2d 489, 280 P.2d 793; Harrold v. Harrold, 100 Cal. App.2d 601, 224 P.2d 66; Lloyd Corporation, Limited v. Industrial Accident Commission, 61 Cal.App.2d 275, 142 P.2d 754.

Assuming that the property settlement agreement was a waiver of the right to costs and fees, as the wife concedes (although we are not certain it is), the question then remains whether, under the facts here involved, the wife was entitled to such an award. It must be remembered that, according to the order of December 17, 1956, the husband had been denied the right to a final decree because there had been a reconciliation. If there was a reconciliation the property settlement including, of course, the waiver, was set aside. The trial court on December 18, 1956, ordered the final decree to be entered. The wife appealed, and, as we have already held in this opinion, the appeal is meritorious. But regardless of the merits of that appeal, it is obvious that whether the property settlement is still effective (and therefore whether the claimed waiver is effective) depends upon which order of the trial court is held to be effective. The wife is challenging one of the orders, contending that because of the reconciliation, the property settlement, and therefore the waiver, is no longer effective. When the wife in good faith challenges the continued existence of the property settlement, or its validity, regardless of whether she is right or wrong, where she is unable to finance the appeal, she must have suit money to prosecute the appeal or she will lose her right to challenge the continued existence of the agreement.

The problem is essentially similar to the one presented in Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715. There the wife brought an action to set aside a property settlement agreement on the ground of fraud. In the property settlement she had waived her right to costs and fees. She

was held entitled to costs and fees on appeal in spite of such waiver, because she was, in good faith, challenging the continued existence of the agreement and waiver. That is precisely what is being done in the present case, and for similar reasons it should be held that the award of such costs and fees was proper. See also Vishner v. Vishner, 125 Cal.App.2d 667, 271 P.2d 68.

[13, 14] It is also urged by the husband that the evidence does not support the challenged award. This contention is without merit. The wife's affidavit in support of her motion avers her inability to pay such costs and the ability of the husband to pay them. At the hearing, although evidence was not formally produced, counsel for the wife stated to the court that his client was earning $266 a month and had two children by a prior marriage to support, and that the husband was earning in excess of $1,000 a month. The husband did not see fit to challenge these statements. He contends that he was precluded from doing so, but the record shows that he elected not to produce any evidence on the issue. While the practice is to award such costs and fees only after a hearing (1 Armstrong, Family Law, 301), and such fees can only be awarded after the contesting party has had an opportunity to be heard (Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793), there can be no doubt of the propriety of making such an award based upon the showing made in the affidavits alone, at least where, as here, the counsel for the contesting party told the court that he had decided "to let well enough alone." Armstrong v. Armstrong, 81 Cal.App.2d 322, 183 P.2d 905; Peyre v. Peyre, 79 Cal. 336, 21 P. 838; see discussion 16 Cal.Jur.2d 476, § 185.

In No. 17,928 the orders appealed from are reversed.

In No. 17,889 the order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

167 Cal.App.2d 251

K. KROUZIAN, Plaintiff and Appellant,

v.

Aram L. HAGOPIAN, Administrator of the Estate of Sol Zaven Hagopian, Alias, Deceased, Defendant and Respondent.

No. 17870.

District Court of Appeal, First District, Division 1, California.

Jan. 21, 1959.

Action for rent. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered order denying plaintiff's motion to vacate a previous judgment and to enter a different judgment, and the plaintiff appealed. The District Court of Appeal, Bray, J., held that where findings found the facts to be practically as alleged in the first cause of action and judgment was entered in favor of defendant on that cause of action, there was such inadvertence and mistake as would permit the trial court on its own motion to vacate the judgment and enter a different judgment.

Order affirmed.

1. Judgment ⇐381

Where findings found the facts to be practically as alleged in the first cause of action and judgment was entered in favor of defendant on that cause of action, there was such inadvertence and mistake as would permit the trial court on its own motion to vacate the judgment and enter a different judgment. West's Ann.Code Civ. Proc. § 473.

2. Judgment ⇐316

Trial court has the power, regardless of the lapse of time, to correct judgments and orders on its motion so as to make them conform to the judicial decision actually made; this power exists independently of statute. West's Ann.Code Civ.Proc. § 473.

3. Judgment ⇐304

The trial court has no power to correct a judicial mistake.

Claude D. Perasso, San Francisco, for appellant.

Gately & Gately, Nubar Tashjian, Ralph Bancroft, San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from an order denying his motion to vacate a previous judgment and to enter a different judgment.

[1] Question Presented.

Were the previous findings of fact, conclusions of law and judgment signed and entered through the trial court's inadvertence and mistake?

Record.

After a trial on April 26, 1957, the trial judge on May 8 signed findings of fact and conclusions of law, and on May 9 signed and had entered a judgment in favor of plaintiff for $200 (based on plaintiff's second cause of action), in favor of defendant on plaintiff's first cause of action, and granting defendant a nonsuit on plaintiff's third cause of action. Thereafter plaintiff moved to set aside said judgment and to substitute a different judgment therefor on the ground that the findings do not support the judgment, as the findings find in effect that all of the allegations of plaintiff's first and second causes of action are true, yet the conclusions of law and judgment state that defendant is entitled to judgment against plaintiff on the first cause of action.[1] On June 5[2] a minute order signed by the trial judge was entered which stated: "Order of the Court in the above-entitled matter. It appearing to the Court that the Findings of Fact and Conclusions of Law heretofore signed on May 8, 1957, and the Judgment herein signed May 9, 1957, were signed and entered herein by said Court through the said Court's own inadvertence, improvidence and mistake and that the said Findings of Fact and Conclusions of Law and said Judgment do not conform to or represent the views of the Court heretofore expressed and the intention of the said Court, now on said Court's own motion the signing and entry of said Findings of Fact and Conclusions of Law and said Judgment are ordered vacated and set aside and counsel for the defendant is ordered and directed to prepare and submit Findings of Fact and Conclusions of Law and a form of Judgment consistent with the Court's views heretofore expressed. It is further ordered that the motion to vacate judgment and enter a different judgment filed by plaintiff herein be and the same is hereby denied."

Inadvertence and Mistake.

[2, 3] It is obvious by comparing the findings relating to the first cause of action with the conclusions of law and judgment that a mistake was made in either the findings or the conclusions of law and judgment as to that cause of action. The findings found the facts to be practically as alleged in that cause of action.[3] Thus either the findings on that first cause of action were correct and the conclusions and judgment were wrong, or vice versa. The trial judge said in the minute order that the findings of fact and conclusions of law and judgment were not those expressed by her. It clearly appears that they could not have been as no judge would intentionally sign such contradictory documents. It is well settled that a court has the power, regardless of the lapse of time, to correct judgments and orders on its own motion

1. The motion as made was limited to correcting the findings and judgment as to the first cause of action only for the reason that the findings found that all of the allegations of the first and second causes of action in plaintiff's complaint were true and yet the judgment was that defendant have judgment on the first cause of action.

2. The motion was noticed for May 28. The record fails to show what, if anything, happened that day. Plaintiff contends that the motion was granted. There is no evidence or record to that effect.

3. The difference between the two causes of action is that the first one sought rent for the period when plaintiff alleged that his property was occupied by the decedent, and the second sought rent for the period of alleged occupancy by the defendant administrator.

so as to make them conform to the judicial decision actually made. This power exists independently of statute. Meyer v. Porath, 1952, 113 Cal.App.2d 808, 811, 248 P.2d 984; Culligan v. Leider, 65 Cal.App.2d 51, 149 P.2d 894; Smith v. Smith, 157 Cal.App.2d 658, 661, 321 P.2d 886. Or as stated in Minardi v. Collopy, 1957, 49 Cal.2d 348, 352, 316 P.2d 952, 955: "It is primarily for the trial judge to determine whether a decision misstated his real intention and whether the judgment as signed was an inadvertence. The trial court, independently of statute, has the power to correct its mistakes and amend its orders which are not the result of an exercise of judicial discretion." See Bastajian v. Brown, 1941, 19 Cal.2d 209, 120 P.2d 9, holding that a court can vacate and correct its judgment both under section 473, Code of Civl Procedure, and its inherent power, whenever the judgment has been made inadvertently or by mistake. See Morgan v. State Board of Equalization, 1949, 89 Cal.App.2d 674, 677, 201 P.2d 859, holding that the trial court may correct a clerical error without notice and on ex parte application. The court, of course, has no power to correct a judicial mistake. McKannay v. McKannay, 68 Cal.App. 709, 230 P. 218; Stevens v. Superior Court, 160 Cal.App.2d 264, 325 P.2d 204. But such is not the case here. As stated before, a mere comparison of the findings with the conclusions and judgment show the inadvertence and mistake. It well corroborates the judge's statement in the minute order. There is nothing in the record to the contrary. For that reason we deem it unnecessary to determine whether a trial court's statement of inadvertence and mistake, unsupported by anything else in the record, is sufficient to prove that a judgment as signed was not the intended judgment.[4]

As the findings, conclusions of law and judgment as to the first cause of action were inadvertently signed and when corrected as originally intended will be consistent rather than contradictory, as now, the court properly denied plaintiff's motion to enter a judgment which would be inconsistent with the findings as intended.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

167 Cal.App.2d 340

Raymond M. HEMPHILL, Petitioner and Appellant,

v.

CONTRACTORS' STATE LICENSE BOARD of the State of California, and E. W. Ford, Registrar and Executive Secretary, Defendants and Respondents.

Civ. 23271.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1959.

Mandamus proceeding brought to compel board to restore petitioner's contractor's license. The Superior Court of Los Angeles County, Bayard Rhone, J., denied a writ of mandate, and petitioner appealed. The District Court of Appeal, Vallée, J., held that evidence supported finding that licensed contractor had breached fiduciary duty with intent of making a secret and undisclosed profit by submitting false statements to contractee for materials and services and by permitting subcontractors to deviate from plans and specifications.

Affirmed.

4. In another case this day decided, Nacht v. Nacht, Cal.App., 334 P.2d 275, that very question was in issue and decided.

1. Stipulations ⇐18(7)

Having stipulated before hearing officer that he had been acting as a contractor, licensee could not successfully urge, in mandamus proceeding brought to compel license board to restore his contractor's license, that he might be exempt from disciplinary proceedings on theory that he had acted as an employee rather than as a contractor in transactions in question. West's Ann.Bus. & Prof.Code, §§ 7108, 7109, 7113, 7116.

2. Mandamus ⇐187(9)

On appeal from judgment denying a writ of mandate to compel restoration of petitioner's contractor's license, question was solely whether evidence, viewed in light most favorable to respondents, sustained finding of trial court. West's Ann. Bus. & Prof.Code, §§ 7000 et seq., 7053.

3. Licenses ⇐38

In disciplinary proceeding, evidence supported finding that licensed contractor had breached fiduciary duty with intent of making a secret and undisclosed profit by submitting false statements to contractee for materials and services and by permitting subcontractors to deviate from plans and specifications. West's Ann.Bus. & Prof.Code, §§ 7108, 7109, 7113, 7116.

Sweeney, Stearns & Foye, Manhattan Beach, for appellant.

Edmund G. Brown, Atty. Gen., and Miles J. Rubin, Deputy Atty. Gen., for respondents.

VALLÉE, Justice.

Appeal by petitioner, Raymond M. Hemphill, from a judgment denying a writ of mandate to compel the Contractors' State License Board to restore petitioner's contractor's license.

Since November 1953, petitioner has been licensed by the board as a general building contractor. On May 24, 1956 an accusation was filed by an investigator of the board wherein Hemphill was charged with having improperly diverted funds received under the terms of a written contract for the construction of a single family residence and garage; departing from plans and specifications in seven instances to the prejudice of the owners, Robert H. and Florence Rosenberg; failing to complete construction for the price stated in the contract; and presenting false statements to Mr. Rosenberg for labor and materials in violation of sections 7108, 7109, 7113 and 7116 of the Business and Professions Code.

A hearing was conducted by a hearing officer, after which he found that Hemphill had violated section 7116 [1] in that he breached his fiduciary duty to the owner with the intent of making a secret and undisclosed profit by submitting false statements for materials and services rendered and by permitting subcontractors to wilfully deviate from the plans and specifications to the material prejudice of the owner. The hearing officer recommeded revocation of Hemphill's license and his recommendation was adopted by the board.

It was stipulated that at all times mentioned in the accusation Hemphill was acting as and in the capacity of a contractor under the provisions of chapter 9, division 3, of the Business and Professions Code.

Hemphill petitioned the superior court for a writ of mandate. The court found that the decision and order of the board are supported by the weight of the evidence. Judgment followed denying the writ. Hemphill appeals.

[1] In his brief Hemphill concedes he was acting as a contractor in his relationship with the Rosenbergs. As pointed out, he so stipulated before the hearing officer and the latter so found. Hemphill takes the inconsistent position that he might be exempt from disciplinary proceedings on the theory he acted as an em-

1. Section 7116: "The doing of any wilful or fraudulent act by the licensee as a contractor in consequence of which another is substantially injured constitutes a cause for disciplinary action."

ployee of the Rosenbergs rather than as a contractor, and therefore the board was without jurisdiction to discipline him. See Bus. & Prof.Code, § 7053. In view of the stipulation, the point is without merit.

[2] The question is solely whether the evidence, viewed in the light most favorable to respondents, sustains the finding of the trial court. Manning v. Watson, 108 Cal.App.2d 705, 712, 239 P.2d 688.

The written contract entered into between Hemphill and the Rosenbergs provided that bids had been obtained from subcontractors as per plans and specifications; Hemphill would act as owners' agent and supervisor of construction with diligence until completion; the owners would pay all subcontractor and material supply bills approved by Hemphill; and the total cost of the bids and supervision was not to exceed $23,620.44.

Rosenberg testified that at the time the contract was executed it was orally agreed that Hemphill would supervise construction for $1,200, payable $100 a week. He stated Hemphill, who drafted the contract, told him he did not want to set this out in the writing because he did not want the subcontractors to know he was doing the job under a supervisory arrangement as they would not approve of it.

Construction commenced about January 28, 1955. Hemphill hired the subcontractors and controlled the work, and for a period of 12 weeks from January 28 to April 23 received $100 a week from Rosenberg. Hemphill paid the subcontractors' bills and obtained waivers of liens for material and labor furnished. Hemphill never presented the bills to Rosenberg until after his discharge when demand was made on him for them by Rosenberg. Instead, he prepared and submitted to Rosenberg 11 written statements itemizing the cost of labor and materials furnished by the subcontractors. He admitted that a number of items in the statements were in excess of the amounts he had actually paid to the subcontractors. They were as follows:

Type of work:	Amount claimed by Hemphill:	Amount paid by Rosenberg:	Amount paid subcontractors by Hemphill:
Rough carpentry	$1,775.00	$1,775.00	$1,390.00
Sewer work	300.00	300.00	234.00
Metal work	214.00	214.00	107.50
Roof	960.00	960.00	810.00
Sliding door	241.00	241.00	172.68
Cabinets	1,045.00	1,045.00	855.95
Garage door	75.00	75.00	58.50
Hardwood Flooring	503.00	503.00	471.00

According to Hemphill his billing practice was to determine in his own mind when he was going to be billed by the subcontractors for the work then in progress, refer back to his original cost breakdown and bill Rosenberg according to his estimate of the percentage of work done and the estimated cost in the breakdown, so that he would receive the money from Rosenberg in advance of billings by the subcontractors. After receipt of bills from subcontractors for completed work and materials furnished, Hemphill gave no credits and made no adjustments on any of the later statements to Rosenberg, with one minor exception in which he credited Rosenberg with $11.37 as an "adjustment on Med. Cab." which he had billed at $73.37 to Rosenberg the previous week.

In reliance on the statements, Rosenberg gave Hemphill checks for the amounts shown thereon to be due. On June 20,

at the request of Rosenberg, Hemphill had a cost breakdown prepared for Rosenberg to submit to a bank in applying for a loan to complete construction. It contained items under the headings "Payments to Sub-Contractors as of June 20, 1955 * * *" and "Estimated Amount Needed to Complete," reflecting the same false figures (except for a sliding door) as appeared in the statements previously submitted to Rosenberg. Hemphill admitted the figures were not correct but stated that he put them down anyhow with knowledge that the document would be submitted to the bank and that the bank would probably rely thereon.

At no time during construction did Rosenberg learn of the overcharges in the statements, and he denied asking Hemphill to falsify the figures. Rosenberg discharged Hemphill on June 27 and had the construction completed at an expenditure of $2,244.10 more than the contract price. As of the date of discharge Rosenberg had paid Hemphill $20,204.89, including the $1,200 fee, and Hemphill had paid the subcontractors about $18,300.19. Thereafter Hemphill disbursed an additional sum of $514.62 which paid up all expenses for which he had been billed to the date of his discharge. He testified he made a profit of $189.06 in addition to his $1,200 fee as supervisor. There is no evidence in the record of an agreement that Hemphill was to receive a profit over and above the $1,200 fee, other than his testimony to that effect. Hemphill told Rosenberg any savings made during construction would either be refunded or credited against the estimated cost.

Hemphill's claim that he could have completed construction, including correction of the deviations, for the original contract price of $23,620.44 if he had not been discharged is contrary to the statement and figures attached to the cost breakdown sheet on which he had indicated the "Estimated Amount Needed To Complete as of June 20, 1955" was "$5,250.59."

The plans and specifications called for a side porch with bases thereon to support wooden pilasters on each side of a window by the porch entrance. Although there were no specific figures on the plans showing the dimensions of the porch, it was drawn to scale. As scaled by Rosenberg and a building inspector for the city of Palos Verdes Estates it was over 8 feet in length. Rosenberg testified that instead of an 8-foot porch, a 3-foot stoop was installed and no bases were provided to support the pilasters so that they appeared to be hanging in air. Testimony of the building inspector and an investigator for the board was to the same effect, and photographs admitted in evidence show the installation and its awkward appearance. Hemphill admitted he had installed a stoop-type porch but stated he discussed it with Rosenberg and the subcontractor before the work was done and Rosenberg was happy about the way it was going to be. A reading of his testimony discloses, however, that the discussion was limited to the direction in which the steps should lead, since they were not shown on the plan, and the dimensions of the porch were not given. Hemphill also admitted discussing with the cement contractor the cost of making the correction, and the extension of the porch to 8 feet at an estimated cost of $25 was listed by him among items to be corrected. Rosenberg testified that he could get no satisfaction from Hemphill in correcting the work; Hemphill said the stoop was all right the way it was installed; and after Hemphill's discharge he had the stoop converted into a porch at the cost of $25.

The plans and specifications also called for a full concrete foundation of a minimum height of 18 inches on the interior walls. An investigator for the board testified the walls were dwarfed and wooden crippling was substituted for some of the solid walls of cement. Hemphill admitted the walls had been crippled but testified that when he talked to Rosenberg about making the change he told him (Rosenberg authorized the change. Rosenberg save time and a few dollars and Rosenberg authorized the change. Rosenberg

testified he did not authorize the crippling; he specifically told Hemphill he had to comply with the plans and specifications and he was assured by Hemphill that the walls would all be solid concrete. There is no evidence that Hemphill ever offered to correct the work.

[3] We conclude that the board had jurisdiction to discipline Hemphill and that the evidence amply supports the finding that he breached his fiduciary duty with the intent of making a secret and undisclosed profit by submitting false statements to Rosenberg for materials and services and by permitting the subcontractors to deviate from the plans and specifications.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 313

M. B. HOLDER and Dorothy Holder, Husband and Wife, Plaintiffs and Appellants,

v.

Harold A. WILLIAMS, also known as H. A. Williams, et ux., Defendants and Respondents.

Civ. 5788.

District Court of Appeal, Fourth District, California.

Jan. 22, 1959.

Suit to establish plaintiffs' equitable rights in certain property, to establish a trust, for an accounting, and for recovery of sum by compulsory sale of property and distribution of proceeds. From a judgment of the Superior Court of San Bernardino County, A. D. Mitchell, J., plaintiffs appealed. The District Court of Appeal, Shepard, J., held that lien of resulting trust had attached as of date when plaintiffs paid purchase price for land conveyed to defendants and had been converted into an equitable lien on date when defendants executed memorandum, reciting that if plaintiffs were unable to pay balance still owing under contract for construction of house on property defendants could sell property and return total amount paid under contract to plaintiffs.

Modified and affirmed.

1. Liens ⇐7

An "equity lien" is much favored by courts to do justice and prevent unfair results.

2. Liens ⇐22

Evidence supported judgment declaring equitable lien for amount paid by plaintiffs under contract by defendant to construct house for plaintiffs.

3. Novation ⇐3

A novation extinguishes old obligation.

4. Appeal and Error ⇐1009(1)

When, upon reliable evidence, court finds that parties intended to create equitable lien, such finding should not be disturbed.

5. Liens ⇐7

An equitable lien is not judicially recognized until a judgment is rendered declaring its existence, but lien relates to time it was created by conduct of parties.

6. Liens ⇐7

Lien of resulting trust attached as of date when plaintiffs paid purchase price for land conveyed to defendants, and lien was converted into an equitable lien on date when defendants executed memorandum, reciting that if plaintiffs were unable to pay balance still owing under contract for construction of house defendants could sell property and return total amount paid under contract to plaintiffs, and such lien continued thereafter to be impressed upon property, subject to enforcement by foreclosure, and homestead, filed a few days prior to rendition of judgment judicially recogniz-

ing equitable lien, would not take precedence over plaintiffs' lien. West's Ann.Civ. Code, §§ 853, 2224.

Busch & Maroney, Donald E. Maroney, Upland, for appellants.

Tomlinson & Tomlinson, John T. Tomlinson, Jr., Chino, for respondents.

SHEPARD, Justice.

Plaintiffs sued to establish their equitable rights in certain residence property in Upland, California, to establish a trust, for an accounting, and recovery of $7,900 by compulsory sale of the property and distribution of the proceeds.

After a full trial, the court found as to matters here material that on April 18, 1954, plaintiffs, as owners, and defendant H. A. Williams as contractor, entered into a contract for construction of a house on said property; that for the sole purpose of facilitating construction said defendant would hold title in his name and would procure the necessary construction loan in his own name; that by May 4, 1954, plaintiffs had paid to said defendant $2,600, being the total purchase price of the lot of land involved, and on the same day said defendant purchased said lot in his own and his wife's name as grantees; that on May 6, 1954, defendants secured a construction loan on said lot in the amount of $10,000; that thereafter, in August and September, 1954, plaintiffs paid an additional $5,300; that on September 11, 1954, Mr. Holder and Mr. Williams, each acting on behalf of the community of himself and his wife, executed a memorandum reciting what had occurred and stating that if Holder was unable to pay within 30 days the balance of $3,200 still owing to Williams, Williams "may then sell" the property; that $7,900, the total amount paid by Holder, would then be returned to Holder; that defendants before April, 1955, advised plaintiffs that they could sell the house much better if they were using it as a residence; that defendants then sold their own home and moved into said Upland house, which is the subject of this action, without the consent or permission of plaintiffs; that on April 28, 1955, defendants secured a new loan whereby the total encumbrance against the property was increased to the sum of $14,500, this also being done without the knowledge or consent of the plaintiffs; that defendants then constructed on said premises without plaintiffs' consent a heated swimming pool; that on May 24, 1955, defendant Harold Williams told plaintiffs that plaintiffs had no interest in the house and defendants would sell same when defendants were ready; that the property has not been sold; that defendants were and each of them was at all times acting on behalf of their community interest; that defendants are indebted to plaintiffs in the sum of $7,900; that plaintiffs' charges of fraud against defendants are untrue; and that the essential allegations of defendants' cross-complaint are untrue.

Judgment was entered for a money judgment in the sum of $7,900 in favor of plaintiffs and against defendants, and an equitable lien for said sum with interest at 7% from November 1, 1954 until paid was impressed on the real property involved. Plaintiffs appeal.

Plaintiffs contend that the trial court ought to have declared that defendants hold the property in trust, ordered the same sold and the proceeds of the sale distributed $7,900, interest and costs to plaintiffs, and the balance, if any, to defendants.

[1] Resulting trusts, constructive trusts and equitable liens are very much akin to each other, and their basic purposes to identify and impress upon certain property the beneficial rights that have arisen in an innocent party who in some way contributed to the acquisition, protection or improvement of that property are, in general, the same. We use, however, different names to indicate the different types of situation, elements of approach and kind of relief available. The basic definition and rule of equity relating to resulting and constructive trusts has been crystallized into statutory form in California.

"When a transfer of real property is made to one person, and the consider-

ation therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Civil Code, Sec. 853.

"Involuntary Trust Resulting From Negligence, Etc. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civil Code, Sec. 2224.

Many of the liens formerly cognizable only as "equity liens" have also been incorporated into statutory form but, in the main, the "equity lien" is still nonstatutory. It is much favored by the courts to do justice and prevent unfair results. Mannon v. Pesula, 59 Cal.App.2d 597, 606(5), 139 P.2d 336. In Nau v. Santa Ana Sugar Co., 79 Cal.App. 685, 691(1), 250 P. 705, 707, the court quotes the general rule on equitable liens from Pomeroy's Equity Jurisprudence:

"'Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice.'"

[2, 3] The facts presented in the case at bar would clearly have supported a judgment declaring a resulting trust. However, they are also sufficient to support a judgment declaring an equitable lien. It appears from an examination of the evidence and the court's findings that the court believed the document signed on September 11, 1954, wherein it was recited that if the balance of $3,200 shall not be paid in 30 days defendants might sell, constituted a novation and that it was the intention of the parties that plaintiffs should have an equitable lien on the property as security for the repayment to them of said $7,900. This was not unreasonable in view of the difficulties of selling for an adequate price a home in the $25,000 class. When such a novation takes place it extinguishes the old obligation. Beckwith v. Sheldon, 165 Cal. 319, 324, 131 P. 1049.

[4] When upon reliable evidence the court finds that the parties intended to create an equitable lien, such finding should not be disturbed. In re Estate of Henshaw, 68 Cal.App.2d 627, 636(4), 157 P.2d 390; Grant v. De Otte, 122 Cal.App.2d 724, 729 (3), 265 P.2d 952.

[5, 6] Plaintiffs have included in their final brief a reference to the filing of a homestead by one of the defendants a few days before the judgment was rendered in this cause, and appear to be somewhat fearful that the homestead might precede the plaintiffs' equitable lien. This is not the rule.

"Although an equitable lien is not judicially recognized until a judgment is rendered declaring its existence, the lien relates to the time it was created by the conduct of the parties." Hise v. Superior Court, 21 Cal.2d 614, 627(8), 134 P.2d 748, 755.

Therefore, under the findings of the court, the equitable lien of the resulting trust attached as of the date of the purchase of the property, was converted into an equitable lien as of September 11, 1954, and continued to be impressed upon the property and still is so impressed, subject to enforcement by foreclosure.

Paragraph 2 of the judgment herein is hereby amended to add an additional sentence at the end thereof, reading as follows: "Said lien is impressed upon the property from and after September 11, 1954." As so modified, the judgment is affirmed. Each party will bear his own costs on appeal.

MUSSELL, Acting P. J., concurs.

Albert L. VALLERGA and Mary Azar, Petitioners and Appellants,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL and Russell S. Munro, Director of Alcoholic Beverage Control, Respondents.

Civ. 18184.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1959.

As Amended Jan. 28, 1959.

Mandamus proceeding brought to compel department to annul its revocation order and to reinstate petitioners' on-sale liquor license. The Superior Court, Alameda County, Donald K. Quayle, J., denied the relief sought, and an appeal was taken. The District Court of Appeal, Peters, P. J., held that liquor license may not be suspended or revoked simply because homosexuals or sexual perverts patronize bar, and that before such deprivation can occur there must be improper, illegal, disgusting or immoral acts committed on premises to knowledge of licensee.

Judgment reversed with directions.

1. Intoxicating Liquors ⇐106(2)

Under Business and Professions Code section, liquor license may not be suspended or revoked simply because homosexuals or sexual perverts patronize bar, and before such deprivation can occur there must be improper, illegal, disgusting or immoral acts committed on premises to knowledge of licensee. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 24200(e).

2. Mandamus ⇐15, 187(9)

Notwithstanding fact that department, believing that license could be revoked merely because bar was a hangout for homosexuals, had not charged that immoral, improper, disgusting or illegal acts had been committed on the premises, it could properly urge, as ground for upholding revocation, that there was substantial evidence of such conduct; and if record showed such conduct, judgment denying writ of mandate to compel department to annul its order and reinstate license would be affirmed. West's Ann.Bus. & Prof. Code, § 24200(e).

3. Intoxicating Liquors ⇐106(2)

That women had danced with and kissed other women on licensed premises was not necessarily such "offensive, illegal or improper conduct" as would justify revocation of license. West's Ann.Bus. & Prof.Code, § 24200(e).

See publication Words and Phrases, for other judicial constructions and definitions of "Offensive, Illegal or Improper Conduct".

Golden & Stefan, J. Bruce Fratis, Oakland, for appellants.

Morris Lowenthal, Juliet Lowenthal, Karl D. Lyon, San Francisco, amici curiae on behalf of appellants.

Edmund G. Brown, Atty. Gen., Wiley W. Manuel, Deputy Atty. Gen., for respondents.

PETERS, Presiding Justice.

The Department of Alcoholic Beverage Control revoked the general on-sale liquor license of Albert Vallerga and Mary Azar. The Alcoholic Beverage Control Appeals Board affirmed the revocation. This appeal is taken from the judgment of the Superior Court denying a writ of mandate to compel the Department to annul its order and to reinstate the license.

In June of 1956 the Department filed its First Amended Accusation charging the licensees with the violation of section 24200(e) of the Business and Professions Code, in that "From on or about September 7, 1955 until the date hereof [June 1, 1956], the portions of the premises of the licensees, where the activities permitted by the license are conducted, have been and still are a resort for sexual perverts, to wit: Homosexuals."

A hearing was had on this accusation. The hearing officer recommended a revo-

cation. The Department adopted this recommendation, and ordered a revocation of the license. The Department found that there had been no prior formal accusations made against the licensees, and then found that the charge contained in the accusation, quoting it as charged, was true. It was also found that Vallerga, one of the licensees, admitted at the hearing that the premises "were established as a resort for lesbians and homosexuals, and that he was aware that said premises were a hangout for homosexuals." For these reasons the Department determined that "the continuance of the said license would be contrary to public welfare and morals within the meaning of said words as used in Article XX, Section 22, of the California Constitution."

The licensees appealed. The Appeals Board, without referring to any conduct of patrons on the licensed premises, held that, if the licensees knowingly permitted homosexuals to gather on the licensed premises, it violated section 24200(e) and justified revocation of the license. There is not one word in the decision about illegal, immoral, disgusting or indecent acts having been committed on the premises. The Department prosecuted the case, and the Appeals Board affirmed it, without any reference to the conduct of patrons while on the premises. The theory of both boards was that section 24200(e) prohibits the using of the licensed premises as a resort or gathering place for sexual perverts; that homosexuals are sexual perverts as a matter of law, and that if the licensed premises are so used, a violation justifying revocation of the license has occurred.

This is a misinterpretation of the law. In the leading case of Stoumen v. Rielly, 37 Cal.2d 713, 234 P.2d 969, the licensee was charged with operating a disorderly house to which people resorted for purposes which were injurious to public morals, health, convenience or safety. The trial Administrative Board found that the licensee maintained such a disorderly house in that he knowingly permitted persons of homosexual tendencies to patronize that bar and to use the bar as a meeting place. The Administrative Board ordered the suspension of the license. This was reversed by the Supreme Court in a unanimous opinion. The court pointed out that there "was no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the restaurant for purposes injurious to public morals" (37 Cal.2d at page 715, 234 P.2d at page 970), and then held that the disorderly house statute there involved did not attempt to regulate mere patronage by any particular class of persons without regard to their conduct on the premises. The court stated (37 Cal.2d at page 716, 234 P.2d at page 971): "Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron 'except for good cause,' and if he does so without good cause he is liable in damages. See Civ. Code, §§ 51, 52. In analogous cases it has been held that a liquor license could not be revoked on the ground that prostitutes had dined in the licensee's restaurant, In re Farley, 217 N.Y. 105, 111 N.E. 479, and that a conviction of maintaining a bawdy house was not supported by evidence that women of loose or immoral character had obtained lodging in defendant's hotel. Patterson v. State, 9 Okl.Cr. 564, 132 P. 693, 695. In the Patterson case the court pointed out that such women are human beings entitled to shelter and that it is not a crime to give them lodging unless it is done for immoral purposes. The same reasoning applies to the patronage of a public restaurant and bar by homosexuals, and mere proof of patronage, without proof of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes, is not sufficient to show a violation of section 58."

It was then held that from the fact that homosexuals used the licensed premises as a meeting place it could not be inferred that illegal or immoral acts were committed on the premises.

After determining that mere patronage did not violate the maintenance of a disorderly house statute, the court then went on to hold that, because of such patronage, the license could not be revoked under Article XX, section 22 of the Constitution, which provides that a license may be revoked if the administrative agency determines "for good cause that the granting or continuance of such license would be contrary to public welfare or morals." The court said (37 Cal.2d at page 717, 234 P.2d at page 971): "The board's discretion under section 22, however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals. * * * In order to establish 'good cause' for suspension of plaintiff's license, something more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place."

The Stoumen case was decided in 1951. In 1955 the Legislature added section 24200 (e) to the Business and Professions Code. (Stats. of 1955, p. 2230, Chap. 1217.) As then amended, and as it now reads, that section provides, in part, that it shall be a ground for the suspension or revocation of a license if "the portion of the premises of the licensee upon which the activities permitted by the license are conducted are a resort for illegal possessors or users of narcotics, prostitutes, pimps, panderers, or sexual perverts."

Literally, this section seems to make revocation permissible if the licensed premises are simply used as a "resort" by "sexual perverts." But because such a literal interpretation would raise grave doubts as to the constitutionality of the section, it has not been literally construed. It has been held that the section must be interpreted in view of the holding in the Stoumen case as to what constitutes "good cause" for the revocation of a license. The reason for this interpretation is obvious. The Legislature, in enacting section 24200(e), acted under the authority and power granted by Article XX, § 22 of the state Constitution. As the section read in 1951 when the Stoumen case was decided, it provided that the State Board of Equalization shall have the power "in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." In the Stoumen case, as already pointed out, it was held that this provision did not confer uncontrolled discretion upon the Board, and that before a license could be revoked there must exist good cause, and that in order to establish "good cause" under the section "something more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place." While this section of the Constitution was later amended, in this respect, the Constitutional language is still as it was in 1951 when the Stoumen case was decided. That case necessarily decided that "good cause" for revocation of a license must consist of something more than mere patronage; there must be conduct on the premises that indicates that the continuance of the license would be contrary to public welfare or morals. Thus the Stoumen case necessarily decided that the Legislature was without power to provide that mere presence of a prohibited class was sufficient to revoke a license. It was for this reason, and in order to perserve the constitutionality of section 24200(e) that it was held that mere presence of homosexuals or of sexual perverts under the section was not enough and that in the absence of improper or illegal conduct on the licensed premises, the license could not be revoked.

The first of the cases so holding was Kershaw v. Dept. of Alcoholic Bev. Control, 155 Cal.App.2d 544, 318 P.2d 494, decided in 1957. In that case the enforcement officials contended, as they do here, that the use of the licensed premises as a meeting place for homosexuals was alone

sufficient, under section 24200(e), to revoke the license. In refuting this contention, and in holding that improper conduct on the licensed premises was required before a license could be revoked, this court stated (155 Cal.App.2d at page 550, 318 P.2d at page 498): "It would seem a fair inference to conclude that in making that amendment [the addition of § 24200(e)] the Legislature acted in the light of and consistently with the rule of the Stoumen case, by inference excluding from the coverage of subdivision (e) the type of conduct which the Supreme Court had declared harmless and not inimical to public welfare or morals. The court having so recently and with such clarity said it, why should the Legislature say it again?" There was, however, evidence of illegal and immoral conduct on the part of patrons to the knowledge of the licensee sufficient to sustain the revocation.

This interpretation of section 24200(e) was reaffirmed in the recent case of Nickola v. Munro, 162 Cal.App.2d 449, 328 P.2d 271, decided in July of 1958. There, as in the Kershaw case, and in the instant case, it was contended that, upon proof that homosexuals used the licensed premises as a meeting place, the license could be revoked. This court stated (162 Cal.App.2d at page 455, 328 P.2d at page 274): "We do not think that section 24200(e), was passed by the Legislature to repeal or to change the rule of the Stoumen case to the effect that improper or illegal or immoral conduct must occur on the premises before discipline of the licensee is permitted, but was passed with the Stoumen case in mind to clarify the rule of that case." In the Nickola case there was ample evidence of improper conduct on the premises, and of the licensee's knowledge of such conduct.

[1] A petition for hearing was denied in the Nickola case. No petition for hearing was filed in the Kershaw case. It must, therefore, be accepted that, under section 24200(e), a license may not be suspended or revoked simply because homosexuals or sexual perverts patronize the bar in question. Before such deprivation can occur there must be improper, illegal, disgusting or immoral acts of conduct committed on the premises to the knowledge of the licensee. As already pointed out, unless section 24200(e) is so interpreted, there would be grave doubts as to its constitutionality. The Stoumen case was interpreting what constitutes "good cause" for the revocation of a license under the Constitution. This constituted a limitation on the Legislature as well as on the administrative board. The only way that the constitutionality of section 24200(e) could be saved was to assume that the Legislature was not attempting to overrule the Supreme Court's interpretation of the Constitution, but was acting in conformity thereto. That is the explanation of the Kershaw and Nickola cases.

[2] In the present case the proceeding was commenced and tried on the theory that mere patronage by homosexuals, to the knowledge of the licensees, was sufficient to warrant a revocation of the license. As already pointed out, there is no charge or finding that immoral, improper, disgusting or illegal acts were committed on the premises. The respondent, nevertheless, seeks to uphold the revocation on the ground that there was substantial evidence of such conduct. We think that respondent may properly urge such a contention, and that, if the record shows such conduct, the judgment should be affirmed.

The period involved in the charge contained in the amended accusation is from September 7, 1955, to June 1, 1956, a period of about nine months. The bar commenced operations in 1946, and in 1950 Vallerga purchased a half interest. During all the period it was operating, and particularly during the nine-month period involved in the charges, there had been no arrests for improper conduct on the premises, except one when the bartender called the police to eject an intoxicated patron. During the nine-month period involved in the charge, the licensed premises were subjected to frequent and intensive surveillance by the city and military police. Admittedly, not

once during this period did the police call the attention of the licensees or their employees to any improper acts on the part of patrons that they had observed, nor was any person arrested for improper acts on the premises.

At the hearing, the enforcement officials were primarily interested in proving that the bar had a general reputation for being a hangout for homosexuals. This was done under that portion of section 24200(e) providing that "the character of the premises may be proved by the general reputation of the premises in the community as a resort for * * * sexual perverts." There is no doubt that the enforcement officials proved that the licensed premises were used as a meeting place by homosexuals. The Deputy Chief of the Oakland Police Department, the Patrol Captain of the area where the bar is located, the sergeant in charge of that patrol, the patrol officer in the area, and the sergeant in charge of the Armed Forces Police all testified that the reputation of the bar was bad in that its patronage consisted almost exclusively of homosexuals and lesbians. This fact was not in controversy. In fact, Vallerga, one of the licensees, testified that the bar was established in 1946 for homosexuals, and that it continued to be such an establishment from that date up to the date of the hearing; that in 1950, when he purchased a one-half interest in the bar, he consulted an attorney and was advised that since his bar was a public place, he was under a duty, and had the right, to serve his customers as long as they behaved themselves. Obviously, this evidence that the bar was largely patronized by homosexuals, is of importance only in showing that the licensee knew or should have known of this fact. Since the licensee admitted this fact, there was no dispute as to it. Contrary to the contention of the enforcement officials, this fact alone, as already pointed out, was not sufficient to justify a revocation of the license.

All of the police officials laid great emphasis upon the fact that the majority of female customers were dressed in mannish attire, and that the patrons of the bar usually paired off men with men, and women with women. These facts, if entitled to any legal significance, merely emphasized the fact that the patrons were homosexuals or lesbians. Of themselves, these acts did not amount to immoral, indecent, disgusting or improper acts. They merely tended to prove that the patrons were homosexuals, a fact the licensee admitted. That fact alone, for reasons already stated, did not justify revoking the license.

[3] During the nine-month period of intensive surveillance the police officers did testify that they did observe a few isolated acts which are relied upon to support the revocation order. Several of the police officers testified that, on occasion, women were observed dancing with, and kissing, other women. This is not necessarily offensive, illegal or improper conduct that would justify the revocation of the license.

The most damaging testimony was given by a policewoman who went to the bar as an undercover agent. She testified that she sat at a table and that a patron dressed in mannish costume sat down and stated to her "You're a cute little butch." Later in the evening this patron kissed the witness. A waitress of the establishment, Buddy by name, came by and warned the participants that if they wanted to continue such activity they should go into the rest room. Other than through this waitress, there was no evidence the licensees knew of this activity or that they had been told of it. The officer did not complain to anyone about this conduct.

Another police officer (who had been in the bar 10 times) on one occasion observed a display of affection between two men. He observed these two embrace and whisper to each other with their foreheads touching. He heard one of the men state to the bartender "Arley and I are going steady." There was no evidence that the acts of affection between these two men were or should have been observed by the licensees or their employees.

This is a fair summary of the alleged misconduct that was observed during the

nine-month period. Some of the officers visited the bar during this period almost daily, while others were present several times a week. At most, the conduct observed indicated that the patrons were homosexuals. But that fact alone will not support the revocation. The conduct observed was not similar to the conduct observed in the Kershaw and Nickola cases which was held to support revocation orders. There the conduct was disgusting, immoral and illegal. It clearly demonstrated that the continuance of the licenses would be "contrary to public welfare or morals." The same cannot be said of the conduct observed here.

The other contentions of appellants attacking the constitutionality of section 24200(e) on various grounds were all decided adversely to appellants in the Kershaw or Nickola cases, or in both, and are without merit.

The judgment is reversed with instructions to the trial court to grant a peremptory writ of mandate directing the Administrative Board to set aside its order of revocation and to take such further action as may be proper.

BRAY and FRED B. WOOD, JJ., concur.

167 Cal.App.2d 359

Stephen J. PERRY, Plaintiff and Appellant,

v.

FIRST CORPORATION et al., Defendants,

Southern Pacific Company, a corporation, and American Can Company, a corporation, Defendants and Respondents,

Hartford Accident and Indemnity Company, Plaintiff in Intervention and Appellant.

No. 17439.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1959.

Hearing Denied March 25, 1959.

Action against railroad and others for injuries sustained by plaintiff when he fell while getting out of a boxcar from which he was unloading steel drums, which shipper had negligently loaded and carrier had negligently failed to inspect or had negligently transported, to fix a lift on a truck which was being used in the unloading procedure. The Superior Court, Alameda County, A. J. Woolsey, J., granted defendants' motions for nonsuit and the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence did not establish that plaintiff was contributorily negligent as a matter of law and it was error to order a nonsuit on that ground.

Judgment reversed.

1. Railroads ⇐282(9)

Mere fact that an accident occurred while plaintiff was using a certain method of unloading a boxcar did not demonstrate as a matter of law that he acted negligently in the selection and use of that method.

2. Negligence ⇐136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists and that reasonable or sensible men could have drawn that conclusion and none other, and where there are different inferences that may be drawn, one for and one against, the inference against contributory negligence will be followed and before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion.

3. Negligence ⇐65

Where a person must work in a position of possible danger, the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving his attention to work than would otherwise be the case.

4. Railroads ⇐282(9)

In action against railroad and others for injuries sustained by plaintiff when he fell while getting out of a boxcar from which he was unloading steel drums, which shipper had negligently loaded and carrier

had negligently failed to inspect or had negligently transported, to fix a lift on a truck which was being used in the unloading procedure, evidence did not establish that employee was contributorily negligent as a matter of law and it was error to order a nonsuit on that ground.

5. Railroads ⇐282(9)

In action against railroad and others for injuries sustained by plaintiff when he fell while getting out of a boxcar from which he was unloading steel drums, which shipper had negligently loaded and carrier had negligently failed to inspect or had negligently transported, to fix a lift on a truck which was being used in unloading procedure, evidence did not show as a matter of law that employee assumed the risk of harm to himself in endeavoring to unload the boxcar.

6. Trial ⇐162

In action against railroad and others for injuries sustained by plaintiff when he fell while getting out of a boxcar from which he was unloading steel drums, which shipper had negligently loaded and carrier had negligently failed to inspect or had negligently transported, to fix a lift on a truck which was being used in unloading procedure, wherein counsel for employee stated he was prepared to rest except for introduction of testimony with respect to where boxcar came from, by whom it was delivered and when it was taken off siding, part of which would be covered by stipulation and part by introduction of a couple of documents, plaintiff had not completed presentation of his evidence on question of defendants' responsibility, and nonsuits entered in favor of defendants could not be sustained upon ground that there was a failure to prove that defendants owed a duty to plaintiff, until after completion of case as to defendants' responsibility. West's Ann.Code Civ.Proc. § 581c.

7. Appeal and Error ⇐419(1)

Notice of appeal allegedly couched in terms of an appeal from a formal written judgment instead of minute order of nonsuit which preceded it would be treated as being from the appealable order, when it was filed in ample time and when no one was misled or prejudiced thereby. West's Ann.Code Civ.Proc. §§ 581c, 581d.

Edises, Treuhaft, Grossman & Grogan, Aubrey Grossman, Oakland, for appellant (plaintiff).

Ricksen, Freeman, Hogan & Vendt, Oakland, for respondent Southern Pac. Co.

Barfield & Barfield, San Francisco, for respondent American Can Co.

FRED B. WOOD, Justice.

A carload of empty drums belonging to Dewey and Almy Chemical Company had been returned to it by rail. One of its employees, plaintiff herein, was injured while removing drums from the car. Defendants' motions for nonsuit upon the ground of plaintiff's contributory negligence and assumption of risk were granted and he has appealed.

Plaintiff was a maintenance mechanic at the Dew and Almy plant but during the eight years of his employment had been assigned to the loading and shipping of cars about a half day to a day a month and during that time had worked at the unloading of 20 or 30 cars.

He testified that empty drums such as these (three feet high and two feet in diameter, weighing 110 to 125 pounds each) are customarily loaded upright in tiers, one tier above the other (a full car has three tiers), with a board across the doorway (nailed from the inside against the door post, which is of wood in contrast to the steel on the outside) opposite each tier, to hold the drums in.

When unloading such a car, the boards would be removed one at a time, the top one first. A ladder placed against the door of the car would be used to climb part way up to the level desired and the unremoved boards would be used to get high enough to reach the top drums. The men would climb up and roll the drums out onto a track system which joined with the plant

conveyor, until they had an opening big enough to get into the car itself.

Upon the occasion here involved, plaintiff's foreman told him to work on the unloading of a certain boxcar. They had to pry the door open. The drums were up against it. So they got a piece of board and stuck it between the opening and kept prying the drums loose from the door so they could get the door open. When the door was pried open, it could be seen that there were no boards across the doorway. This was the first car plaintiff ever unloaded that did not have boards across the doorway. The first and second tiers of drums were standing upright. The first tier was packed loosely. The drums in the top row were not standing upright. They were laying down. They were badly scrambled. That was perfectly visible to plaintiff at the time the door was open. He was fully aware of that before he went into the car.

The method for the unloading of this car was different from what it had been on previous occasions. Plaintiff testified "* * * we couldn't unload it from the outside because the drums were pretty rickety and wobbly, and it was a hazard to attempt unloading it from the outside. The only way to unload it was to get inside up on top, find a safe place to stand and roll them out up on top." He used a ladder that was between six and seven feet in length (it reached up to a point about two feet above the level of the floor of the car) to get as high as he could, then grabbed the side of the door and the door frame and pulled himself up and into the boxcar. The door opening was about eight feet high. When he was up in the car he had "to figure out each move so I wouldn't get myself hurt. The car was in such a mess." He was fully aware of that when he went into the car, "it was not a safe loaded car, I will tell you that." Asked whether he knew when he went up into the car whether he was putting himself into a position of danger, he said, "Yeah, I guess so. It wasn't the safest looking car that I have ever gone into," and that "there is danger in anything I guess you do."

He had rolled half a dozen drums out from the third tier when he was called to attend to a breakdown on a high-lift truck. It was his duty to respond to that call to fix the lift. He got out backwards by hanging onto the frame of the door, swinging himself around and putting his right foot on the top rung of the ladder. His right hand was on the edge of the doorframe, his left hand was around the door post and his left leg was hooked around the door post. He let his left hand go to get a lower grip so he could lower his left foot onto the ladder. He reached out and laid his hand on a second tier drum which was tipping over on him. He shoved the drum back in so it would not fall and knock him off. The result was that he lost the grip he had with his right hand and fell to the ground. The drum did not fall. He said that this drum tipped over the edge and would have "got" him if he had not shoved it back. He did not believe he moved that drum while he was in the car. He believed he moved the drum that was on top of it. He did not know of any other way he could have gotten out of the car from the third tier down to the ladder than the way he took.

He referred to the ladder he used as a "make-shift" ladder. He said "it wasn't a proper ladder to use." His employer had other types of ladders and longer ladders. With a longer ladder it would have been easier to climb in and out of that particular car. Asked if anything prevented him from making inquiry as to the whereabouts of another ladder or going and getting another ladder, he said "No, I usually get told to do a job and I try to do it to the best of my ability without asking too many questions." He used this ladder because it was out there for that purpose, the only one around there, and "when they unloaded these cars they use it. I was no different than anyone else." The ladder rested on solid ground and did not fall nor did it slip. It remained right where it was when he fell.

Plaintiff's foreman testified that he was present at the beginning of the unloading operation, but was not there when the accident happened. He was there to be sure that the men were being careful. He believed "they were handling it sufficiently not to have any accident at that time." He had dunnage boards that could have been used to shore up the doorway. He did not consider it necessary to do so. (No one asked plaintiff if it occurred to him that it might be desirable to place boards across the doorway, nor whether he knew that boards were available for such a purpose.)

[1] We have a picture of a man who was faced with a situation quite different from that which normally confronted him when unloading a car. He adopted a method for unloading this car which, according to him, seemed suitable for getting the drums out with the minimum of risk. The mere fact that an accident did occur does not demonstrate as a matter of law that he acted negligently in the selection and use of that method.

[2] The test to be applied in such a case as this we find well expressed in Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829: "* * * contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. [Citations.]"

[3] When applying this test in this case we must bear in mind the fact that here the plaintiff had a function to perform, that of unloading the very drums which, allegedly, the shipper had negligently loaded and the carrier had negligently failed to inspect or had negligently transported. It is unlike the case of an invitee upon another man's land who encounters an obviously dangerous instrumentality and can avoid harm to himself by simply walking around it. "It has long been recognized that '* * * where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case. [Citations.]'" Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 239, 282 P.2d 69, 77. See also James v. Key System Transit Lines, 125 Cal.App.2d 278, 281, 270 P.2d 116, 117, where it appeared that "plaintiff's duties required him to cross" a strip of rough pavement and "he had no choice except to cross" it.)

[4] We do not find any factors in this case which "point unerringly" to the conclusion of lack of due care on the part of the plaintiff.

Contributory negligence might be found in the failure to place boards across the doorway. However, the boards perhaps could not be readily fixed in place on the inside of the door frame. The drums pressed so closely to the door it had to be pried open. The boards could hardly be fastened on the outside because the outside walls of the car were of steel. Moreover, plaintiff's foreman, who had a great deal of experience in unloading boxcars, testified that such boards were not placed because he did not consider it necessary. Plaintiff might well be justified in relying on the foreman's superior experience and greater knowledge. See Hoogbruin v. Atchison, etc., Ry. Co., 213 Cal. 582, 592, 2 P.2d 992; Andre v. Allynn, 84 Cal.App. 2d 347, 352–353, 190 P.2d 949.

Contributory negligence might be found in the use of a six-foot ladder to ascend and descend from the car. Plaintiff testified, when asked why he did not use a different ladder, "that ladder was out there for that purpose and that is the only one there was around there, and when they unloaded these cars they use it." The ladder extended about two feet above the

level of the floor of the car. The car was about 10 feet high on the inside. Since the drums were three feet high, the level of the third tier could not have been more than four feet above the end of the ladder. It would not seem unreasonable for plaintiff to assume that entry and exit from the car could be safely made with the ladder that was used. Whether he should have used a longer ladder in the exercise of ordinary caution was a question for the jury.

Contributory negligence might be found in plaintiff's manner of exit. The same considerations would apply. Plaintiff testified that he knew of no other way to get out. See Rau v. Redwood City Women's Club, 111 Cal.App.2d 546, 551, 245 P.2d 12.

Placing his hand upon a drum which had begun to tip over and shoving it back into position, does not point unerringly to negligence. It appeared to plaintiff at the time that but for that act upon his part the drum would fall upon him with all its weight and bulk.

Since conflicting inferences are possible from the evidence concerning plaintiff's exercise of ordinary care or the lack of it, contributory negligence does not appear as a matter of law. It was error to order nonsuit upon that ground.

[5] For like reasons the evidence does not show, as a matter of law, that plaintiff assumed the risk of harm to himself. Plaintiff was faced with a dilemma created by defendants' alleged negligence, the unloading of the very drums which allegedly had been negligently loaded. Under the circumstances of the case, it was for the triers of the facts to determine whether the measures plaintiff took to meet that situation constituted a voluntary assumption of the risks involved. In such a case the question is whether "plaintiff conducted himself as a reasonable and prudent person." DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 100, 92 P.2d 899, 905.

"The defenses of assumption of risk * * * will negative liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts [1941], p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. (See Rest., Torts, § 893.) Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk." Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 161–162, 265 P.2d 904, 906. See also Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 384–385, 240 P.2d 580; Hawk v. City of Newport Beach, 46 Cal.2d 213, 218, 293 P.2d 48.

Plaintiff testified that he guessed he was aware that he was putting himself in a place of danger, and that "[i]t wasn't the safest looking car that * * * [he had] ever gone into." This shows a knowledge of some risk, but not necessarily an appreciation of the extent of the risk. Plaintiff had been in the car 15 or 20 minutes before his attempted exit, and there is no testimony that any drums had fallen out during that time. Even if he initially might have believed that there was danger of falling drums from the lack of boards holding them in, the lack of any such result for a period of time might have lulled him into a momentary forgetfulness of the danger.

Moreover, it is not clear from the plaintiff's testimony what particular risk he appreciated. If defendants are to be relieved from liability on the ground of assumption of risk, the jury would have to find that the plaintiff appreciated the danger from drums falling out the door, which was the particular risk, if any, which caused the plaintiff's injury. The testimony above quoted may refer only to the danger of falling within the car from the haphazard arrangement of the drums. The

following testimony was given just before the part quoted above: "I [plaintiff] didn't do anything but find a footing so I could stand on up there and move what drums I did move. That took all the time I was up in there. I had to figure each move so I wouldn't get myself hurt. The car was in such a mess. Q. You were fully aware then of that, at the time you went into the car, is that correct? A. Yeah, it was not a safe loaded car, I will tell you that. Q. You knew at the time that you went into the car that you were putting yourself into a position of some danger, is that correct? A. There is danger in anything I guess you do."

Assumption of risk as a matter of law does not appear in this case. The danger was no more patently obvious to a person of average intelligence than that in Prescott v. Ralph's Grocery Co., supra, 42 Cal. 2d 158, 265 P.2d 904, 905, where the patron of a grocery store slipped and fell on a sidewalk on which there was "a lot of water," and the court reversed for erroneous instructions on assumption of risk; Hawk v. City of Newport Beach, supra, 46 Cal.2d 213, 293 P.2d 48, where a 17-year old boy injured himself when he dived from a rock, apparently because of the shallow water surrounding the rock, and the boy did not know the depth of the water except that the greatest depth he encountered wading out to the rock was appproximately up to his waistline; or Erde v. City of Los Angeles, 116 Cal.App. 2d 565, 254 P.2d 110, where plaintiff was injured by a falling light standard after he noticed the shade was broken and in a position likely to fall and had asked that it be repaired.

Cases upon which defendants principally rely are distinguishable. In Southern R. Co. v. Edwards, 5 Cir., 44 F.2d 526, and in Fisher v. Minneapolis & St. L. Ry. Co., 8 Cir., 199 F.2d 308, the injury occurred as a result of an obviously dangerous method of unloading poles which had been properly loaded. In Fletter v. City and County of San Francisco, 110 Cal.App. 2d 820, 824, 244 P.2d 59, 61, the plaintiff's testimony was "subject to only one interpretation, that knowing of the existence of the opening, he purposely stepped across for a hand truck, misjudged the distance, and fell into the opening."

[6] Defendants claim that the nonsuits can be sustained upon the ground of failure to prove that defendants owed a duty to plaintiff. They are mistaken. That question was not before the trial court for consideration and action, nor is it before this court. Plaintiff had not completed his case as to defendants' responsibility when he rested and defendants moved for a nonsuit. Upon resting his case in chief, plaintiff's counsel did so conditionally. He said: "Now, Your Honor, we are prepared to rest except for the introduction of certain very brief testimony with respect to where these cars came from, by whom they were delivered and when they were taken off the siding, part of which will be covered by stipulation, perhaps all, and part by the introduction of a couple of documents * * * I would ask leave that I rest subject simply to being permitted to reopen to put in this small portion of evidence." This request was granted. The court later said, "Well, you have rested your case with the exception of certain documents?" Plaintiff's counsel replied that this was correct. Twelve minutes later the motions for nonsuit were made. Obviously, plaintiff had not "completed * * * the presentation of his evidence" on the question of defendants' responsibility. Not until "after" such completion would a motion for nonsuit on that ground be in order. Code Civ.Proc. § 581c. It was proper to consider the questions of assumption of risk and contributory negligence for it was manifest that plaintiff was not going to introduce any more evidence pertinent to those issues. Moreover, plaintiff makes no claim that the motions on those grounds were prematurely made. See Skelton v. Schacht Motor Car Co., 22 Cal.App. 144, 146, 133 P. 504; Dineen v. City and County of San Francisco, 38 Cal. App.2d 486, 493, 101 P.2d 736.

[7] The contention is also made that this appeal should be dismissed because the notice of appeal was couched in terms of an appeal from a formal written judgment instead of the minute order which preceded it, although filed within 60 days of the entry of the minute order. It is clear that plaintiff seeks a review of the order of nonsuit, which is the judgment in a case such as this. Code Civ.Proc. §§ 581c and 581d, construed in Costa v. Regents of University of Cal., 103 Cal.App. 2d 491, 492–494, 229 P.2d 867, and cases therein cited. The notice of appeal was filed in ample time. No one has been misled. No prejudice to the defendants is involved. The notice should and will be treated as being from the appealable order and, therefore, effective. See Holden v. California Emp., etc., Comm., 101 Cal. App.2d 427, 430, 225 P.2d 634; Collins v. City and County of San Francisco, 112 Cal.App.2d 719, 722, 247 P.2d 362.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

167 Cal.App.2d 389

Matter of the GUARDIANSHIP of the Person and Estate of Evelyn KOSTORS, a Minor.

Earl GILBERT and Elsie Gilbert, Petitioners and Respondents,

v.

Alice KOSTORS, Respondent and Appellant.

Civ. 18267.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1959.

Proceeding on petition for appointment of guardian for 15-year-old minor. From an order of the Superior Court, County of Contra Costa, Harold Jacoby, J., appointing as guardians persons who were not related to minor over objection of mother and minor's maternal grandparents, the mother appealed. The District Court of Appeal, Kaufman, P. J., held that fact that minor child had nominated a guardian did not dispense with requirement that guardianship be shown to be necessary or convenient before appointing strangers as guardians of minor, who was a ward of Juvenile Court.

Order reversed.

1. Parent and Child ⇐2(1)

Parents of a legitimate child have preference over a nonparent and custody may not be given to a nonparent unless the parent is found unfit.

2. Infants ⇐16.12

Fact that child was a ward of juvenile court did not of itself imply either that custody had been removed from mother, or that mother was unfit. West's Ann. Welfare & Inst.Code, § 739.

3. Guardian and Ward ⇐13(4)

Fact that 15-year-old minor child had nominated a guardian did not dispense with requirement that guardianship be shown to be necessary or convenient before appointing strangers as guardian of minor, who was a ward of juvenile court. West's Ann.Welfare & Inst.Code, §§ 739, 750.

Rodney G. Commons, Oakland, for appellant.

Richard D. Sanders, Pittsburg, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal by Alice Kostors, the mother of Evelyn Kostors, from an order appointing respondents, Earl and Elsie Gilbert, as guardians of the person and estate of Evelyn Kostors, a minor.

Respondents, who are not related in any way to this 15-year-old minor, were

appointed guardians of her person and estate over the objections of her mother and her maternal grandparents. Her father is not living, and no relative supported the petition of respondents. The minor was, throughout the pendency of this proceeding, a ward of the Juvenile Court. Although appellant's brief, to the statement of facts in which we may look (Rule 17(b), Rules on Appeal) because no respondents' brief was filed, states that the petition for letters was filed at the request of the probation officer, there is no showing or suggestion of notice to or consent by the Juvenile Court. Neither petition nor order makes any reference to the fitness or lack of fitness of the mother. She appeals from the order. Respondents have filed no brief.

[1] Although our Supreme Court has recognized a "modern trend" to "regard as of primary importance the welfare of the minor himself" (In re Estate of Mathews, 174 Cal. 679, 683, 164 P. 8, 9), and despite some strong dissents, the majority of that court holds to the doctrine of parental right in guardianship and custody matters (for full review of the decisions, see In re Guardianship of Smith, 147 Cal.App.2d 686, 302 P.2d 86). We are therefore bound by the rule that "The parents of a legitimate child have preference over a non-parent and the custody shall not be given to a non-parent unless the parent is found unfit." In re Guardianship of Smith, 42 Cal.2d 91, 92, 265 P.2d 888, 889, 37 A.L.R.2d 867. Here the finding of unfitness is wholly lacking.

[2, 3] The fact that the child is a ward of the Juvenile Court does not of itself imply either that custody has been removed from the mother or that the mother is unfit, since the Juvenile Court "may define the extent of control permitted" to the parent and "no ward of the juvenile court shall be taken from the custody of his parent" without the latter's consent, unless specified facts supporting such removal are found. Welf. & Inst.Code, § 739. There is nothing in this record to suggest that any such finding was ever made by the Juvenile Court. The fact that the minor is over 14 years of age, and has nominated a guardian, does not dispense with the requirement that guardianship be shown to be "necessary or convenient." In re Guardianship of Kentera, 41 Cal.2d 639, 262 P.2d 317, 319. It is said in Kentera (41 Cal.2d at page 643, 262 P.2d at page 319): "The statutory provisions were not intended to upset the normal relationship of parent and child or to disrupt normal family discipline by allowing the fourteen-year-old minor to withdraw from the family circle at his whim." When the parent is not found unfit, a finding of necessity and convenience for the appointment of a stranger as guardian of the person would have this result.

We have left open the question whether, in view of the complete custodial control given by the statute to a juvenile court over its wards, the appointment of a guardian of the person of such a ward can ever be necessary or convenient unless the juvenile court first terminates its wardship. Welf. & Inst.Code, § 750.

Appellant's statement that respondents have removed the child from this state, which statement is not denied by reason of respondents' failure to file a brief, points up the fact that this proceeding could achieve most of the results of an adoption without any consent by the only living parent and without any order depriving her of custody and control.

Order reversed.

DOOLING and DRAPER, JJ., concur.

167 Cal.App.2d 247

The PEOPLE of State of California, Plaintiff and Respondent,

v.

Margaret COOK and Fred Cook, Defendants and Appellants.

Cr. 2839.

District Court of Appeal, Third District, California.

Jan. 20, 1959.

Prosecutions for grand theft. The Superior Court, San Joaquin County, R. M. Dunne, J., entered judgment of conviction and defendants appealed. The District Court of Appeal, Peek, J., held that evidence disclosing that defendants operating travel agency appropriated to their own use money given to agency by client in payment of airline tickets, sustained conviction, and there was no error in excluding on cross-examination question as to custom of trade in support of defendant's contention that their relationship with their particular airline was one of debtor and creditor since matter had not been raised on direct examination and character of relationship could only be established by their own particular agreement and not by evidence of how some other airline might handle situation.

Affirmed.

1. **Embezzlement** ⇐44(1)

In prosecution resulting in conviction of grand theft, evidence sustained findings that defendants had appropriated for their own use money which they had collected for payment of airline fares while operating travel agency, that defendants were under a fiduciary duty to deliver funds to airlines, and that their failure to do so supported conviction of embezzlement.

2. **Criminal Law** ⇐1122(5)

Where no request was made for inclusion of refused instructions in transcript on appeal, reviewing court could not ascertain on state of record whether such instructions were properly refused.

3. **Customs and Usages** ⇐15(1)
Witnesses ⇐269(2)

In prosecution for grand theft arising out of defendants' alleged appropriation of funds belonging to airline for their own use, there was no error in sustaining objection to cross-examination on part of defendants relative to custom of trade as supporting defendants' contention that their relationship with airline was one of debtor and creditor, since subject matter of question had not been raised on direct examination and that character of relationship between airline and defendants could only be established by their own particular agreement and not by evidence of how some other airline might handle similar situation.

Robert N. Chargin, Deputy Public Defender, Stockton, for appellants.

Edmund G. Brown, Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal from a judgment of conviction for grand theft, and from the order of the trial court denying defendants' motion for a new trial.

The defendants, Margaret and Fred Cook, operated a travel agency in the City of Lodi known as the Lodi Travel Service. The record contains a great amount of testimony regarding the relationship between the defendants and Air France International Air Lines and the desires of defendants to have Air France sponsor their membership in the International Air Travel Association, known as I.A.T.A., thereby entitling them to receive commissions on the sale of air transportation on lines operated by Air France. Mr. DeCabrol, District Manager for Air France, explained that until defendants became members of the I.A.T.A. they could not receive commissions, but once they became members they would receive commissions retroactively. Following discussions between defendants and DeCabrol, an oral agreement was entered into whereby the defendants

would be permitted to sell Air France service to their clients. The arrangement between the parties provided that the defendants would notify Air France when a local client wished passage on the latter's facilities. Air France would then forward the requested ticket made out in the passenger's name. The defendants would deliver the ticket to the customer, collect the price of the ticket and remit the same in its entirety to Air France. It should be noted, however, that the agency was permitted to draw its own check for the amount of the ticket for remission to Air France.

In July of 1957, a Mrs. John Precissi made arrangements with the defendants for herself and friends for a tour of Europe. A portion of the tour involved utilization of Air France service. Defendants obtained tickets from Air France of the value of $4,491.88. These tickets were made out in the names of Mrs. Precissi and her friends and were delivered to them by defendants who in turn received a check for $6,896.68. This check was in payment of the Air France tickets and other travel service in connection with the tour. Mr. Cook cashed the check and obtained $4,000 in one-hundred dollar bills, and took the balance in two drafts. Thereafter the defendants left Lodi, leaving no forwarding address. Air France received none of the money paid to defendants for the tickets. Following their arrest, defendants admitted the appropriation of the money.

[1] Defendants now contend, as they did throughout the trial, that the relationship between them and Air France was one of debtor and creditor in that the tickets were sold by Air France directly to defendants. This contention was refuted by Mr. DeCabrol, District Manager for Air France. His testimony was that the tickets were sold by his company directly to the persons who were to use them, the clients of defendants, and that an agent cannot buy tickets for resale. He further stated the reason that the air line requested the travel agent to remit with his own check was in order to keep a record of sales so that when the question of sponsorship in the I.A.T.A. came up at some future date the company would have such record available. Were it not for this the air line would simply request a check direct from the purchaser. Under such facts the jury could properly find, as it did, that defendants had appropriated for their own use money which they had collected for the payment of the fare and therefore defendants were under a fiduciary duty to deliver the funds to the air lines and their failure so to do would support a conviction of embezzlement. People v. Hedderly, 43 Cal.2d 476, 274 P.2d 857; People v. Foss, 7 Cal.2d 669, 62 P.2d 372.

[2] Defendants' further contention that the trial court erred in failing to give certain instructions requested by them is not properly before this court. No request was made for the inclusion of the refused instructions in the transcript and hence this court cannot ascertain on this state of the record whether such instructions were properly requested. People v. Rivera, 123 Cal.App.2d 358, 266 P.2d 810.

[3] Equally without merit is defendants' final contention, which is made without reference to the transcript and without benefit of authority, that the trial court erred in refusing to admit evidence of custom of the trade in support of defendants' contention that their relationship with Air France was one of debtor and creditor. The record shows that the local manager for United Air Lines was called as a witness for the prosecution and testified to certain payments made to United by the defendants. On cross-examination he was asked if it was not true that in so far as United Air Lines was concerned any non-sponsored travel agent was considered merely as a purchaser of the ticket and not as a representative of United Air Lines. Not alone was the question improper cross-examination, since the subject matter of the question had not been raised on direct examination, but furthermore the character of the relationship between Air France and defendants could only be established by

their own particular agreement and not by evidence of how some other air line might handle a similar situation.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

167 Cal.App.2d 130

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Von Zayne WOMACK, alias Von Layne Womack, also known as Von De Saint, Defendant and Appellant.

Cr. 6468.

District Court of Appeal, Second District, Division 2, California.

Jan. 14, 1959

Defendant was convicted of an offense and from a judgment and an order denying his motion for new trial, Albert E. Wheatcroft, J., the defendant appeals. The District Court of Appeal, Herndon, J., held that an act of sexual intercourse between defendant and the 14-year-old daughter of his half-sister was incestuous under the statute.

Judgment and order affirmed.

1. Statutes ⇐241(1)

Where the language of a penal statute is reasonably susceptible of two constructions, that construction more favorable to the accused will ordinarily be adopted.

2. Incest ⇐5

An act of sexual intercourse between defendant and the 14-year-old daughter of his half-sister was incestuous under the statute. West's Ann.Pen.Code, § 285; West's Ann.Civ.Code, § 59.

3. Incest ⇐5

Prohibitions against incestuous relationships apply to designated near relatives, whether by the half blood or the whole blood. West's Ann.Pen.Code, § 285; West's Ann.Civ.Code, § 59.

Ellery E. Cuff, Public Defender, Los Angeles County, Richard W. Erskine, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

HERNDON, Justice.

The sole question posed by this appeal is whether an admitted act of sexual intercourse between defendant and the 14-year old daughter of his half-sister was incestuous under section 285 of the Penal Code: "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not less than one year nor more than fifty years."

Section 59 of the Civil Code provides: "Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate."

The essence of defendant's argument, as stated in his opening brief, is as follows: "An ordinary reading of Civil Code, Section 59, leads counsel to the conclusion that 'half-uncle' and 'half-niece' are not included in the language. The words 'of the half as well as the whole blood' clearly apply to the words 'brothers and sisters'; they clearly do not apply to 'uncles and nieces'. In such case, where 'half-bloods' are mentioned as to one class of persons and not mentioned as to another class, it

seems clear that 'half-bloods' are not covered as to the latter class."

[1, 2] Defendant seeks to invoke the rule that where the language of a penal statute is reasonably susceptible of two constructions that construction which is more favorable to the accused will ordinarily be adopted. People v. Valentine, 28 Cal.2d 121, 169 P.2d 1.

Although the question here presented has not been decided in any reported California decision, the great weight of authority is adverse to defendant's contention. We are in accord with the prevailing view that the statutory prohibition applies to the relationship here involved. By definition, an uncle is a brother of one's father or mother, and no distinction is made between the whole and the half blood according to common and ordinary usage. Black's Law Dictionary, 4th Ed.; The Oxford English Dictionary, Vol. 11, page 86. In referring to himself as the "half-uncle" of the victim of his act, defendant employs a misnomer; it is a term unknown to common usage.

In State v. Reedy, 1890, 44 Kan. 190, 24 P. 66, 67, the terms of the applicable statutes were essentially the same as those here involved. The Supreme Court of Kansas declared: "The language employed by the legislature is to be interpreted according to its common meaning; and, when the terms 'uncle' and 'niece' are viewed in that light, they will include the half-brother of the father, and the daughter of a brother of the half-blood."

In State v. Guiton, 1898, 51 La.Ann. 155, 24 So. 784, 785, the defendant was convicted of incest with a niece, the daughter of his half-brother. The definitive statute provided that "marriage is prohibited between brother and sister, whether of the whole or of the half blood, whether legitimate or illegitimate, and also between the uncle and the niece, the aunt and the nephew." On appeal the same contention as that urged by defendant here was advanced, namely that since the qualifying words relating to the half blood were used only in reference to brother and sister, the relationship involved was not covered. In rejecting the contention the Louisiana court said: "It is true that the compilers of our Code inserted the qualifying words [half-blood]. * * * We incline to the opinion that 'brother' and 'sister', as used, would include brother and sister of the half blood, without the qualifying words of the articles of the Code; that, as relates to the crime charged, the half blood is meant equally with the whole blood. * * Even if it should be conceded that too broad a meaning is given to the words 'brother' and 'sister,' and that, if used alone, they do not mean brothers and sisters of the half blood, here, in terms, brothers and sisters of the half blood are included in the article, followed by the words 'and also,' which refer, as we take it, to uncle and niece, and the qualifying words just preceding, 'of the half blood.' So that, in our view, it is as if the statute read, 'Marriage is prohibited between brother and sister, whether of the whole or half blood, and also uncle and niece, whether of the whole or the half blood.'"

In State v. Harris, 1908, 149 N.C. 513, 62 S.E. 1090, 1091, defendant was convicted of incest under a charge that he had carnal intercourse with a female who was the daughter of his half-sister. In defining the crime, the statute referred to intercourse between brother and sister and uncle and niece, but in referring to brother and sister added the qualifying clause "of the half or whole blood." In affirming the conviction the appellate court said: "For obvious reasons, nothing is said of the half or whole blood. The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in the preceding section. As here, the daughter of defendant's sister is of course related to him only by the half blood. The fact that the mother of the girl is only half-sister of defendant cannot affect the case. * * * We think the defendant and his niece, the daughter of the half-sister, clearly within the statute."

[3] It has been held generally that prohibitions against incestuous relationships apply to designated near relatives, whether by the half blood or the whole blood. State v. Lamb, 1929, 209 Iowa 132, 227 N.W. 830, 831; State v. Wyman, 1887, 59 Vt. 527, 8 A. 900; Simon v. State, 1892, 31 Tex. Cr.R. 186, 20 S.W. 399, 716; People v. Binger, 1919, 289 Ill. 582, 124 N.E. 583; Shelley v. State, 1895, 95 Tenn. 152, 31 S.W. 492, 493; Burdue v. Commonwealth, 1911, 144 Ky. 428, 138 S.W. 296, 297; Commonwealth v. Ashey, 1924, 248 Mass. 259, 142 N.E. 788, 789; State v. Skinner, 1945, 132 Conn. 163, 43 A.2d 76, 77.

The statements of the text-writers are uniformly to the same effect; Keezer, Marriage and Divorce (1923), Sec. 110; 1 Schouler, Marriage, Divorce, Separation and Domestic Relations 22–23, Sec. 16; 2 Nelson, Marriage and Separation (1895), 640, Sec. 710; 1 Bishop, Marriage, Divorce and Separation (1891), 322, Sec. 748; 3 Burdick, Law of Crime, 239, Sec. 837. See also 31 C.J. 377, Sec. 10; 42 C.J.S. Incest § 3, p. 505, and 27 Am.Jur. 289, Sec. 3.

The judgment and the order denying motion for a new trial are affirmed.

FOX, P. J., and ASHBURN, J., concur.

51 Cal.2d 471

Donald A. COY, Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent.

L. A. 25209.

Supreme Court of California, In Bank.

Feb. 2, 1959.

Petition for prohibition to prevent the trial of petitioner under information charging him with unlawful possession of narcotics. The Supreme Court, Traynor, J., held that the fact that officers did not disclose identity of informer, whose information led to arrest of defendant for unlawful possession of narcotics, did not make the arrest illegal and evidence obtained as result thereof inadmissible, where no motion to strike the officer's testimony was made after identity of informer was refused, and neither in his objection to introduction of narcotics in evidence nor by argument elsewhere in the record did defendant indicate that he was relying on refusal to identify the informer to establish illegality of the arrest and search.

Alternative writ discharged and peremptory writ denied.

1. Witnesses ⇐220

On preliminary hearing on information charging defendant with unlawful possession of narcotics wherein officer testified that informer had provided accurate information in the past that led to arrest of other persons for unlawful possession of narcotics, and stated that in his opinion informer, whose information led to arrest of defendant, was a reliable source of information and that officer had relied on him in making the arrest, magistrate did not err in sustaining objection to question asking identity of informer, since the prosecution was entitled to elect between disclosure and having the officer's testimony struck, and it was incumbent on defendant to compel such election, by moving to strike or otherwise making his position clear. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1881, subd. 5.

2. Arrest ⇐63(4)
Criminal Law ⇐394.4(9)

That officers did not disclose identity of informer, whose information led to arrest of defendant for unlawful possession of narcotics, did not make the arrest illegal and evidence obtained as result thereof inadmissible, where no motion to strike the officer's testimony was made after identity of informer was refused, and neither in his objection to introduction of narcotics in evidence nor by argument elsewhere in the record did defendant indicate that he was relying on refusal to identify the informer to establish illegality of the arrest and search. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1881, subd. 5.

John P. Brown and J. C. Radzik, Pasadena, for petitioner.

Edmund G. Brown, Atty. Gen., William B. McKesson, Dist. Atty., Ralph F. Bagley, Jere J. Sullivan, Lewis Watnick and Robert Lederman, Deputy Dist. Attys., Los Angeles, for respondent.

TRAYNOR, Justice.

An information filed by the District Attorney of Los Angeles County charged defendant with possessing narcotics in violation of Health and Safety Code, section 11500. His motion to set aside the information under Penal Code section 995 was denied, and he now seeks a writ of prohibition to prevent his trial.

On June 11, 1958, Officer Hill of the Los Angeles Police Department Narcotics Division received information from a confidential informer that defendant was in possession of narcotics and that the room he occupied in a rooming house was being used as a "shooting gallery," a place where addicts congregate to use narcotics. The informer accompanied Officers Hill and Loreste to the neighborhood of the room-

ing house and pointed out the building and the room defendant occupied.

An hour or so later, the officers entered the rooming house with the permission of the landlady, who accompanied them upstairs to defendant's room. As they approached the room, the door opened and defendant emerged dressed in a bathrobe. The landlady indicated that he was the person the officers had inquired about, and they placed him under arrest. The officers had no warrant. When the officers searched defendant's person after the arrest, they found narcotics and paraphernalia for their use in the pockets of his bathrobe. Defendant admitted that the narcotics were his, that he had purchased them that morning, and that he was on his way to the bathroom to take a fix.

The informer was not present at the arrest, and took no other part than to supply information of defendant's possession and show the officers the location of defendant's residence.

At the preliminary hearing, Officer Hill testified to the foregoing facts. He also testified that the informer had provided accurate information in the past that led to the arrest of three persons for unlawful possession of narcotics. He stated that in his opinion the informer was a reliable source of information and that he had relied upon him in making the arrest in the present case.

On cross-examination, Officer Hill was asked the identity of the informer. The prosecution's objection was sustained on the ground that the informer's identity was privileged. (See, Code Civ.Proc., § 1881, subd. (5).) After the cross-examination, the prosecution sought to introduce into evidence the narcotics found on defendant's person after the arrest. Defendant's objection on the ground that they had been obtained as a result of an illegal search and seizure was overruled. Defendant was committed and held for trial and his motion to set aside the commitment was denied.

Defendant contends that since the identity of the informer was not disclosed, the officers could not justify the arrest on the basis of the informer's information; that the arrest was therefore illegal and the evidence obtained as a result thereof inadmissible; and that accordingly the writ should issue since there was no competent evidence to support the commitment. Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39; Badillo v. Superior Court, 46 Cal.2d 269, 271, 294 P.2d 23.

In the Priestly case we held that "when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant." 50 Cal.2d at page 819, 330 P.2d at page 43.

[1, 2] In the present case no motion to strike the officer's testimony was made after the identity of the informer was refused, and neither in his objection to the introduction of the narcotics in evidence nor by argument elsewhere in the record did defendant indicate that he was relying on the refusal to identify the informer to establish the illegality of the arrest and search. The magistrate did not err in sustaining the objection to the question asking the identity of the informer, for the prosecution was entitled to elect between disclosure and having the officer's testimony struck. It was incumbent on defendant to compel this election, however, by moving to strike or otherwise making his position clear. The prosecution may have had evidence other than the information of the informer to justify the search or it may have been willing to waive the privilege of nondisclosure if its case would otherwise fail, and it was entitled to an opportunity to produce such evidence or waive nondisclosure. It was not called upon to do so, however, while evidence of reasonable cause stood unchallenged in the record. To hold that the magistrate or trial court must strike the evidence on its own motion when the objection to it has not been called to its attention would open the door to needless repetitions of preliminary hearings. It

would also permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal and a new trial ordered. No undue burden is placed on the defendant by requiring him to make a motion to strike when the basis for excluding evidence theretofore properly admitted becomes apparent, and there is no basis for departing from the settled rule requiring such a motion (City of Venice v. Short Line Beach Land Co., 1919, 180 Cal. 447, 453, 181 P. 658; Ballos v. Natural, 1928, 93 Cal.App. 601, 608, 269 P. 972; Brandt v. Krogh, 1910, 14 Cal.App. 39, 56, 111 P. 275; Fricke, California Criminal Evidence, 444–445 (4th ed. 1957)) in the present situation.

The alternative writ is discharged and the peremptory writ is denied.

GIBSON, C. J., and CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

51 Cal.2d 474

R. W. AGNEW, Respondent,

v.

CULVER CITY et al., Appellants.

L. A. 25283.

Supreme Court of California,
In Bank.
Feb. 2, 1959.

Rehearing Denied March 4, 1959.

Suit for declaratory judgment determining validity of certain ordinances of defendant city. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment adverse to city, and appeal was taken by it from parts of such judgment. The Supreme Court, McComb, J., held that where ordinance requiring a license fee limited right of electrical contractor holding state license to contract in city unless he paid city prescribed fee and obtained permit from city, requirement for payment of fee and obtaining a permit nullified permission given contractor by general law to conduct his business at any place in state and penal provisions of such ordinance were therefore invalid.

Affirmed.

Opinion, 331 P.2d 201, vacated.

Municipal Corporations ⇐592(1)

Where ordinance requiring a license fee limited right of electrical contractor holding state license to contract in city unless he paid city prescribed fee and obtained permit from city, requirement for payment of fee and obtaining permit nullified permission given contractor by general law to conduct his business at any place in state and penal provisions of such ordinance were therefore invalid. West's Ann. Bus. & Prof.Code, §§ 7000–7145.

M. Tellefson, City Atty., Culver City, for appellants.

R. W. Agnew, in pro. per.

McCOMB, Justice.

This cause was transferred to this court after decision by the District Court of Appeal, Second Appellate District, Division Three. Upon further examination of the record, we adopt the opinion of that court prepared by Mr. Justice Vallée, with such omissions as hereinafter appear, as and for the decision of this court. As modified, it reads:

"Plaintiff brought this suit for declaratory relief to determine the validity of certain ordinances of defendant city. The cause was tried and judgment rendered that Ordinance 49 of Culver City, as amended by Ordinance 250, is invalid and unenforceable against plaintiff insofar as it provides for the enforcement of the provisions of the ordinance by criminal process. On appeal the judgment, to the extent that it adjudged that Ordinance 49, as amended by Ordinance 250, was invalid and unenforce-

able against plaintiff insofar as it provided for the enforcement of the provisions of the ordinance by criminal process, was affirmed. In other respects the judgment was reversed with directions to the superior court to amend its findings of fact and conclusions of law. (Agnew v. City of Culver City, 147 Cal.App.2d 144 [304 P.2d 788].)

"The superior court amended its findings of fact pursuant to the directions; and rendered judgment that 'plaintiff, as a duly State-licensed electrical contractor, is entitled to contract anywhere in the State to do electrical work authorized by said General State License, without applying for or obtaining any license or permit from any municipality, except such licenses or permits as may be required by public agencies with respect to the quality, safety and character of electrical installations, and except such other licenses as may be required by public agencies requiring payment of license fees for revenue purposes only, under duly and legally adopted Ordinances enforceable by civil process only, which tax may, however, be increased by way of penalty of a percentage thereof for failure to pay the same as required by said Ordinances'; and 'That Ordinance No. CS–49, as amended by Ordinance No. CS–250, is invalid and unenforceable against plaintiff insofar as it provides for the enforcement of the provisions of said Ordinance by criminal process.'

"Defendants appeal from the part of the judgment reading, 'except such other licenses as may be required by public agencies requiring payment of license fees for revenue purposes only, under duly and legally adopted Ordinances enforceable by civil process only,' and 'That Ordinance No. CS–49, as amended by Ordinance No. CS–250, is invalid and unenforceable against plaintiff insofar as it provides for the enforcement of the provisions of said Ordinance by criminal process.'

"The contentions are that the penal provisions of a business license ordinance, and particularly Ordinance 49 as amended by Ordinance 250, are not invalid and do not invalidate the ordinance in imposing an additional burden on plaintiff in carrying on his work as a licensed contractor; and that the penal provisions of a business license ordinance, and particularly Ordinance 49 as amended by Ordinance 250, do not invalidate the ordinance as requiring imprisonment for a debt in violation of section 15, article I, of the Constitution.

"Plaintiff is an electrical contractor licensed by the Contractors' State License Board under section 7000 et seq. of the Business and Professions Code. He applied to the proper official for a permit authorizing him to do electrical work within Culver City at a designated address. He was informed it would be necessary for him to pay a license fee of $100 under Ordinance 49 and to obtain from the business license collector a business license to do work as an electrical contractor in the city. Plaintiff refused to pay the fee and to obtain the license on the ground his state license as an electrical contractor authorized him to do work as such in Culver City without conforming to any local ordinances requiring a license or the payment of a fee.

"Ordinance 49, as amended by Ordinance 250, makes it unlawful for any person to commence or carry on any business specified in the ordinance without first having paid the required license fee and having procured a license certificate so to do from the city and without obtaining the permit, certificate of compliance, or other instrument required by the ordinance. The license fee required was $50 a year or part thereof from *local* and $100 a year or part thereof from *itinerant* electricians and electrical contractors. The amount of the license fee is made a debt to Culver City. Violation of any provision of the ordinance is a misdemeanor. On payment of the required fee it is made the duty of the license collector to issue a license certificate.

"On the former appeal it was expressly held that Ordinance 49, as amended by Ordinance 250, is invalid and unenforce-

able against plaintiff insofar as it provides for the enforcement of its provisions by criminal process, and that the fee required was for regulation and not revenue purposes.

"In the recent case of Agnew v. City of Los Angeles, 51 Cal.2d 1 [330 P.2d 385], the Supreme Court held that a section of the Electrical Code of the City of Los Angeles which provided that 'In order to obtain a license tax registration certificate number, the contractor must pay the city clerk a fee based on the amount of his gross receipts' and made it a misdemeanor for an electrical contractor to install wiring without a permit from the Department of Building and Safety of the city was invalid for the reason that it was in conflict with the Contractors' License Act (Bus. & Prof.Code, §§ 7000–7145) which has preempted the field of regulating contractors.

"The license fee required by the Culver City ordinance is of the same character as that held invalid in Agnew v. City of Los Angeles, 51 Cal.2d 1 [330 P.2d 385]. As said on the prior appeal in this case, it limits the right of a contractor holding a state license to contract in Culver City unless he pays the city the prescribed fee and obtains a permit from the city; the requirement for the payment of a fee and the obtaining of a permit nullifies the permission given a contractor by the general law to conduct his business at any place in the state. And in the Los Angeles case it is said (51 Cal. 2d at page —, 330 P.2d at page 388):

" 'The only material difference between the ordinance held invalid in Agnew v. City of Culver City, supra [147 Cal.App.2d 144, 304 P.2d 788], and the ordinance here involved is that the former imposed a fee of $100, while in the instant case the fee varies according to the amount of the contractor's gross receipts, the minimum being $12.'

"We hold that the penal provisions of Ordinance 49, as amended by Ordinance 250, are invalid. Agnew v. City of Culver City, 147 Cal.App.2d 144 [304 P.2d 788], constitutes the law of the case. (Katemis v. Westerlind, 142 Cal.App.2d 799, 805–806 [299 P.2d 383]; Hard v. Hollywood Turf Club, 134 Cal.App.2d 174, 178–179 [285 P.2d 321]; Stock v. Meek, 114 Cal. App.2d 584, 586 [250 P.2d 622].) Furthermore, the holding in Agnew v. City of Los Angeles, 51 Cal.2d 1 [330 P.2d 385], is conclusive on the question. As said in that case (51 Cal.2d —, 330 P.2d at page 388):

" 'Of course, as contended by defendants, a municipality may tax electrical contractors, as other trades, professions and businesses are taxed. The fees in the present case, however, are exacted not as a business tax but as the price of a license that the city cannot require.'

"Defendants' contention that the penal provisions of Ordinance 49, as amended by Ordinance 250, are not invalid, cannot be sustained." []*

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.

51 Cal.2d 445

PEOPLE of the State of California, Respondent,

v.

Wilma Lee RICHARDSON, Appellant.

Cr. 6346.

Supreme Court of California,
In Bank.
Jan. 30, 1959.

Defendant was convicted in the Superior Court, City and County of San Francisco, Walter Carpeneti, J., for possessing narcotics in violation of Health and Safety Code section, and she appealed. The Su-

* [ ] Brackets together in this manner are used to indicate deletions from the opinion of the District Court of Appeal.

preme Court, Gibson, C. J., held that record permitted determination that, notwithstanding absence of warrant, arrest and ensuing search of defendant had been justified because there had been reason to believe that she had committed a felony.

Affirmed.

Opinion, 328 P.2d 524, vacated.

1. Criminal Law ⇐1036(1)

Not having objected at any point in trial to admission of evidence on ground that it was obtained by unlawful search and seizure, defendant could not raise matter for first time on appeal.

2. Arrest ⇐63(4)

In prosecution for possessing narcotics in violation of Health and Safety Code section, record permitted determination that, notwithstanding absence of warrant, arrest and ensuing search of defendant had been justified because there had been reason to believe that she had committed a felony. West's Ann.Health & Safety Code, § 11500.

Frank J. Baumgarten, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Peter T. Kennedy, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

A jury found defendant guilty of possessing narcotics in violation of section 11500 of the Health and Safety Code. On this appeal she claims that there was an unlawful search and seizure and that there is insufficient evidence to show knowing possession.

Defendant was taken into custody on the morning of January 2, 1957, by Inspector Noel and three other officers. Noel and one of the other officers testified at the trial and related substantially the same facts with respect to the arrest. Upon entering the building in which defendant's apartment was located, the officers, who did not have a warrant, saw defendant open her door and walk down a hallway to the rear of the building. Her door was left ajar, and the officers entered and began to conduct a search. When defendant returned a few minutes later, she was placed under arrest, and a vial of narcotics was found in her skirt pocket. She said, "Well, I guess you have got me good this time," and, when questioned as to where she had obtained the narcotics, she replied, "I'd rather not say." She did not deny knowing that the narcotics were on her person.

Inspector Noel testified that the officers had gone to defendant's apartment because of information obtained from two sources on the morning of the arrest. A man who was known to the inspector as James Allen and who claimed to be living with defendant came to the inspector's office and said that defendant was selling narcotics at her apartment. Shortly thereafter, Noel was told by Inspector Ohlson, who did not testify at the trial, that Ohlson had received the same information from Randolph Clark. According to Noel, both Allen and Clark had, on previous occasions, given the authorities information which led to arrests, and, in his opinion, they were reliable informers. A photograph was introduced into evidence which Noel identified as being that of James Allen.

Defendant took the stand and said that she was living with a James Allen at the time she was taken into custody but that he was not the man whose photograph was in evidence. She testified that she had not known of the presence of narcotics on her person, and she denied making the incriminating remarks attributed to her by the officers. Her explanation was that one of her boarders, Randolph Clark, had quarreled with her and that, while she was washing clothes shortly before the arrest, Faye Robertson, a woman living with Clark, had asked her to keep something for a few minutes and had put an object wrapped in a five-dollar bill into her skirt pocket. According to defendant, the vial of narcotics was wrapped in a five-dollar bill when found by the police, and she then

saw the vial for the first time. The officers testified, however, that there was no five-dollar bill in defendant's pocket, and, when Faye Robertson was called to the stand by the People, she testified that she did not know of any quarrel between defendant and Clark and that she had not given defendant the narcotics.

The defense called a witness who testified that his name was James Allen, that he had formerly lived at defendant's address, and that he had never given Inspector Noel information about defendant or anyone else. It was stipulated that the witness was not the informer referred to by Noel.

The evidence against defendant, if legally secured, clearly warrants the jury's implied finding that she knowingly possessed narcotics, and the only claim of error which need be discussed is the assertion that the evidence against defendant was obtained as the result of an unlawful search and seizure.

[1, 2] Defendant did not object at any point in the trial to the admission of evidence on the ground that it was obtained by an unlawful search and seizure, and she may not raise the matter for the first time on appeal. People v. Goldberg, 152 Cal. App.2d 562, 572, 314 P.2d 151; People v. Williams, 148 Cal.App.2d 525, 532, 307 P.2d 48; see People v. Kitchens, 46 Cal.2d 260, 262, 294 P.2d 17; cf. Robison v. Superior Court, 49 Cal.2d 186, 187, 316 P.2d 1. Moreover, the record permits the determination that, notwithstanding the absence of a warrant, the arrest and ensuing search were justified because there was reason to believe that defendant had committed a felony. Noel's testimony regarding James Allen, with whom he dealt personally, is alone sufficient for this purpose, without resort to his testimony about the information he received indirectly from Randolph Clark. The position taken by defendant, although not entirely clear, appears to be that the showing made by her with respect to Allen compels the conclusion that the alleged informer either did not exist or was not reliable. Obviously, however, defendand succeeded, at most, in creating a conflict in the evidence for the trial court to resolve, and the court was entitled to believe Noel and to determine that the communication in question was in fact made by an informer known to Noel as James Allen and that, in view of the informer's past reliability, there was reasonable cause for the arrest and search.

What has been said above makes it unnecessary to consider defendant's claim that the information allegedly given by Randolph Clark cannot be relied upon to justify the search and seizure because Noel learned of it indirectly through Inspector Ohlson, who did not testify.

The judgment is affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

51 Cal.2d 467

Leo D. RAPP, Appellant,

v.

Vera K. GIBSON et al., Respondents.

L. A. 25107.

Supreme Court of California,
In Bank.
Feb. 2, 1959.

Action by county auditor for declaratory relief against all incumbent elective officers to determine effective date of ordinance increasing compensation of officers. From judgment of the Superior Court, Kern County, Robert B. Lambert, J., adjudging effective date of increase to be that as provided in ordinance, auditor appealed. The Supreme Court, Traynor, J., held under statute suspending constitutional prohibition of salary increases to municipal officers during war and defining period

of war as commencing when armed forces of the United States are engaged in active military operations and ending one year after termination of hostilities therein as proclaimed by the President, by Presidential proclamation fixing terminal date of eligibility of certain Korean veteran benefits and reciting that the armistice had terminated the hostilities in conflict, suspension of prohibition against salary increases terminated one year after Presidential declaration.

Reversed.

Officers ⇐100(1)

Under statute suspending constitutional prohibition against salary increases to municipal officers during war and defining war as commencing when armed forces of the United States are engaged in active military operations and ending one year after termination of hostilities as proclaimed by President, by Presidential proclamation fixing terminal date of eligibility for certain Korean benefits and reciting that armistice had terminated hostilities in Korean conflict, suspension of prohibition against salary increases terminated one year after date of Presidential proclamation. Proclamation No. 3080, U.S.Code Congressional and Administrative News 1955, p. 985; Executive Order No.10585, U.S.Code Congressional and Administrative News 1955, p. 1048; West's Ann.Const. art. 11, § 5; West's Ann.Gov.Code, §§ 53070, 53071.

Baker, Palmer, Wall & Raymond, and Oran W. Palmer, Bakersfield, for appellant.

Vera K. Gibson, Albert E. Burton, Joshua H. Hanks, J. Perry Brite, Stanley A. Newman, Charles S. Dumble, LeRoy F. Galyen and Charles H. Shomate, in pro. per., and Roy Gargano, County Counsel, Dennis McCarthy, Asst. County Counsel, Bakersfield, for respondents.

J. F. Coakley, Dist. Atty., of Alameda County, Oakland, Douglas R. Dunning, Asst. Dist. Atty., Piedmont, Francis W. Collins, Dist. Atty., of Contra Costa County, Martinez, Clyde H. Larimer, Dist. Atty. of Glenn County, Willows, William B. McKesson, Dist. Atty., of Los Angeles County, Lester J. Gendron, Dist. Atty., of Madera County, Madera, Leland H. Jordan, County Counsel of Marin County, San Rafael, William O. Mackey, Dist. Atty., of Riverside County, Riverside, John B. Heinrich, County Counsel of Sacramento County, Richard W. Dickenson, County Counsel of San Joaquin County, Stockton, H. C. Grundell, Dist. Atty., of San Luis Obispo County, San Luis Obispo, Keith C. Sorenson, Dist. Atty. of San Mateo County, Redwood City, Vern B. Thomas, Dist. Atty., of Santa Barbara County, Santa Barbara, Spencer M. Williams, County Counsel of Santa Clara County, San Jose, James M. Shumway, County Counsel of Solano County, Fairfield, Richard M. Ramsey, County Counsel of Sonoma County, Santa Rosa, Frederick W. Reyland, Jr., County Counsel of Stanislaus County, Modesto, Scott K. Carter, Dist. Atty., of Tuolumne County, Sorona, and Roy A. Gustafson, Dist. Atty., of Ventura County, Ventura, as amici curiae on behalf of respondents.

TRAYNOR, Justice.

Plaintiff, the auditor of Kern County, brought this action for declaratory relief against all of the incumbent elective officers of that county to determine the effective date of a salary ordinance adopted by the Board of Supervisors of Kern County on December 31, 1957, increasing the compensation of these officers. The officers contend that the increase became effective on February 1, 1958, as provided in the ordinance. The auditor contends that the California Constitution prevents the salary ordinance from becoming effective until after defendants' terms of office expire on January 5, 1959.[1]

1. The ordinance provides that if the provisions of law prohibit the salary increases from becoming effective on February 1, 1958, they should become effective on January 5, 1959, the date of the expiration of defendants' terms of office.

The Constitution provides that "the compensation of any county, township or municipal officer shall not be increased after his election or during his term of office, * * *" (Art. XI, sec. 5.) This section was amended in 1944 to permit the Legislature to suspend the provision "for any period during which the United States is engaged in war and for one year after the termination of hostilities therein as proclaimed by the President of the United States." Pursuant to this amendment, the Legislature suspended the provision during "time of war" (Gov.Code, § 53071). "War" is defined in section 53070 of the Government Code as "that period of time commencing: (a) When Congress declares war; or (b) When the armed forces of the United States are engaged in active military operations against any foreign power whether or not war has been formally declared; * * * and ending one year after the termination of hostilities therein as proclaimed by the President of the United States."

The trial court found that beginning in 1950 the armed forces of the United States were engaged in active military operations in Korea that constituted "hostilities" and a "war" within the meaning of section 53070(b); that no proclamation has been issued by the President specifically terminating these hostilities; and that under section 53071, the constitutional prohibition against salary increases is still suspended. The court therefore held that the salary increases were effective February 1, 1958. Plaintiff contends that the termination of hostilities in the Korean conflict has been proclaimed by the President and that therefore the salary increases cannot become effective before January 5, 1959, the expiration date of the terms of office during which the salary ordinance was adopted. We agree with this contention.

On January 7, 1955, a presidential proclamation fixing the terminal date of eligibility for certain Korean veteran benefits declared that: "Whereas the armistice between the United Nations Command, on the one hand, and the Korean People's Army and the Chinese People's Volunteers, on the other hand, effective July 27, 1953, has terminated hostilities in said conflict * * *." (Presidential Proclamation No. 3080, U.S.Code Congressional and Administrative News 1955, p. 985, 3 C.F.R. 17 [20 C.F.R. 173]). On the same date the President issued Executive Order No. 10585, U.S.Code Congressional and Administrative News 1955, p. 1048, relating to income tax exemptions of the armed forces, in which he declared that "January 31, 1955, is designated as the date of termination of combatant activities" in the Korean conflict. The fact that the immediate purpose of these declarations was to terminate certain veteran benefits does not make them any the less official public proclamations by the President of the termination of the Korean hostilities. The President could hardly be expected to make such declarations unrelated to some specific purpose simply to declare the termination of a formally undeclared war. (See Pye, The Legal Status of the Korean Hostilities, 45 Geo.L.J. 45, 58–59; 27 Atty. Gen.Op. 295.) The United States Court of Military Appeals, relying on the foregoing presidential declarations, has held that for purposes of the military code the hostilities in the Korean conflict were at an end before June 4, 1955: "[T]aking into consideration all the circumstances existing on June 4, 1955, the date the offense in this case was committed, the inescapable conclusion is that a 'time of war' condition has ended." United States v. Sanders, 7 U.S. C.M.A. 21, 21 C.M.R. 147, 148.

Since the presidential declarations of January 7, 1955, fulfilled the requirements of Article XI, Section 5 of the Constitution and sections 53070–53071 of the Government Code, the suspension of the provision prohibiting salary increases terminated on January 7, 1956, one year after the presidential declaration of termination of hostilities. It follows that the salary ordi-

nance of December 31, 1957, did not become effective until after defendants' terms of office expired on January 5, 1959.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

167 Cal.App.2d 542

The PEOPLE of the State of California

v.

John Burr ROBERSON, Defendant and Appellant.

Crim. 6467.

District Court of Appeal, Second District, Division 1, California.

Feb. 3, 1959.

Prosecution for committing lewd and lascivious acts on bodies of two females under age of fourteen years. From adverse judgment of the Superior Court, Los Angeles County, J. Howard Ziemann, J., the defendant appealed. The District Court of Appeal, Lillie, J., held that in absence of more specific and relative information, mere declaration that defendant pleaded guilty under a "promise" of probation was ineffective to create a meritorious issue before reviewing court particularly when it was clear from record that defendant was at all times represented by counsel and never called matter to attention of trial judge on motion to set aside guilty plea, or otherwise, either before, at time of trial, or after judgment.

Judgment affirmed.

1. Criminal Law ⇐1044

In absence of more specific and relative information, mere declaration that defendant pleaded guilty under a "promise" of probation was ineffective to create a meritorious issue before reviewing court particularly when it was clear from record that defendant was at all times represented by counsel and never called matter to attention of trial judge on motion to set aside guilty plea, or otherwise, either before, at time of trial, or after judgment.

2. Criminal Law ⇐274, 1149

In allowing or denying a motion to set aside a plea of guilty, trial court is vested with broad discretion, exercise of which will not be disturbed on appeal unless abuse is clearly shown.

3. Criminal Law ⇐273

A defendant, by a voluntary plea of guilty, admits every element of offense with which he is charged.

4. Criminal Law ⇐982.3(3)

Granting of application for probation is discretionary with trial judge and is not an absolute right to which a person is entitled.

5. Criminal Law ⇐1147

An order denying probation will not be reviewed on appeal from judgment unless record clearly shows an abuse of discretion.

6. Criminal Law ⇐982.3(3)

In prosecution for committing lewd and lascivious acts on bodies of two females under age of fourteen years wherein two doctors were appointed to examine defendant and one of doctors reported that defendant was not only a sexual psychopath but a menace to health and safety of others, trial court did not abuse its discretion in denying defendant's application for probation. West's Ann.Pen.Code, § 288; West's Ann.Welfare and Inst.Code, § 5504.

John Burr Roberson, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was charged in Counts 1 and 2 of an information with having committed lewd and lascivious acts on the bodies of two females under the age of fourteen years, in violation of Section 288, Penal Code. He pleaded not guilty to both counts, but on the day set for trial defendant, represented by, and in the presence of his counsel, withdrew his plea of not guilty to Count 1 and substituted therefor a plea of guilty. The court, under Section 5504, Welfare & Institutions Code, appointed two doctors to examine him and ordered the Probation Officer to submit a probation report. Proceedings on Count 2 were continued for further disposition, and later dismissed.

Upon the report of the two court-appointed doctors that defendant was "a possible sexual psychopath," the court below, on March 10, 1958, committed him to Atascadero State Hospital for a period not to exceed ninety days for observation. Thereafter, returning defendant for sentence, the Director of the State Hospital, Dr. Rude, reported to the court that defendant was a sexual psychopath, would not benefit from further care and was a menace to the health and safety of others; and recommended he be sentenced on the charge. On July 11, 1958, defendant, with his counsel, appeared before the lower court, at which time it found defendant to be a sexual psychopath, denied probation and sentenced him to the state prison. Defendant's appeal is taken from "my case," but we will treat the same as one taken from the judgment entered upon his plea of guilty and the subsequent denial of probation.

Although defendant was represented by counsel at all stages of the proceedings in the court below, he appears before us now in propria persona. His opening brief, not in compliance with the Rules of Appeal and consisting of only several short paragraphs, declares that he had been drinking to relieve a back pain and that because of a "promise" of probation, he pleaded guilty to a crime he "did not commit."

[1] Defendant's bare statement that he was "promised probation" stands alone without any explanation concerning the manner in which the alleged promise was made, by whom and when it was made, and of what it consisted. In the absence of more specific and relative information, the mere declaration that defendant pleaded guilty under a "promise" of probation is ineffective to create a meritorious issue before this court, particularly when it is clear from the record he was at all times represented by counsel, and never called the matter to the attention of the trial judge on a motion to set aside the guilty plea, or otherwise, either before, at the time of, or after judgment.

In all of the proceedings in the court below, defendant was represented by competent counsel of his own choice, who was present at all times with his client. There is no hint in the record or otherwise that any of the proceedings were other than proper or not free from duress, fraud, coercion or other forces overreaching the free will of the defendant. Defendant's statement on this appeal is the only suggestion anywhere that a "promise" of probation ever existed, and it, in the absence of specific explanatory facts, constitutes nothing more than that it was the disappointed hope of getting probation that motivated defendant's plea of guilty. Defendant made no request of the trial court to be relieved of his guilty plea, but even if the matter were properly before this court on an issue of abuse of discretion, such a circumstance is wholly insufficient to justify appellate interference. Said the court in People v. Van Valkenburg, 111 Cal.App.2d 337, at page 342, 244 P.2d 750, at page 754: "* * * it is equally clear that mere disappointment of the accused in the awarded sentence, or reliance upon his own counsel's advice, are not sufficient to prove abuse of discretion in denying the motion. (Citations.)" We have no reason to believe that such a "promise" was ever made, or if it was, that it came from any one officially connected with the prosecution or the court,

or that defendant's plea was not entered by him voluntarily, while fully informed of his rights and with the knowledge, and in accord with, the advice of his counsel.

[2] At no time, either before or after judgment, did defendant ask the court below to permit him to withdraw his plea of guilty and substitute a not guilty plea therefor. Had he filed such a motion, it would have been incumbent on him to show good cause for the substitution. At that time he could and should have set forth in detail all of the matters of which he now complains, and whatever defense to the charge he now claims. In allowing or denying such motion, the trial court is vested with a broad discretion, the exercise of which will not be disturbed on appeal unless abuse is clearly shown. People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806; People v. Cooper, 123 Cal.App.2d 353, 266 P.2d 566; People v. Broady, 120 Cal.App.2d 901, 262 P.2d 669; People v. Van Valkenburg, 111 Cal.App.2d 337, 244 P.2d 750.

Although we do not believe the matter to be properly before us, and are not confronted with the matter of discretion, nevertheless we have fully considered defendant's contentions in the light of the record on appeal and we find nothing which would justify this court's interference with the judgment of the court below.

[3] With reference to defendant's declaration that he "had been drinking to relieve a pain" in his back, we are unable to determine from his brief whether he made the statement in connection with his contention that he pleaded guilty to a crime "he did not commit," or presented it to this court as a "defense" to the charge. If it is the latter, he is not now in a position to urge the same since, by his voluntary plea of guilty, he has admitted every element of the offense with which he was charged. People v. Ottenstror, 127 Cal.App.2d 104, 273 P.2d 289.

[4–6] As to the lower court's disposition of defendant's application for probation, this, too, is discretionary with the trial judge, probation not being an absolute right to which a person is entitled. People v. Hainline, 219 Cal. 532, 28 P.2d 16; People v. Roach, 139 Cal.App. 384, 33 P.2d 895. In any event, an order denying probation will not be reviewed on an appeal from the judgment unless the record clearly shows an abuse of discretion. People v. Jackson, 89 Cal.App.2d 181, 200 P.2d 204; People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907. The limited record before us contains neither the probation officer's report nor the medical reports. However, it does disclose that a probation report was ordered, medical reports of the two court-appointed doctors were submitted and the report of Dr. Rude was filed; and that all were considered by the trial judge before judgment was pronounced. It further shows that the probation officer recommended a period of observation for defendant; the two doctors found him to be a "possible sexual psychopath" and Dr. Rude, after observing defendant, reported that he was not only a sexual psychopath, but a menace to the health and safety of others, and recommended his sentence on the felony charge. The trial court considered these matters, and, in addition, had the opportunity to talk with and observe the defendant. We are unable to find anything that even approaches an abuse of its discretion in denying defendant's application of probation.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

167 Cal.App.2d 492

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frederick M. DAGAMPAT and Leo Soto Contreras, Defendants,

Frederick M. Dagampat, Defendant and Appellant.

Cr. 6306.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1959.

Defendant and his codefendant were convicted of kidnapping. The Superior Court of Los Angeles County, Albert E. Wheatcroft, J., entered judgment and an order denying defendant's motion for new trial, and the defendant appealed from the judgment and the order. The District Court of Appeal, Shinn, P. J., held that the requisite force or compulsion needed to justify conviction for kidnapping need not consist of the use of actual physical force or of express threats, and that the taking is forcible where it is accomplished through the giving of orders, which the victim feels compelled to obey because he fears harm or injury from the defendant, and his apprehension is not unreasonable under the circumstances, and that evidence sustained conviction for kidnapping.

Judgment and order affirmed.

1. Kidnapping ⇐5

Evidence sustained kidnapping conviction. West's Ann.Pen.Code, § 207.

2. Kidnapping ⇐1

The gravamen of the offense of kidnapping is some form of compulsion. West's Ann.Pen.Code, § 207.

3. Kidnapping ⇐1

The requisite force or compulsion to justify kidnapping conviction need not consist of the use of actual physical force or of express threats. West's Ann.Pen.Code, § 207.

4. Kidnapping ⇐1

A taking is "forcible" within meaning of statute dealing with kidnapping where it is accomplished through the giving of orders which the victim feels compelled to obey because he fears harm or injury from defendant, and victim's apprehension is not unreasonable under the circumstances. West's Ann.Pen.Code, § 207.

5. Kidnapping ⇐4

Where defendant is not charged with kidnapping for a specific purpose, the people are only required to prove that he intended to commit the acts denounced by statute dealing with kidnapping. West's Ann.Pen.Code, § 207.

6. Criminal Law ⇐428

In prosecution for kidnapping, there was sufficient proof of the corpus delicti to justify the admission of the extrajudicial statement of defendant's codefendant. West's Ann.Pen.Code, § 207.

Ellery E. Cuff, Public Defender, J. Stanley Brill, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial, Frederick M. Dagampat and Leo Soto Contreras were found guilty of kidnaping and were committed to the Youth Authority. Dagampat appeals from the judgment and the denial of his motion for new trial. Contreras has not appealed.

The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Stanley Jaramillo, aged 15, was the complaining witness. As Stanley was walking away from a friend's house near the intersection of Sunset Boulevard and Beaudry on the night of December 7, 1957, an open convertible containing three boys drove up and stopped beside him. Appellant was the driver of the car; Contreras and a boy named Johnny Valencia were in the back seat. Valencia got out of the car and entered a drug store on the corner. Appellant told Stanley: "Get into the car. I want

to talk to you about the fight." (On November 29, Stanley had witnessed a fight during which Contreras had stabbed one Manuel Avalos with a knife.) Stanley looked at Dagampat and Contreras, "and they were as if they were giving me some dirty looks"; he turned and saw Valencia approaching him from behind. Asked what he was afraid of, he testified: "Well, you know, like what they did to Manuel. I was scared they might do that to me, too. * * * Stab me too." Stanley said "All right." He got into the car and appellant drove away from the intersection. Stanley testified that the boys displayed no weapons and made no threats, but he entered the car because he was afraid of being stabbed.

After the car had proceeded for half a block, Contreras asked Stanley if he had witnessed the stabbing of Avalos. Upon receiving an affirmative answer, Contreras and Valencia began to hit him. The car stopped in an alley a few blocks away from Sunset and Beaudry and appellant opened the door. Stanley pushed appellant out of the car. After all four boys had alighted, Stanley was held by the jacket while the others hit him; they laughed as they administered the beating; Valencia also gouged his eyes. Stanley then slipped out of his jacket and ran away; as he was running, he was hit on the head by a bottle. On cross-examination, Stanley was asked whether he entered the car voluntarily and he replied: "Not because I wanted to." He admitted that he had not asked to be let out of the car and had not attempted to leave the car or to call for help. He was also asked the following question: "Now, * * * they just asked you if you wanted to get in the car at the drug store, didn't they?" and he answered "Yes."

Dagampat and Contreras were taken into custody shortly after Stanley ran away from the alley. Policewoman Florence Stanton testified that she had a conversation with Contreras about an hour after his arrest. Contreras told her: "If I had to do it over again I would do the same thing. I will probably do time for it but when I get out I know where I can get a .22 gun and if you ask for mercy I will laugh at you." Evidence of the conversation was introduced over the objection of Contreras that the corpus delicti had not been established. Upon motion of counsel for appellant the evidence was admitted only against Contreras.

Appellant testified that he observed Stanley standing on the corner of Sunset and Beaudry when the car stopped for a red light. He had known the complaining witness for six months or a year. He called Stanley over and asked him if he wanted to go for a ride. Stanley entered the car and appellant drove away at an average speed. He handed Stanley a bottle of wine and Stanley took a drink. After he had driven a few blocks, Contreras and Stanley suddenly began to fight; appellant did not participate in the struggle. He drove into an alley and stopped, whereupon Stanley ran away. Appellant denied holding Stanley, hitting him or throwing a bottle at him. At no time did Stanley call for help or indicate that he wanted to get out of the car.

Contreras gave a similar account of the ride. He testified that he and his companions had not been looking for Stanley, that the latter did not ask to leave the car and that no one prevented him from doing so. He also testified that Stanley started the fight by calling him a name and swinging at him.

The first contention to be considered is the insufficiency of the evidence to establish appellant's guilt of kidnaping. Section 207 of the Penal Code provides in material part: "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another * * county, or into another part of the same county, * * * is guilty of kidnaping."

Appellant argues ably and at length that there was no evidence of a forcible abduction of the complaining witness and no evidence that he acted with a criminal intent. Although the argument could well have impressed the trial court it cannot prevail upon this appeal.

It is contended that Stanley had no reason for fear except the "dirty looks" he observed and that these could not reasonably induce fear of harm. But there was much more for Stanley to think about. He was outnumbered and with one of the group behind him. He was faced by another who was a knife carrier and who might have a knife in his belt. They wished to talk with him as a supposed witness to a fight. It is difficult for us to see how it was unreasonable for Stanley to fear harm that might come from his refusal to enter the car in view of the fact that he was assaulted soon after entering it. Who can say what would have happened to the boy if he had defied his adversaries.

[1–4] We do not doubt that evidence and the reasonable inferences amply established a forcible taking. The court could reasonably have found that Stanley did not willingly enter the car, but did so because of a fear of bodily harm induced by appellant's order to get into the convertible, defendants' "dirty looks," the sudden approach of Valencia from the drugstore, and his recollection of the fight in which Contreras stabbed Avalos. These factors influencing Stanley's decision were not to be analyzed separately, but as parts of a single indivisible transaction. The gravamen of the offense of kidnaping is some form of compulsion. People v. Guerrero, 22 Cal.2d 183, 189, 137 P.2d 21. The requisite force or compulsion need not consist of the use of actual physical force or of express threats; the taking is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he fears harm or injury from the accused, and his apprehension is not unreasonable under the circumstances. People v. Broyles, 151 Cal.App.2d 428, 311 P.2d 88. Stanley was only 15 years of age. There could be no doubt as to the purpose of appellant and Contreras in inviting him into the car. He was the one to decide what might be the consequences of a refusal and he had ample reason for believing that the invitation to enter the car was not a friendly one. The prospect of having a knife thrust into one's ribs upon refusal of an invitation would furnish a good reason for regarding it as a command. We cannot say, as a matter of law, that Stanley was not actuated by fear or that his fears were unjustified.

[5] Where the accused is not charged with kidnaping for a specific purpose, the People are only required to prove that he intended to commit the acts denounced by the statute. People v. Hunter, 49 Cal.App. 2d 243, 250, 121 P.2d 529, and cases cited. Whether appellant intended to abduct the complaining witness was a question of fact which was resolved against him by the court upon sufficient evidence.

[6] The remaining contention to be considered is that the extrajudicial statement of Contreras should not have been allowed in evidence for the reason that there was no proof of the corpus delicti. In the light of the preceding discussion, the argument is clearly without merit.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

167 Cal.App.2d 423

Lucy M. MERRILL, Plaintiff and Appellant,

v.

Bruce R. MERRILL, Defendant and Respondent.

Civ. 17884.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1959.

Proceeding on motion to modify custody provisions of a divorce decree. The Superior Court, Marin County, N. Charles Brusatori, J., modified the decree in a manner unsatisfactory to mother and she appealed. The District Court of Appeal, Pet-

ers, P. J., held that evidence failed to show that trial court abused its discretion in continuing joint custody of child of the parties and in dividing his physical custody between them, rather than giving mother undivided physical custody with visitation rights by father.

Order affirmed.

1. Divorce ⇐303(2)

Before a trial court will modify a child custody order in a divorce decree, there must be evidence of a change in circumstances arising after issuance of the decree.

2. Divorce ⇐303(3)

Evidence of either party of acts prior to rendition of a challenged divorce decree is inadmissible on a hearing for modification of child custody provisions thereof since it is irrelevant on question of a change of conditions, although there are exceptions to such rule, the major one being that evidence of acts unknown to the court or the complaining party at the time the challenged decree was entered may be admissible.

3. Divorce ⇐312.6(9)

In proceeding on motion to modify child custody provisions of a divorce decree, error, if any, by the trial court in refusing mother's offer to introduce evidence that prior to interlocutory decree father had submitted mother, and father's two other children by a prior marriage, to psychiatric examinations, to show that father had a pattern or phobia to submit members of his family to psychiatric examinations, was not prejudicial, in view of fact that court permitted mother to introduce evidence that after the interlocutory decree, father had submitted child of the parties to several psychiatric examinations.

4. Divorce ⇐303(3)

In every proceeding to modify a child custody provision of a divorce decree, burden is on the moving party to satisfy the court that conditions are so changed as to justify the modification, and all presumptions are in favor of the reasonableness of the decree, and in the absence of a showing that compels the conclusion that the decree should be modified, an appellate court cannot interfere with the trial court's refusal to modify it.

5. Divorce ⇐303(2)

Infractions of child custody provisions of interlocutory divorce decree by father, in taking child of the parties out of the state without consent, were not of such gravity as to warrant modification of the decree in regard to split physical custody of the child.

6. Divorce ⇐303(3)

In proceeding on motion to modify custody provisions of a divorce decree, evidence failed to show that trial court abused its discretion in continuing joint custody of child of the parties and in dividing his physical custody between them, rather than giving mother undivided physical custody with visitation rights by father.

Anthony E. O'Brien, San Francisco, for appellant.

Leigh Athearn, San Francisco, Ann L. Diamond, San Rafael, for respondent.

PETERS, Presiding Justice.

Plaintiff, Lucy M. Merrill, obtained an interlocutory decree of divorce from defendant on February 25, 1954. There was one child of the marriage, Bruce, then aged 7. The decree granted the parents joint custody of this child and divided his physical custody between them. Thus, defendant was awarded physical custody on alternate week ends, and on certain designated holidays. Defendant was also awarded physical custody during six weeks of the summer vacation. The plaintiff was awarded physical custody for all of the periods not specifically awarded to defendant. The final decree, embodying the terms of the interlocutory, was entered March 1, 1955.

In June of 1956 plaintiff noticed a motion to modify the decree so as to greatly limit the periods of custody that had been awarded to defendant, and in July, 1956, noticed a supplementary motion to further modify the decree by awarding the plaintiff full custody of the child and allowing the defendant certain limited visitation rights. Affidavits accompanied both notices, and, after some difficulties, defendant's deposition was taken. In November, 1956, after a two-day hearing, the trial court modified the decree to provide that defendant was to see to it that during the periods the child was in his custody the child was to be sent to Sunday School. The modification also expressly provided that the plaintiff had the right to select the grammar school the child was to attend, and provided that both parents should permit the child to take readily movable toys from one residence to the other. The court also inserted a provision that each of the parties should keep the other informed of the whereabouts of the child during the long summer vacation, and that during the vacation periods each parent should have the reasonable right of visitation while the child was with the other parent. The six-week period awarded to defendant during summer vacations was divided into two three-week periods. In all other respects, the motions to modify were denied. The plaintiff appeals, contending that it was an abuse of discretion not to have granted her a more extensive modification.

The record shows that defendant is a practicing psychiatrist. He has been married three times, there being two children resulting from the first marriage, and Bruce was the sole issue of the second marriage to plaintiff. After the date the parties were divorced, both parents resided in Marin County. Defendant first rented a house in Sausalito. The household there consisted of a cook, defendant's then secretary whom he subsequently married, and occasionally the defendant's two children of the first marriage, and the secretary's mother. Since August of 1954 defendant has lived in Belvedere, where the cook and his secretary, who is now his wife, went to live with him. At both residences the defendant, his secretary and various house guests indulged, on occasion, in considerable drinking, sometimes in the presence of Bruce. But there was no evidence that defendant was ever intoxicated in the presence of the child; in fact, the evidence is to the contrary.

The plaintiff attempted to show immorality on the part of defendant by evidence that defendant had lived with his secretary before he married her. Defendant denied sharing his bedroom with his secretary until after they were married.

There was evidence that defendant did not take Bruce to church or to Sunday School while he had custody of the boy. Defendant testified that he did not think any religion should be forced on a child, but that young children should have religious training. This he tried to give to the boy by having him watch a religious television program each Sunday. The defendant evidenced a willingness to abide by any order about Sunday School that might be made.

The defendant frankly admitted that, on several occasions, without the consent of the court or of the plaintiff, he had taken Bruce outside of the area permitted except with the consent of the court. During Easter vacation in 1955 he took the child to Los Angeles, and another time took the child to Phoenix without notifying plaintiff or the court. On several occasions he took Bruce to the Nevada side of Lake Tahoe, without court approval, to a spot the family had frequently visited before the divorce. He testified that he thought the decree permitted this. It did not.

On several occasions, after the interlocutory decree, the defendant consulted other psychiatrists about the boy, and, on three occasions, without telling plaintiff, took the boy to see psychiatrists. Although plaintiff testified that she did not think the child needed psychiatric care, she did ad-

mit that the divided custody arrangement "had just raised havoc with him." On one occasion when the psychiatrist involved, at the request of defendant, asked plaintiff for her consent to such an examination, she refused her consent. Defendant believed that the boy needed this care.

There is substantial evidence that, after the interlocutory, there was a good relationship between the defendant and his son. The defendant was frequently observed playing and working with, and reading to the child. There is also evidence that the relationship between defendant's new wife and the child was good.

The child has a health problem. Before the divorce he had contracted polio, and plaintiff testified that at the time of the hearing the child was still under a doctor's care for this condition, and was still taking therapy treatments. The defendant testified that he did not believe in stereotyped orthopedic exercise for the boy, because such treatment was apt to overimpress him with the idea that he was sick. For this reason, when Bruce was with his father, the defendant would advise spontaneous activities that would help to build up his shoulder muscles, such as boat rowing or paddling, or bag punching.

The plaintiff wife resided in Kentfield and there is no doubt that the child's relationship with his mother was a good one. The environment there was a happy one. The plaintiff testified as to several minor incidents concerning conduct on the part of defendant of which she complained, but these were either reasonably explained by defendant or were so trivial that they did not show the defendant to be unfit to have custody. Plaintiff particularly complained that defendant purchased many expensive toys for the child which defendant would not allow the child to take to plaintiff's home in Kentfield. The trial court expressly provided in the order appealed from that the child should be permitted to take movable toys from one house to the other.

The most serious charges against defendant relate to his claimed excessive drinking and to his claimed relationship with his secretary prior to his marriage to her. So far as the drinking is concerned there was a direct conflict in the evidence. While defendant admitted drinking in front of the child, there is substantial evidence that defendant never became intoxicated in front of the child. On the issue of immorality, while there is evidence that defendant shared his bedroom with his secretary prior to the time they were married, defendant denied that he had done so. These conflicts were for the trial court.

Appellant makes a vigorous attack on an evidentiary matter that appears to be of relatively minor importance. The plaintiff desired to introduce evidence that, prior to the interlocutory decree, defendant had submitted her, and his two other children by the prior marriage, to psychiatric examinations. It was the theory of plaintiff that in this fashion she could show a "pattern" or "phobia" on the part of defendant to submit members of his family to psychiatric examinations. Apparently, plaintiff believed that, if she could establish such fact, it would be relevant on the issue of defendant's competency to have custody of the child. The parties argue at length as to whether or not the problem was properly submitted to the trial court, and whether the court actually made a ruling on the issue. Although the matter is not entirely free from doubt, it may be assumed that the plaintiff proffered such testimony, and that the trial court ruled that it was inadmissible. The ruling, in our opinion, was not erroneous, but, even if it were, it certainly was not prejudicial.

[1–3] It is difficult to see how the evidence was relevant. The problem before the court was whether the custody provisions in relation to Bruce should be modified. In deciding this question the court was required to consider the best interests of the child. Defendant testified that such care was required and plaintiff admitted that the child was disturbed. Moreover, it is the general rule of law that, before a trial court will modify a custody order,

there must be evidence of a change in circumstances arising after the issuance of the decree sought to be modified. Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719; see cases collected 16 Cal.Jur.2d 558, § 268. An obvious corollary of that rule is that evidence of either party of acts prior to the rendition of the challenged decree is inadmissible because irrelevant, since such evidence could not possibly show a change of conditions. Gantner v. Gantner, 39 Cal. 2d 272, 246 P.2d 923; Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96; In re Wood, 103 Cal.App. 790, 285 P. 323. Of course, there are exceptions to this rule, the major one being that evidence of acts unknown to the court or the complaining party at the time the challenged decree was entered, may be admissible. Olson v. Olson, 95 Cal.App. 594, 272 P. 1113; Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96; Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719; for cases from other jurisdictions discussing the problem see annotation in 9 A.L.R.2d 623.

It should be noted that plaintiff, at the time of the interlocutory, had actual knowledge of all of the facts about her husband's alleged "mania" for submitting members of his family to psychiatric examinations. Thus, the proffered evidence did not show any change in circumstances. The trial court permitted plaintiff to introduce evidence that, after the interlocutory, the defendant had submitted Bruce to several psychiatric examinations. Thus, no error was committed. (See Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295, where a similar ruling of the trial court was upheld.) The trial court evidently believed defendant's testimony that such psychiatric examinations were necessary.

[4] The other major contention of plaintiff is that the trial court abused its discretion in not modifying the interlocutory and final decrees so as to grant full custody to her and to limit defendant to visitation privileges. Of course "in every proceeding to modify a provision for the custody of a minor child the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification. All presumptions are in favor of the reasonableness of the decree, and in the absence of a showing that compels the conclusion that the decree should be modified, an appellate court cannot interfere with the trial court's refusal to modify it." Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295, 297; see cases collected 16 Cal.Jur.2d 563, § 270.

[5, 6] In the instant case plaintiff has failed to sustain this burden. The claimed excessive drinking and immorality charges have already been discussed. As already pointed out, the evidence as to them was conflicting. The infractions of the interlocutory by defendant taking the child out of the state without consent were admitted by him. The trial court did not believe that these infractions were of such gravity as to warrant a modification. It was justified in this conclusion. The failure to take the child to Sunday School, and the refusal to allow the child to take toys from his house to that of plaintiff were explained by defendant, and the court modified the decree so as to prevent these problems from arising in the future. The other charges against defendant were either denied or explained by him, or were so trivial as not to warrant special mention. Thus, it is quite apparent that plaintiff has failed to show that the trial court abused its discretion in refusing to modify the basic terms of the decree.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

167 Cal.App.2d 499

Matter of the ESTATE of Augustus Loring HART, also known as A. L. Hart, also known as A. Loring Hart, also known as Loring Hart, also known as Augustus L. Hart, Deceased.

Fred B. HART, Administrator of the Estate of Augustus Loring Hart, aka etc., Appellant,

v.

Lillian A. WORTHINGTON, Cora M. Zimmerman, Gertrude H. E. Glafcke, Guy A. Rodenbaugh and L. Marie Betchtel, Respondents.

Civ. 9490.

District Court of Appeal, Third District, California.

Jan. 30, 1959.

Rehearing Denied Feb. 24, 1959.

Hearing Denied March 25, 1959.

Proceeding respecting accounting of administrator. From a decree of the Superior Court, Sacramento County, Jay L. Henry, J., administrator appealed. The District Court of Appeal, Van Dyke, P. J., held that where administrator had recovered judgment in civil action against administratrix of estate of decedent's predeceased spouse but record on judgment roll appeal showed only that such administratrix had appeared as an heir of administrator's decedent and had filed objections as such and there was nothing to indicate that court had obtained any jurisdiction over administratrix in her capacity as such, court was without jurisdiction to take any action against party as administratrix and properly refused to make any order against her attorney or such party as administratrix.

Affirmed.

1. Executors and Administrators ⇐85(4)

Where administrator of decedent's estate had recovered judgment in civil action against administratrix of estate of decedent's predeceased spouse requiring administratrix to deliver certain assets adjudged to belong to decedent's estate, but record on judgment roll appeal in decedent's estate proceeding failed to disclose that party had appeared in estate as anything but an heir of decedent and there was nothing to show that she had appeared in her capacity as administratrix of predeceased spouse's estate and she was represented by her personal counsel, court was without jurisdiction to take any action against party as administratrix of estate of predeceased spouse or against her attorney, and it was proper for court to refuse to make any order against attorney or against such person as administratrix as requested by administrator's petition.

2. Executors and Administrators ⇐86(2)

Where administrator of decedent's estate was the sole heir thereof and obtained civil judgment against administratrix of estate of decedent's predeceased wife requiring her to deliver to administrator certain property which had been either the separate property of decedent or property of pre-existing community, but administratrix was unable to discharge from assets in her hand the total money judgment plus judgments for costs, upon receipt of money which administratrix was able to deliver, after satisfaction of costs, excess sum was to be allocated to community and separate property sources pro rata.

3. Executors and Administrators ⇐510(9)

On judgment roll appeal by administrator from decree in accounting proceeding, court must assume that evidence supported determination that attorneys had earned a specific sum for extraordinary services.

4. Executors and Administrators ⇐507(1)

Where court in probate proceedings had decreed that in addition to statutory fees attorneys had reasonably earned $2,500 for extraordinary services but between date of minute order and filing of final decree administrator filed document dismissing paragraph of his petition containing allegations concerning attorney's fees and prayed court for new order adjudging and determining attorney's fees on ground that petition in that respect had been prematurely filed, attorneys having been called into matter for determination of fees upon original petition of administrator and evidence as to fees presumably having been taken and determination made as indicated in

minute order, administrator did not have authority to withdraw matter of attorney's fees from court's consideration without consent of attorneys. West's Ann.Prob. Code, § 911.

5. Appeal and Error ⇐907(3)

On judgment roll appeal presumption is in support of decree that proper notice was given or waived by interested parties to proceedings.

6. Appeal and Error ⇐907(3)

On a judgment roll appeal court must assume in support of decree that notwithstanding purported withdrawals of waivers by administrator to his fees, all proceedings taken supported decree that administrator had waived right to fees or commissions in open court for work done as administrator of estate of decedent and as associate counsel, and such waivers were confirmed.

Fred B. Hart, Oakland, for appellant.

Brandenburger, White & Dillon, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

This is a judgment roll appeal by Fred B. Hart as administrator of the Estate of Augustus Loring Hart, deceased, from a decree of the probate court. Appellant-administrator filed in the estate proceedings a document entitled "Petition, Waiver, Report and Accounting of Administrator". As reflected in the document the status of estate proceedings stood as follows: Notice to creditors had been published. The time for filing claims had elapsed and no claims had been filed. Appellant-administrator had filed his inventory of assets and the assets had been appraised. All costs of administration excepting only attorneys' fees and commissions of the administrator had been paid. There were no debts outstanding. Inheritance taxes had been paid in full. Some of the estate property had been sold during the course of administration. By partial distributions there had been distributed all property in the estate having its source and origin in separate property of appellant's decedent with certain listed exceptions. A final judgment had been obtained by appellant as administrator against Lillian Worthington, administratrix of the estate of Irene I. Hart, who had predeceased appellant's decedent and whose wife she had been. By this judgment it had been decreed that certain property which Lillian Worthington as such administratrix had taken possession of as being property of the estate of Irene had been either separate property of appellant's decedent or property of the preexisting community and therefore belonged to and ought to be probated as assets of the estate of Augustus. This judgment had not been wholly satisfied.

Petitioner prayed that the court allow and confirm his account as rendered; that the court fix the attorneys' fees for services rendered to him by attorneys both as to their general fees and as to fees for extraordinary services rendered. There were other matters which the petitioner requested the court to act upon but they will be discussed later. There was no prayer for final distribution.

Before discussing the contentions of error advanced by appellant, we will state briefly the vesting of the descent of decedent's estate. Appellant is the sole surviving brother and kin of the decedent and succeeded to all of the estate except that portion thereof which was formerly community property of the decedent and his predeceased wife, Irene. As to that community property one-half descended to appellant and the other half to respondents herein, two of whom are sisters, one of whom is a brother and one of whom is a niece of Irene.

[1] Appellant first contends that the court erred in dismissing that portion of the petition which sought relief against Lillian Worthington as administratrix with the will annexed of the estate of Irene, and William Dobkins, her attorney, in requiring them to deliver to appellant as administrator assets adjudged to belong to the estate of Augustus. By his petition herein

appellant sought to have an order made by the court in probate based upon said judgment. There is nothing in this record to indicate that the court had obtained any jurisdiction over Lillian A. Worthington in her capacity of administratrix of the estate of Irene. As we have said this is a judgment roll appeal. The only parts of the record below which have been brought to us are the following: The petition, the objections thereto, the decree and order constituting the dismissal now under discussion, the notice of appeal and the notice and request for reporter's and clerk's transcripts. Although it appears from this last notice that as filed it requested a reporter's transcript, none has been brought up. Lillian Worthington appeared as an heir and filed objections as such. She specifically stated in her appearance that she was not appearing in her capacity as administratrix of the estate of Irene. She was represented by personal counsel and not by the attorney who had been her attorney in the estate proceedings. No process appears to have been addressed to her except in her capacity as an heir. Although her attorney in the proceedings in the estate of Irene was named in the petition, no process appears to have been addressed to the attorney and he made no appearance. On this record, therefore, it appears that the court was without jurisdiction to take any action against Lillian Worthington as administratrix of the estate of Irene and equally without jurisdiction to take any action against her attorney. Therefore, it was proper for the court to refuse to make any order against him or against Lillian Worthington as administratrix and the court properly dismissed the petition in so far as it asked such relief.

[2] It appears that after the civil judgment had become final, Lillian Worthington, as administratrix, pursuant to that judgment, delivered to appellant as administrator herein all of the personal property in her hands which she had claimed belonged in the estate of Irene and so to that extent satisfied the judgment. However, the judgment ran against her as administratrix for something over $2,000 in money, which obligation she was unable to discharge from the assets in her hands for want of sufficient funds. By that judgment costs had been awarded appellant in the sum of $402.27. Of the money he received from Lillian Worthington, appellant allocated to the payment of the cost item enough to discharge the same. There is no dispute here as to the propriety of that allocation. As to the balance, however, appellant's account showed that of the additional money recovery, he allocated $386.75 in satisfaction of that portion of the money award deriving from separate estate of his decedent which had come into the hands of Lillian. That left a balance of the funds received by him from Lillian in the sum of $187.41, which he applied in partial satisfaction of that portion of the money judgment derived from community property that had come into the hands of Lillian and this left an unpaid balance on the community obligation in the sum of $1,450.90. This allocation the court rejected and ordered that of the sum received in excess of costs the same should be allocated to community and to separate property sources pro rata. Appellant contends that this reallocation was error. We do not agree. In making the allocation which he sought to have the court approve, appellant was acting in the capacity of a trustee for all persons interested in the estate as heirs, including himself. Under such circumstances he was obliged to act equitably. By the allocation he made he preferred himself to the other heirs because he was the sole heir to those portions of the estate of his decedent which had constituted separate property of that decedent, whereas he was entitled to only half of the property which had constituted community property of his decedent and Irene Hart. The trial court could well find, and undoubtedly did, that, although acting as a trustee, he was seeking to prefer himself to the other beneficiaries of the trust by taking advantage of his position as trustee. We think it was eminently proper for the trial court to make the equitable reallocation that is reflected in its decree. Petitioner

insists that Lillian Worthington, in resisting as administratrix of the estate of Irene the appellant's representative demands that the property she had taken into the estate of Irene was in truth assets belonging to the estate of Augustus, had been guilty of fraudulent conduct; that by the reallocation made by the probate court herein she and her coheirs in the community assets were given the fruits of fraud. There is nothing in this record which justifies these contentions. All that appears is—and we take this from the recitals in the petition—that Lilllian Worthington as administratrix of the estate of Irene Hart claimed that certain property was the separate property of Irene before her death; that appellant, as administrator of the estate of Augustus, claimed that the property was in part separate property of Augustus and in part community property of the two to which Augustus succeeded since Irene died intestate; that he demanded the property be turned over to him as administrator and the demand being refused he, as administrator, brought action against Lillian Worthington as administratrix and obtained a judgment that the property was in truth assets of the estate of Augustus. There is nothing in all this that fixes upon Lillian the charge of fraud or fastens upon her the obligations of a trustee ex maleficio, for, notwithstanding the litigation turned out adversely to her, it may well be that under the facts she was charged with the duty to resist the demands of appellant in behalf of the estate of Irene. Neither is there anything in all this that charges the coheirs of Lillian with any accountability or liability to the estate of Augustus. Under the circumstances as disclosed by the record, the oral proceedings not having been brought up, we must assume as could have been the case that the reallocation made by the probate court was justified.

[3–5] Appellant contends that the court erred in fixing attorneys' fees. In his petition he had set forth that the attorneys involved had represented him as administrator and were entitled to the regular fees allowable therefor under the statute. He further alleged that they had performed extraordinary services in conducting the litigation resulting in the judgment against Lillian as administratrix of the estate of Irene and he alleged that those services were reasonably worth 10% of the amount of the recovery which would figure out something over $800. The court decreed that in addition to the statutory fees the attorneys had reasonably earned $2,500 for extraordinary services. On a judgment roll appeal we must, of course, assume that the evidence supported this determination. It appears, however, that on September 10, 1957, appellant's petition was heard by the court and a minute order was made at the conclusion of the hearing that the attorneys' fees for extraordinary services be allowed in the sum of $2,500. The formal decree was filed November 26, 1957. Intermediate the minute order and the filing of the final decree, appellant, on October 17th, filed a document entitled "Dismissal", wherein he stated, first, that he "does hereby dismiss paragraph 15 in said petition" (this being the paragraph containing the allegations concerning attorneys' fees) and, second, that he further "does dismiss" paragraph 2 of the prayer (whereby petitioner had prayed the court for an order adjudging and determining attorneys' fees both general and special). He now contends that his dismissal as he calls it withdrew that part of his petition which requested the determination of attorneys' fees. He argues that the petition in that respect had been prematurely filed and that the court had no jurisdiction at that time in the probate proceedings to act upon the matter of attorneys' fees. We think the court had jurisdiction to make the order it did and if that be so, then, of course, the attorneys having been called into the matter for the determination of their fees upon the petition of appellant and evidence as to those fees presumably having been taken and a determination indicated in the minute order, it did not lie with petitioner to withdraw the matter of attorneys' fees from the court's consideration without the consent of interested parties. According to the record such consent had not been obtained. Un-

der the provisions of Section 911 of the Probate Code, at any time after six months from the issuance of letters of administration the probate court may on proper petition make an order requiring the administrator to pay such attorneys out of the estate such compensation on account of services rendered up to that time as the court shall deem proper and such payment shall be made forthwith. It appears that all of the services which might be termed extraordinary were listed in appellant's petition as constituting extraordinary services rendered up to that time so there could be nothing premature in their allowance under the terms of the cited section of the code. There is nothing to indicate that proper notice that the attorneys' fees were to be fixed was not given and, of course, appellant could not raise such an objection since he brought the matter on for hearing by his own petition and according to the recitals in the decree appeared and participated in the proceedings which included the fixing of those fees. In re Estate of Pailhe, 114 Cal.App.2d 658, 251 P.2d 76. No other interested party has appealed and on a judgment roll appeal the presumption is in support of the decree that proper notice was given or waived. Appellant further argues that the services of the attorney in the civil action had not been completed and that, therefore, the court was without power to fix the fees in advance of the completion of the work. There is nothing in the record which supports the assertion that the work had not been completed or that any of the other matters handled by the attorneys and for which petitioner asked that allowances be made had not been completed. In so far as the regular statutory fees be concerned, they were computed concededly according to the statute, but they were not ordered paid. The court, responsive to the petition, merely determined the amount of the ordinary fees, did not order them paid and therefore appellant's contentions of error as to them are without merit. So far as fees for extraordinary services are concerned they may be allowed and ordered paid when earned. In re Estate of Hunt, 33 Cal.App.2d 356, 91 P.2d 612.

Simultaneously with the filing of the "dismissal" as to that part of the petition dealing with the determination of attorneys' fees, petitioner, who is a practicing attorney, filed a document wherein he purported to withdraw his waiver of attorneys' fees for himself as stated in his petition.

[6] On this subject the decree reads as follows: "That said Fred B. Hart has waived in Open Court his right to any and all fees or commissions as Administrator of the estate of said decedent, and as associate counsel for said Administrator in propria personam, which Waivers should be and the same are hereby confirmed, approved and allowed." Once again we must advert to the fact that this is a judgment roll appeal and we must assume, therefore, in support of the decree, that, notwithstanding the purported withdrawal of waivers, the oral proceedings taken support the decree rendered.

Finally, appellant contends that the court erred in fixing the amount of contribution which the community part of the estate and the separate part of the estate severally ought to bear with respect to the extraordinary services of his attorneys. He argues this was a proper situation for applying the rule that fees for legal services rendered in preserving a common fund for the benefit of all heirs are proper charges against such fund; that each beneficiary should bear his proportionate share of expenses of litigation as a result of which he derives a benefit. See, In re Estate of Lundell, 107 Cal.App.2d 463, 464–465, 237 P.2d 62; In re Estate of Hendrix, 77 Cal.App.2d 647, 176 P.2d 398. But it sufficiently appears that there were numerous items of separate and community property of varying values (at least the contrary does not appear) and the difficulty of proving title to each may have varied immensely. What was an equitable apportionment does not therefore appear as a matter of law. Once again we cannot follow appellant in his arguments in support

of this assignment of error, because we cannot tell from the record here what evidence was before the trial court respecting apportionment and must assume that the decree of the court was supported by the oral proceedings.

Nothing further appearing, the judgment appealed from is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

167 Cal.App.2d 405

Herbert J. MATTSON, Plaintiff and Appellant,

v.

Sheriff BISCAILUZ et al., Defendants and Respondents.

Civ. 9562.

District Court of Appeal, Third District, California.

Jan. 28, 1959.

Proceeding on petition for an order to vacate, nullify and void a New York warrant of arrest by virtue of which a hold had allegedly been placed against plaintiff. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered order denying petition, and plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that where plaintiff was serving term of imprisonment in a California prison and he was not presently being held under New York warrant and extradition proceedings were not pending or threatened, his petition was premature.

Affirmed.

Criminal Law ⇐219

Where plaintiff was serving term of imprisonment in a California prison and he was not presently being held under New York warrant and extradition proceedings were not pending or threatened, his petition for an order to vacate, nullify and void a New York warrant of arrest by virtue of which a hold had allegedly been placed against plaintiff was premature. West's Ann.Pen.Code, § 476a.

Herbert J. Mattson, in pro. per.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondents.

WARNE, Justice pro tem.

This is an appeal from an order denying appellant's "petition for an order to vacate, nullify and void" a warrant of arrest issued by a magistrate of the City of New York, New York, by virtue of which a hold has been placed against appellant by the Police Department of New York City. The appeal comes before this court on a judgment roll only.

The petition was filed in propria persona by appellant, who is serving a term in Folsom prison, apparently for issuing worthless checks. Appellant does not seek to set aside the judgment of conviction for which he is now imprisoned, although he alleges that it was obtained by perjured testimony and that an appeal therefrom is pending. It is alleged in his petition that since issuance of the New York warrant in 1955 appellant has been held thereunder in many states, but that he was acquitted in Kentucky of the charges and that for this reason those same charges were dismissed by the municipal court of Los Angeles; that despite that fact the Sheriff of the County of Los Angeles, who is one of the "defendants" named herein, placed a "renewal" on the New York warrant which had theretofore expired. Thereafter the municipal court made the notation "dropped" on the renewal, but appellant alleges "someone has removed the renewal part this body warrant hold and that it is again upon his person illegally," and has been forwarded to someone by the Sheriff of Los Angeles County. Appellant further alleges that the Governor of California has advised the

Sheriff of Los Angeles County that New York has made no request for the extradition of appellant and that he is no longer wanted there. Despite this allegation, appellant asks that the Governor be advised that he is not extraditable. He also asks that the sheriff be ordered to answer why he placed a renewal on an expired warrant and why he held appellant over 72 hours without arraignment. Appellant prays that a police officer of Los Angeles be ordered to show why he fraudulently filed an extradition warrant purportedly based on a Kentucky indictment for grand theft of an auto when no such indictment existed, and which charge the Municipal Court of Los Angeles dismissed. Appellant further alleges that as a matter of law the New York warrant expired one year after its issuance and could not thereafter be legally renewed by the California authorities. He further alleges that he cannot be held or tried on the New York charges as he was acquitted thereof in Kentucky. Appellant's final prayer is "that the record may be augmented and the Warrant removed from the body of the plaintiff."

Appellant does not claim that he is now being held under the New York warrant or that extradition proceedings are pending or threatened. As heretofore stated, appellant is now serving a term of imprisonment for three violations of Section 476a of the Penal Code. See People v. Mattson, Cal.App., 327 P.2d 915.

Since appellant does not claim that he is now being held under the New York warrant or that extradition proceedings are pending or threatened at this time, the relief which he is seeking is premature. If, upon the expiration of his present term of imprisonment, he is held or if he is denied parole because of the outstanding New York warrant, he may then seek relief. We are of the opinion that the law as stated in the case of In re Drake, 38 Cal.2d 195, 238 P.2d 566, is applicable to the instant proceedings. In that case the Supreme Court held that a person may not by a proceeding in the nature of habeas corpus litigate the future right of a sister state to extradite the prisoner. The court stated in 38 Cal.2d at pages 197–198, 238 P.2d at page 568:

> "No present extradition proceedings are pending. Should Drake be detained at some future date upon extradition proceedings, he may then apply for the writ of habeas corpus to test the legality of such detention. (§ 1550.1 Pen. Code.) Until that time, there is no detention which Drake can question by means of the writ. Whether Drake is subject to extradition, or whether his constitutional rights would be violated by extradition, are questions not now presented. Habeas corpus does not lie to challenge the validity of an anticipated future action nor to secure declaratory relief in advance thereof. Ex parte Rockwell, D.C., 75 F.Supp. 702; Boyce v. United States, D.C., 52 F.Supp. 115, 116."

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Sophie SHAPIRO, Harold S. Shapiro, Tolnette Karvas and Richard Karvas, Plaintiffs and Respondents,

v.

REPUBLIC INDEMNITY COMPANY OF AMERICA, a corporation, Defendant and Appellant.*

No. 23408.

District Court of Appeal, Second District, Division 3, California.

Jan. 23, 1959.

Rehearing Denied Feb. 9, 1959.

Hearing Granted March 18, 1959.

Action against insurer upon an automobile public liability policy for injuries sustained by plaintiffs in a collision between

* Opinion vacated 341 P.2d 289.

automobile in which they were riding with insured automobile. From adverse judgment of the Superior Court, Los Angeles County, Burnett Wolfson, J., the insurer appealed. The District Court of Appeal, Patrosso, J. pro tem., held that where insurer was obligated to provide for liability arising out of ownership, maintenance or use of automobile during the policy period by incorporation in the policy of a condition that insurer would provide insurance for liability arising out of the ownership, maintenance or use of automobile to the extent of coverage and limits of liability required by law, insurer thereby limited extent of coverage to $10,000 for bodily injury to two or more persons as the result of any one accident and judgments against the insurer aggregating $16,900 was excessive even though the policy fixed a limit of $20,000.

Judgment reversed with directions.

1. Reformation of Instruments ⇐28, 51

Where insureds brought action against insurer after automobile accident for declaration of rights under automobile public liability policy and insurer interposed a cross complaint for reformation of policy to express the true intention of parties and the policy was reformed in favor of insurer, rights of persons injured in collision between automobile in which they were riding and insured automobile were measured by rights of policy as reformed and not by language of policy as originally written.

2. Insurance ⇐143(8)

Fact that insurer instituted an action against persons injured in collision between automobile in which they were riding and automobile owned by persons to whom insurer had issued an automobile public liability policy seeking a declaration that it was not liable to injured persons under terms of the policy as originally written and that action was dismissed prior to trial did not preclude insurer from thereafter seeking and obtaining a judgment reforming the policy to express true intention of the parties.

3. Insurance ⇐435.9

Statute providing that a motor vehicle liability policy shall insure the person named therein and any person using or responsible for the use of said motor vehicle with the express or implied permission of the insured is not limited only to those policies certified as provided by another section of the Vehicle Code as proof of ability to respond in damages. West's Ann.Vehicle Code, §§ 410, 414, 415.

4. Statutes ⇐223.5(6)

Fact that Legislature may have disagreed with construction placed upon language of statute as it read prior to amendment does not authorize the District Court of Appeal to say that Supreme Court was in error in construction which it placed upon the statute prior to amendment, and amendment of statute did not establish that judicial decisions were erroneous.

5. Insurance ⇐152(3), 435.8

Where automobile public liability policy provided that insurance afforded by policy for bodily injury and property damage liability should comply with provisions of motor vehicle responsibility law of any state or province which should be applicable with respect to any liability arising out of ownership, maintenance or use of automobile to extent of coverage and limits of liability required by such law and that terms of policy which were in conflict with statutes of state wherein policy was issued were amended to conform to such statutes, provisions of California Financial Responsibility Law were effectively written in the policy and became a part thereof and insurer would not be heard to complain that policy did not provide insurance to extent of coverage and limits of liability required by law, and restrictive endorsement undertaking to exclude all liability for injuries occasioned by operation of motor vehicle by one under 25 years of age was ineffective. West's Ann.Vehicle Code, § 415.

6. Insurance ⇐173

Where insurer was obligated to provide for liability arising out of ownership, main-

tenance or use of automobile during the policy period by incorporation in the policy of a condition that insurer would provide insurance for liability arising out of the ownership, maintenance or use of automobile to extent of coverage and limits of liability required by law, insurer thereby limited extent of coverage to $10,000 for bodily injury to two or more persons as result of any one accident and judgments against the insurer aggregating $16,900 was excessive even though the policy fixed a limit of $20,000. West's Ann.Vehicle Code, § 415.

Wyman & Finell, Beverly Hills, for appellant.

Oscar Richard Cummins and Morton R. Goodman, Beverly Hills, for respondents.

PATROSSO, Justice pro tem.

Action upon an automobile public liability insurance policy in which judgment was rendered in favor of the plaintiffs from which defendant appeals.

The policy in question was issued to John A. Campbell, Jr. and Pauline Campbell and covered a 1949 Chevrolet automobile owned by them. Among others the policy contains a provision reading in part as follows: "*Definition of Insured.* With respect to insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile * * * provided the actual use of the automobile is by the named insured or with his permission." As originally written there was no language in the policy restricting the scope of the foregoing provision other than an endorsement reading in part as follows: "*Additional Declaration.* * * * (b) There is no operator of the automobile under 25 years of age resident in the Named Insured's household or employed as a chauffeur of the automobile." Subsequently, however, and following the accident out of which plaintiffs' causes of action arose, the Campbells instituted an action against the defendant for a declaration of rights under the policy. In this action the defendant interposed a cross-complaint for reformation of the policy to express the true intention of the parties. This action resulted in a judgment in favor of defendant whereby the policy was reformed by substituting for the endorsement quoted above one reading as follows: "It is agreed that no insurance is afforded by any provision of this policy or of any endorsement attached hereto or issued to form a part hereof while any insured vehicle is being operated, maintained or used by or under the control of a person under twenty-five (25) years of age."

This judgment was affirmed upon appeal (Campbell v. Republic Indemnity Co., 149 Cal.App.2d 476, 308 P.2d 425) and became final.

Within the policy period and prior to the time that the policy was reformed as hereinabove stated, the insured vehicle while being driven by the named insured's son who was then under the age of 25 years was involved in a collision with an automobile owned and driven by the plaintiff, Harold Shapiro, as a result of which he and the other plaintiffs herein, Sophie Shapiro, Toinette Karvas and Richard Karvas, as well as two other persons, Maxine Friedman and Allen Friedman, who are not parties to this action, sustained personal injuries and the automobile of Harold Shapiro was damaged. These parties thereafter instituted actions against the Campbells and their son and recovered judgments as follows: (1) Sophie Shapiro recovered judgment against Mr. and Mrs. Campbell and their son in the sum of $5,800 of which amount the liability of Mr. and Mrs. Campbell was limited to $3,333; (2) Harold Shapiro recovered judgment against Mr. and Mrs. Campbell in the sum of $600 for property damage and against the son alone in the sum of $500 for personal injuries; the Shapiros also recovered costs in the sum of $98.14; (3) Toinette Karvas recovered judgment against the Campbells' son in the sum of $500; (4) Richard Karvas recovered judgment against Mr. and Mrs. Campbell and their son in the sum of $5,800 of which amount the liability of Mr. and

Mrs. Campbell was limited to $3,333; costs were $48.75; (5) Maxine Friedman recovered judgment against Mr. and Mrs. Campbell and their son in the sum of $3,800, said judgment being limited to $3,333 against Mr. and Mrs. Campbell; (6) Allen Friedman recovered judgment against the son alone in the sum of $500; the Friedmans also recovered costs of $47.70.

After the recovery of the aforementioned judgments respondents instituted the present action against the defendant upon the insurance policy. The trial court rendered judgment in favor of the respondents Shapiro in the sum of $6,998.14 together with interest from July 26, 1956, and in favor of the respondents Karvas in the sum of $6,348.75 with interest from July 26, 1956.

[1] At the outset and before addressing ourselves to the contentions of the appellant, it is necessary to dispose of a contention of the respondents. This is to the effect that their rights under the policy are to be determined by the language of the policy as originally written and as it read at the time of the accident in question and not as reformed to read by the judgment in the action between the defendant and the insured Mr. and Mrs. Campbell. The argument is that, as respondents were not parties to the reformation action, they are not bound thereby and the judgment therein is not res judicata as to them. The question of res judicata, however, does not arise. Respondents' rights under the policy are, in any event, measured by the terms of the policy as reformed for they stand in the shoes of the insured and they have no greater rights against the insurer than the insured would have had if they paid the judgments against them and then sued the insurer. Olds v. General Acc. Fire & Life Assur. Corp., 1945, 67 Cal.App.2d 812, 821, 155 P.2d 676; Ford v. Providence Washington Ins. Co., 1957, 151 Cal.App.2d 431, 438–439, 311 P.2d 930; and compare, Valladao v. Fireman's Fund Indemnity Co., 1939, 13 Cal.2d 322, 328, 89 P.2d 643.

[2] Additionally, it is to be noticed that prior to the filing of the action which resulted in the judgment of reformation hereinabove referred to and prior to the institution of the actions by the respondents against the insured, defendant instituted an action against the respondents for declaratory relief seeking a declaration that it was not liable to respondents under the terms of the policy as originally written, which action, however, was dismissed prior to trial. The trial court here concluded that the filing of such action "served to affirm the original policy and endorsement," and respondents contend that as a result the defendant "irrevocably confirmed the terms of the policy and rider" as originally written. Respondents cite no authorities in support of this proposition and we know of none. The mere fact that the defendant may have previously instituted an action which it later dismissed to secure a declaration that it was not liable to the respondents under the policy as originally written did not preclude it from thereafter seeking and obtaining a judgment reforming the policy to express the true intention of the parties.

[3] The trial court found that the restrictive endorsement which was added to the policy by the judgment of reformation was ineffective as being in contravention of section 415 of the Vehicle Code which at the time of the issuance of the policy read in part as follows: "(a) A 'motor vehicle liability policy,' as used in this code means a policy of liability insurance issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured, which policy shall meet the following requirements: * * * (2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured."

The appellant contends that in so deciding the trial court erred because, so it argues, section 415 applies only to those policies certified as provided in section 414 of the Vehicle Code as proof of ability to re-

spond in damages.[1] This identical contention, however, was rejected by the Supreme Court in Wildman v. Government Employees' Ins. Co., 1957, 48 Cal.2d 31, at page 39, 307 P.2d 359, at page 364, where it is said: "It appears that section 415 must be made a part of every policy of insurance issued by an insurer since the public policy of this state is to make owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles. Section 402 of the Vehicle Code provides that 'Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.' We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the Vehicle Code."

While the appellant earnestly argues that the Supreme Court was in error in construing section 415 as applying to every motor vehicle policy rather than only to those certified as provided in section 414 as proof of ability to respond in damages, we are bound by the decision of the Supreme Court and are not at liberty to reexamine the question.

Appellant further contends that the effect of the Wildman decision has been overcome by reason of the fact that following it the Legislature amended the first paragraph of the portion of section 415 of the Vehicle Code heretofore quoted to read as follows: "(a) A 'motor vehicle liability policy,' as used in this ~~code~~ *chapter* means an owner's policy or an operator's policy, or both, of liability insurance, *certified as provided in Section 414 as proof of ability to respond in damages,* issued by an insurance carrier * * *." (Italics and strike-out type indicate changes effected by the amendment.)

[4] Appellant argues that by this amendment the Legislature expressed its disapproval of the interpretation accorded this section by the Supreme Court in the Wildman case. The fact, however, that the Legislature may have disagreed with the construction placed upon the language of the section as it read prior to the amendment does not authorize this court to say that the Supreme Court was in error in the construction which it had placed upon it. Undoubtedly, many statutes have been amended to overcome the judicial construction placed upon them, but this does not serve to establish that such judicial decisions were erroneous. If the amendment to section 415 had occurred prior to the decision in the Wildman case it may well be that the Supreme Court would have given consideration to it in interpreting the language of the section as it read prior to the amendment, that is to say, whether by the amendment the Legislature evidenced an intention to change the law or merely to declare what the law had been prior to the amendment. Cf. Union League Club v. Johnson, 18 Cal.2d 275, 278, 115 P.2d 425; Standard Oil Co. of California v. Johnson, 24 Cal.2d 40, 48, 147 P.2d 577. It by no means follows, however, that, if it had done so, the court would have reached a different result. While "[l]egislative intent may be

1. Section 410, Vehicle Code, provides that the operator's license of any person who has suffered a final judgment to be rendered against him for damages to property "in excess of one hundred dollars ($100) or for damage in any amount on account of bodily injury to or death of any person resulting from the operation" of a motor vehicle shall be suspended until such judgment has been paid and "until the judgment debtor gives proof of financial responsibility in future"; and, section 414 defines what shall constitute "proof of ability to respond in damages." There is no claim here that the insured had previously suffered a final judgment for damages resulting from the operation of a motor vehicle which they had failed to satisfy.

manifest by a subsequent act" (45 Cal.Jur. 2d 678), ordinarily, any essential change in the phraseology of a statutory provision will be taken as an indication of a change in the meaning rather than as an interpretation (id. 679). And it may not be doubted that the amendment here involved an essential change in phraseology.

[5] Moreover, even though we were to sustain appellant's contention that section 415 is without application to the policy here this would not serve to aid appellant's cause for the appellant voluntarily assumed liability under section 415 by the insertion in the policy of the following provisions: *"Condition 8: Financial Responsibility Laws:* Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under this paragraph.

"* * * *Condition 23: Terms of Policy Conformed to Statute:* Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statute."

The policy involved in the Wildman case contained provisions identical to those above quoted and concerning these the court said: "Inasmuch as sections 402 and 415 of the Vehicle Code set forth the public policy of this state such laws must be considered a part of every policy of liability insurance even though the policy itself does not specifically make such laws a part thereof. We have here, however, a policy containing a clause which provides that the insurance afforded by the policy *shall* comply with the provisions of the motor vehicle financial responsibility law 'of any state * * *' wherein the liability arising out of the ownership, maintenance or use of the automobile may occur." Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 40, 307 P.2d 359, 364.

In Farmers Ins. Exchange v. Ledesma, 10 Cir., 1954, 214 F.2d 495, 497, the insurance company had issued to one Isdonas a motor vehicle liability policy in New Mexico which by its terms insured the named insured and "any person while using the automobile with the permission of the named insured." By an endorsement to the policy it was provided that the insurance should not apply while the automobile was being operated outside the limits of an established military or naval reservation unless it was being operated by the named insured or spouse or by any other qualified operator while accompanied by the named insured or spouse. During the policy period one Carter while operating the automobile outside of a military and naval reservation at a time when neither the named insured nor his spouse was present was involved in an accident as a result of which the defendant was injured. The policy contained a further provision substantially identical to condition 8 of the policy here and hereinabove quoted. New Mexico has a financial responsibility law somewhat similar to that of California. While the court there held, as the appellant here contends, that the New Mexico act applied only to "motorists who have been involved in accidents or who fail to pay judgments rendered against them for damages resulting from the use and operation of motor vehicles" and as the named insured was not in this category there was no requirement in the law that the liability insurance policy issued to him provide insurance complying with the provisions of the motor vehicle financial responsibility law, proceeded to say (214 F.2d at page 500): *"But the provision to that effect was voluntarily inserted in the policy with binding force and effect. It made the policy conform to the Act. It imported into the policy the pertinent provisions of the*

Act. The Act provides that a policy issued under its terms shall insure as the insured the person named therein and any other person using or responsible for the use of such motor vehicle with the consent express or implied of the named insured." (Italics ours.)

In the light of the foregoing it is apparent that the provisions of our financial responsibility law were effectively written into the policy and became a part thereof and that the appellant may not be heard to complain that the policy does not provide insurance to the extent of the coverage and limits of liability required by section 415 of the Vehicle Code.

[6] Thus we reach appellant's final contention that, inasmuch as section 415 requires insurance only in the sum of $5,000 for bodily injury to or death of each person as the result of any one accident and $10,000 for bodily injury to or the death of all persons as the result of any one accident, the judgment appealed from is excessive in that it awards in the aggregate a greater sum than the coverage required by section 415. Hence, the question is presented whether the extent of defendant's liability for the bodily injuries sustained by all of the persons as a result of the accident in question is $10,000 as prescribed in section 415 or the policy limit of $20,000.

By virtue of the language of the policy incorporating therein the provisions of the financial responsibility law the defendant agreed, independently of any other provision in the policy, to provide insurance for "liability arising out of the ownership, maintenance or use of the automobile during the policy period, *to the extent of the coverage and limits of liability required by such law.*" (Italics ours.) While the provisions of the statute thus incorporated in the policy operate to render ineffective the restrictive endorsement hereinbefore referred to insofar as it undertakes to exclude all liability for injuries occasioned by the operation of the motor vehicle by one under the age of 25 years, we see nothing in the statute to suggest that an insurer in agreeing to afford coverage for such liability may not restrict the extent thereof to the amounts prescribed by the statute irrespective of the limits of the other coverage afforded by the policy. Indeed, subdivision (c) of section 415 expressly provides that the policy of insurance required thereby may "contain any agreements, provisions or stipulations not in conflict with the provisions of this code and not otherwise contrary to law." If the policy here had provided that no insurance was afforded thereby while the automobile was being operated with the permission of the named insured by one under the age of 25 years except as and to the extent provided in Vehicle Code, section 415, no doubt could arise as to the validity thereof, and when the restrictive endorsement is read in connection with the conditions 8 and 23 of the policy this is in effect what it says. Inasmuch as so construed the policy provides insurance against the liability and to the extent required by section 415 the requirements of the statute are satisfied as well as the public policy embodied therein.

While the question under discussion was not there involved the language of the opinion in Bonfils v. Pacific Automobile Ins. Co., 1958, 165 Cal.App.2d 152, 331 P.2d 766, is pertinent. There the defendant insurance company had issued a policy containing provisions identical with conditions 8 and 23 of the policy in the instant case. The policy also contained a restrictive endorsement to the effect that coverage of the policy should be null and void if the insured vehicle was operated by anyone other than the named insured. While the vehicle was operated by one other than the named insured with the latter's permission it was involved in an accident as a result of which two persons sustained injuries. In speaking of the effect of these two provisions the court said (165 Cal. App.2d at page 159, 331 P.2d at page 770): "Interpreted by the rules applicable to policies of insurance, the endorsement in question did not eliminate, limit or modify the foregoing provisions respecting conform-

ance of the policy to statute and compliance with financial responsibility laws. *When these provisions and the endorsement are considered together, as they must be, the endorsement had the limited effect of withdrawing policy coverage when the subject automobile was operated by a person other than the owner only in the event such withdrawal did not conflict with the statute or laws in question.*" (Italics ours.) So here, the restrictive endorsement may be said to have the limited effect of withdrawing policy coverage when the automobile was operated by a person under the age of 25 years only to the extent that such withdrawal did not conflict with section 415.

While the California courts have not had occasion to consider this precise question the decisions in other jurisdictions having similar financial responsibility laws where the question has arisen under like circumstances as here, are to the effect that notwithstanding the greater coverage provided by the policy, recovery is limited to the minimum figures fixed by the statute. In Landis, for Use of Talley v. New Amsterdam Casualty Co., 1952, 347 Ill.App. 560, 107 N.E.2d 187, the policy named only the owner, E. A. Peters, as the insured. While the automobile was driven by one Landis, with the permission of the owner, it was involved in an accident as a result of which one Talley sustained bodily injuries for which she recovered a judgment against Landis in the sum of $30,000. Illinois has a financial responsibility law, section 58k of which is substantially identical with paragraph (a) and subparagraph (a) (2) of said section 415 hereinbefore quoted. Likewise, the policy there contained a condition identical with condition 8 of the policy in the instant case. After the recovery of the judgment against Landis, Talley instituted an action against the insurance company on the policy and recovered a judgment in the sum of $30,000 which, while within the policy limit, was in excess of the amount fixed by the financial responsibility law of Illinois, namely $5,000. The court said (107 N.E.2d at page 192): "There is also a contention made in this Court that the policy coverage should be limited to $5,000.00 since Section 58e of the Motor Vehicle Financial Responsibility Law provides that proof of financial responsibility shall mean proof of ability to respond in damages in the amount of $5,000.00. The provision of the policy referred to as condition 6 [identical with condition 8 of the policy here] is specifically to the effect that where the provisions of the Motor Vehicle Financial Responsibility Law of any State are to be read into the policy, such provisions are to be effective 'to the extent of the coverage and limitation of liability required by such law, 'but not in excess of the policy limits in amount. It is obvious that the word 'coverage' in the quoted portion of condition 6 could only refer to coverage required by the Financial Responsibility Law. Such required coverage was in the sum of $5,000.00. This construction is reinforced by the further provision that, in no event would such coverage exceed the limits of liability stated in the policy. A judgment, therefore, would be justified under the circumstances, in the sum only of $5,000.00 and costs of suit."

Other authorities to like effect will be found cited in the annotation in 29 A.L.R.2d 811.

Inasmuch as section 415 requires insurance in the aggregate amount, exclusive of insurance and costs, of $10,000 for bodily injuries to two or more persons in any one accident and the total amount awarded by the judgment herein is greater than this, it is to that extent excessive and must be reduced accordingly. As the total amount of the judgments recovered for bodily injuries against the insured by the persons involved in the accident, including the Friedmans, the amount of whose judgments must be considered although they are not parties to this action, aggregates $16,900, each of the respondents is entitled to judgment as follows:

Sophie Shapiro, 58/169ths of $10,000 or $3,432.25; Harold Shapiro, 5/169ths or $295.86; Toinette Karvas, 5/169ths or $295.86; Richard Karvas, 58/169ths or $3,432.25.

In addition Harold Shapiro is entitled to judgment for $600 by virtue of his judg-

ment for property damage and each of the respondents is entitled to the costs incurred in the personal injury actions as follows: Respondents Shapiro, $98.14; and respondents Karvas, $48.75, together with interest at the rate of 7 per cent per annum on the aggregate of the judgments in favor of the respective respondents from July 26, 1956.

The judgment is reversed with directions to the trial court to amend its findings of fact and conclusions of law in accordance with the views herein expressed and enter judgment accordingly.

Appellant to recover costs of appeal.

SHINN, P. J., and VALLÉE, J., concur.

167 Cal.App.2d 332

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Manuel CASTRO, Defendant and Appellant.

Cr. 1191.

District Court of Appeal, Fourth District, California.

Jan. 23, 1959.

Prosecution for unlawfully furnishing and giving away of a narcotic to an undercover agent who accosted defendant and asked him if he had any "stuff" and who gave defendant a ride home and went into defendant's home where he claimed defendant gave him a capsule containing a narcotic. From adverse judgments of the Superior Court, San Bernardino County, Carl B. Hilliard, J., the defendant appealed. The District Court of Appeal, Mussell, Acting P. J., held that evidence warranted inference that defendant voluntarily furnished and gave a narcotic to agent and that defendant was not inveigled into commission of crime.

Judgments affirmed.

1. Criminal Law ⇐1023(10)

No appeal lies from sentences and where an appeal is taken from a judgment and sentence, appeal from sentence will be dismissed and appeal will be considered as having been taken only from the judgment.

2. Poisons ⇐9

Evidence was sufficient to sustain conviction for unlawfully and feloniously furnishing and giving away narcotic to another. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⇐1159(2)

Where evidence, circumstantial or otherwise, establishes that a crime has been committed and that accused was perpetrator thereof, reviewing court will not appraise weight of evidence but will consider and determine only whether, upon the face of the evidence, it can justly be held that trier of facts could not have found sufficient facts to warrant inference of guilt

4. Criminal Law ⇐260(11), 558

Trial court's determination of truth or veracity of a witness is final, and it is not required to accept as true the testimony of a witness even though not contradicted.

5. Criminal Law ⇐1159(3)

Where testimony of undercover agent to whom defendant furnished a narcotic drug was clear and coherent, jury had authority to determine the conflict with testimony of defendant, and its finding could not be disturbed on appeal.

6. Criminal Law ⇐37

"Entrapment" is the conception and planning of an offense by an officer and the procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

7. Criminal Law ⇐330, 739(1)

Entrapment is an affirmative defense imposing upon accused burden of proving that he was induced to commit crime of which he is charged, and existence or nonexistence of entrapment is a question of

fact for trier of fact who is sole judge of weight and worth of evidence.

8. Criminal Law ⇐569

In prosecution for unlawfully furnishing and giving away of a narcotic to an undercover agent who accosted defendant and asked him if he had any "stuff" and who gave defendant a ride home and went into defendant's home where he claimed defendant gave him a capsule containing a narcotic, evidence warranted inference that defendant voluntarily furnished and gave a narcotic to agent and that defendant was not inveigled into commission of crime. West's Ann.Health & Safety Code, § 11500.

Alan T. Selznick, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

MUSSELL, Acting Presiding Judge.

Appellant was charged with furnishing a narcotic (Health and Safety Code, § 11500) a felony, in that on or about the 14th day of January, 1958, he did wilfully, unlawfully and feloniously furnish and give away a narcotic, to wit, codeine. Two prior felony convictions for possession of narcotics alleged in the information were admitted and a jury trial resulted in a verdict finding the appellant guilty as charged. Upon motion of the district attorney the allegations of the prior convictions were dismissed by the trial court in the interests of justice. Appellant's application for probation was denied, and on May 27, 1958, he was sentenced to the state prison for the term prescribed by law for the offense charged and it was further ordered "that the sentence imposed shall run concurrent with any prior sentence or sentences that the defendant may be obligated to serve."

[1] On April 8, 1955, appellant entered a plea of guilty, in the Superior Court of San Bernardino County, to the crime of possession of a narcotic, a felony. His application for probation in that case, Superior Court No. 10404, was granted for a period of three years and on May 27, 1958, the court vacated, revoked and set aside said probation and appellant was sentenced to state prison for the term prescribed by law on this charge. The sentence was ordered "to run concurrent with any prior sentence that defendant may be obligated to serve". Appellant appeals from the judgment in the instant case, tried by a jury, Superior Court No. 12490, and from "the judgment and sentencing in regard to revocation of probation in case No. 10404". No appeal lies from sentences. People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29. The appeal from the sentence herein is therefore dismissed and the appeal herein will be considered as having been taken from the judgment. People v. Yarter, 138 Cal.App.2d 803, 805, 292 P.2d 649.

[2] In October, 1957, Joaquin Acosta, an undercover agent for the San Bernardino County Sheriff's office, was asked by city detectives to see what he could find on appellant if he saw him. Acosta met appellant about six times prior to January 14, 1958, and on that date met appellant at the Turf Club in San Bernardino. Acosta asked appellant if he had any "stuff" with him and appellant said that he did not. Appellant and a friend asked Acosta if he could give them a ride home and after dropping the friend off appellant and Acosta drove to appellant's home. They entered through a side door and went through the kitchen into the den where appellant began to play Hi-Fi records. He left the room several times and one time when he came back into the living room he had a black and green capsule in his hand which he gave to Acosta, saying: "Here, man, this will do you some good". Acosta took the capsule, made a motion to put it in his mouth, and when appellant turned away Acosta put the capsule in his pocket. Later, he delivered the capsule to the city detective and upon analysis and examination by a qualified expert it was found to contain the narcotic codeine. The capsule was delivered to Acosta without any re-

quest having been made therefor by him. On December 8, 1957, a pharmacist had filled a prescription for appellant. This prescription called for the use of codeine and authorized the use of the medicine by appellant and by no one else. Appellant testified that on December 8, 1957, he had injured his shoulder in an automobile accident and had obtained a prescription from a doctor to relieve the pain; that on the night of February 14, 1958, he was suffering from pain in his shoulder and decided to take a capsule; that, Acosta, who was present at the time, asked to see the capsule and when he (appellant) placed some in his hand Acosta took one and pretended to swallow it.

Appellant contends that the evidence is insufficient to support the verdict of the jury; that if there was any transferring of narcotics by him, the "result was due to the undercover agent instilling in the mind of appellant, who was innocent of any criminal purpose, the original intent to do the act, thus entrapping him into the commission of a crime he would not otherwise have committed or even contemplated". These contentions are without merit.

[3] In People v. Mangiameli, 149 Cal. App.2d 642, 645, 308 P.2d 762, the court held that where evidence, circumstantial or otherwise, establishes that a crime has been committed and that the accused was the perpetrator thereof, an appellate tribunal in reviewing a conviction will not appraise the weight of the evidence but will consider and determine only whether, upon the face of the evidence, it can justly be held that the trier of facts could not have found sufficient facts to warrant the inference of guilt.

[4] In People v. Bobeda, 143 Cal.App. 2d 496, 500, 300 P.2d 97, it is held that the trial court's determination of the truth or veracity of a witness is final, and it is not required to accept as true the testimony of a witness even though not contradicted.

[5, 6] This is not the type of a case in which the law requires corroboration (People v. Gebron, 124 Cal.App.2d 675, 676, 268 P.2d 1068). The testimony of the undercover agent was clear and coherent and while the testimony of appellant was in conflict therewith, the jury had the authority to determine the conflict and its finding cannot be disturbed on appeal. In People v. Lindsey, 91 Cal.App.2d 914, 916, 205 P.2d 1114, 1115, it was held that entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer; that the officer must induce the defendant to commit a crime which he would not have committed without such inducement; that:

> "Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. 15 Am.Jur. Sec. 355, p. 24. If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment. People v. Rucker, 121 Cal.App. 361, 364, 8 P.2d 938; People v. Harris, 80 Cal.App. 328, 331, 251 P. 823; In re Moore, 70 Cal.App. 483, 488, 233 P. 805; People v. Heusers, 58 Cal.App. 103, 104, 207 P. 908. Where the defendant is not inveigled into the commission of the crime there is no entrapment. People v. Rucker, supra. * * * It is only when the criminal design is conceived in the mind of the officer and does not originate with the accused, and a decoy is used to ensnare the innocent and law-abiding by persuasion, deceitful representation, inducement or allurement into the commission of the crime, that there is entrapment."

[7, 8] Entrapment is an affirmative defense imposing upon the accused the burdent of proving that he was induced to commit the crime of which he is charged, and the existence or nonexistence of entrapment is a question of fact for the trier of fact who is the sole judge of the weight and worth of the evidence. People v. Gutierrez, 128 Cal.App.2d 387, 390, 275 P.2d 65. The evidence herein warranted the jury in inferring that appellant voluntarily furnished and gave a narcotic to the witness Acosta as charged in the information, and that appellant was not inveigled into the commission of the crime. Appellant has presented no argument, authority or grounds for reversal of the judgment entered by the trial court upon revocation of his probation.

The judgments are affirmed.

SHEPARD, J., and STONE, J. pro tem., concur.

Virginia LAMBERT, Plaintiff and Appellant,

v.

MUNICIPAL COURT of The LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, State of California, Defendant and Respondent.*

Civ. 23343.

District Court of Appeal, Second District, Division 1, California.

Jan. 27, 1959.

Rehearing Granted Feb. 17, 1959.

Petition for writ of prohibition to prevent retrial on same charge after reversal of conviction for violation of felon registration ordinance. The Superior Court of Los Angeles County, Leon T. David, J., entered an order denying the petition, and plaintiff appealed. The District Court of Appeal, White, P. J., held that felon registration ordinance which makes presence in city without registering in compliance with ordinance an offense, regardless of actual knowledge of duty to register or probability of such knowledge, violates due process of law requirement of United States Constitution, U.S.C.A.Const. Amend. 14.

Order reversed and cause remanded with directions.

* Opinion vacated 343 P.2d 81.

1. Prohibition ⇐3(5)

Prohibition would lie to prevent retrial on same charge after reversal of conviction for violation of felon registration ordinance on ground that such conviction without actual knowledge of duty to register or proof of probability of such knowledge violated due process of law requirement of United States Constitution, since the question presented was one of jurisdiction and remedy by motion in arrest of judgment or by appeal after judgment was neither speedy nor adequate. U.S.C.A. Const. Amend. 14.

2. Prohibition ⇐3(5)

Where one is restrained of his liberty under an illegal process, appeal after judgment does not afford such a speedy and adequate remedy as will preclude relief by other appropriate proceedings.

3. Constitutional Law ⇐258

Felon registration ordinance which makes mere presence in city without registering in compliance with ordinance an offense, regardless of actual knowledge of duty to register or probability of such knowledge and subsequent failure to comply with ordinance, violates due process of law requirement of 14th amendment. U.S.C.A. Const. Amend. 14.

4. Prohibition ⇐5(4)

Where conviction for violation of felon registration ordinance had been reversed on ground that ordinance, as construed by courts, violated due process of law requirement of 14th amendment, accused was entitled to peremptory writ of prohibition

to prevent retrial for same alleged violation. U.S.C.A.Const. Amend. 14.

Samuel C. McMorris, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Donald K. Byrne, Deputy County Counsel, Los Angeles, for respondent.

WHITE, Presiding Justice.

In June, 1951 appellant was convicted in the Superior Court of Los Angeles County of the crime of forgery. She was granted conditional probation.

On February 2, 1955 appellant was arrested on suspicion of another offense. Although convicted of the aforesaid charge of forgery, a crime punishable in this state as a felony, she had not at the time of her subsequent arrest on suspicion, registered under the provisions of the Municipal Code of the City of Los Angeles. Section 52.38 (a) of said code defines "convicted person" as follows:

"Any person who, subsequent to January 1, 1921, has been or hereafter is convicted of an offense punishable as a felony in the State of California, or who has been or who is hereafter convicted of any offense in any place other than the State of California, which offense, if committed in the State of California, would have been punishable as a felony."

Section 52.39 provides that it shall be unlawful for "any convicted person" to be or remain in Los Angeles for a period of more than five days without registering; it requires any person having a place of abode outside the city to register if he comes into the city on five occasions or more during a 30-day period; and it prescribes the information to be furnished the Chief of Police on registering.

Section 52.43(b) makes the failure to register a continuing offense, each day's failure constituting a separate offense.

After her arrest on the aforesaid charge of suspicion of another offense, appellant was charged in the respondent Municipal Court of the Los Angeles Judicial District with a violation of the aforesaid registration law. She was convicted, her motion for a new trial was denied, and she was granted conditional probation. The conviction was affirmed by the Appellate Department of the Superior Court. On appeal to the Supreme Court of the United States, the conviction was reversed (Lambert v. People of State of California, 355 U.S. 225, 78 S. Ct. 240, 242, 2 L.Ed.2d 228, 231), on the ground as stated by the court, "* * * we now hold that the registration provisions of the (Los Angeles Municipal) Code as sought to be applied here violate the Due Process requirement of the Fourteeth Amendment * * * No element of willfulness is by terms included in the ordinance nor read into it by the California court as a condition necessary for a conviction". In stating the issue presented on appeal, the Supreme Court of the United States said (355 U.S. at page 227, 78 S.Ct. at page 242, 2 L.Ed.2d at page 231, supra), "The question is whether a registration act of this character violates Due Process where it is applied to a person who had *no actual knowledge* of his duty to register, and where no showing is made of the probability of such knowledge". (Emphasis added.) After noting that registration ordinances are common and that their range is wide, as indicated by cases cited in the opinion, the court (355 U.S. at page 229, 78 S.Ct. at page 243, 2 L.Ed.2d at page 232) went on to say, "But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. At most the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of names and addresses of felons then residing in a given community is compiled. The disclosure is merely a compilation of former convictions already publicly recorded in the jurisdiction where obtained.

Nevertheless this [appellant] on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penality, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalities thereunder. We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.' Id., at 50. *Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it.* Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with Due Process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." (Emphasis added.)

When the remittitur of the Supreme Court of the United States was lodged with the Appellate Department of the Superior Court of Los Angeles County, that tribunal vacated the order of respondent municipal court granting probation, ordered that appellant's motion for a new trial be granted, and remanded the cause to the municipal court for a new trial.

When appellant was notified to appear in respondent municipal court, she applied to the Superior Court of Los Angeles County for a writ of prohibition restraining and enjoining respondent municipal court from proceeding with a retrial of the aforesaid cause. The superior court refused to grant an alternative writ as prayed for or to set a date for hearing appellant's petition therefor. It is from the denial of said petition that appellant prosecutes this appeal.

Appellant's main contention on this appeal is that the municipal code provision as it existed at the time she was prosecuted thereunder was invalid and unconstitutional in that it was offensive to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

[1, 2] Respondent however, contends that prohibition will issue only where there is no plain, speedy and adequate remedy at law. That in the instant case appellant "has the remedy of a motion in arrest of judgment at any time until judgment. In addition there is the basic remedy of appeal after judgment." We cannot agree with respondent where, as here, the ultimate question presented is plainly one of jurisdiction. The rule in criminal cases, sanctioned by right, reason and simple justice, as we conceive it, is stated by the court in Ex parte Hayter, 16 Cal.App. 211, 225, 116 P. 370, 376, as follows:

"The remedy by appeal is neither speedy nor adequate in a case where a citizen is restrained of his liberty under an illegal process. Where one is unlawfully imprisoned and it may be made so to appear to a court in an appropriate legal proceeding, there can exist no conceivable reason why he should not be restored to his liberty by the shortest cut recognized by the law, and not be compelled to remain in a county prison and thus be made to suffer the inconvenience of such restraint until some more dilatory remedy, which may ultimately be available to him, has been put in operation. See Terrill v. Superior Court, [6 Cal.Unrep. 398], 60 P. 38."

And again in Arfsten v. Superior Court, 20 Cal.App. 269, 276, 128 P. 949, 951, the following appears: "It may be added that the contention of another adequate remedy implies, of course, that the petitioner may be convicted and suffer imprisonment until his case can be reached on appeal. Unless convicted he will have no occasion to invoke the other remedy. If convicted, and required, as he may be, to suffer the whole or a part of the term imposed, the remedy by appeal would at least to the appellant seem quite inadequate."

[3] We are persuaded that appellant's contention as to the invalidity of the municipal code section under which it is proposed to try her must be sustained.

Respondent contends that the Supreme Court of the United States (Lambert v. People of State of California, supra) impliedly decided that the ordinance itself need not contain a requirement of notice of the duty to register as a convicted person. That the decision of the highest court in the land was merely to the effect that "as applied to appellant, there must be a showing in the trial court that appellant had knowledge or probability of knowledge of the requirement to register". We do not so construe the decision. At her previous trial, appellant offered proof that she had no actual knowledge of the requirement that she register under the municipal code provision, which defense on her part was rejected by the trial court and the ruling was affirmed on appeal to the superior court appellate department. What the United States Supreme Court said was, and we quote (355 U.S. at page 227, 78 S. Ct. at page 242, 2 L.Ed.2d at page 231), "No element of *willfulness* is by terms *included in the ordinance* nor read into it *by the California Court* as a condition necessary for a conviction". (Emphasis added.) To us it seems manifest that the United States Supreme Court holding was that no conviction can legally be predicated upon the ordinance as construed by the California courts because its omission of the requirement of knowledge and consequent willfulness does violence to the due process requirement of the Fourteenth Amendment to the Constitution of the United States.

Because of the foregoing conclusion at which we have arrived, it becomes unnecessary to discuss other questions presented on this appeal.

[4] For the foregoing reasons, the order from which this appeal was taken is reversed and the cause remanded with directions to the court below to issue its peremptory writ of prohibition as prayed.

FOURT and LILLIE, JJ., concur.

167 Cal.App.2d 433

Roger LE FONT, Plaintiff and Respondent,

v.

Ben I. RANKIN, aka Ben Rankin, James H. Morrison, Bernard Livingston, John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, and John Doe VI, Defendants,

James H. Morrison, Appellant.

Civ. 23289.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1959.

Action for money had and received. Defendant moved for an exemption of half of his earnings allegedly received by him for his personal services within 30 days of levy of an attachment served on a number of banks. The Superior Court, Los Angeles County, H. Eugene Breitenbach, J., denied defendant's claim and he appealed. The District Court of Appeal, Vallée, J., held that defendant's affidavit merely stating that moneys attached were earnings for personal services rendered within 30 days next preceding the levy, was a mere conclusion of law, and did not constitute proof of such fact, nor did defendant's supplemental affidavit to the effect that moneys attached were deposited within 30 days next preceding the levy, afford a basis for the court granting defendant an exemption, since such supplemental affidavit did not contain an averment that the moneys were earned within the 30-day period, and therefore, since there was nothing before the court to show the moneys attached were earnings for personal services rendered within 30 days next preceding the levy, exemption was properly denied.

Affirmed.

1. Exemptions ⇐48(2)

Earnings of a self-employed person, whether he is a professional man or not, are "earnings for personal services" within meaning of statute exempting a portion

of such earnings. West's Ann.Code Civ. Proc. § 690.11.

See publication Words and Phrases, for other judicial constructions and definitions of "Earnings for Personal Services".

2. Exemptions ⇐122, 148

One who contends for an exemption of a portion of his earnings from a levy must establish his right by evidence, and by facts, and an affidavit which merely follows language of an exemption statute states nothing more than a conclusion of law and proves nothing.

3. Exemptions ⇐122

In action for money had and received, defendant's affidavit merely stating that moneys attached were earnings for personal services rendered within 30 days next preceding the levy was a mere conclusion of law, and did not constitute proof of such fact, nor did defendant's supplemental affidavit to the effect that moneys attached were deposited within 30 days next preceding the levy afford a basis for the court granting defendant an exemption, since such supplemental affidavit did not contain an averment that the moneys were earned within the 30-day period, and therefore, since there was nothing before the court to show the moneys attached were earnings for personal services rendered within 30 days next preceding the levy, exemption was properly denied. West's Ann.Code Civ.Proc. § 690.11.

4. Appeal and Error ⇐714(4)

In proceeding by defendant in an action for money had and received for an exemption of half of his earnings from a levy of attachment, declarations filed in District Court of Appeal as to where attached moneys were derived from could not be considered, since they were not a part of the record on appeal. West's Ann. Rules on Appeal, rules 4, 6–8.

5. Appeal and Error ⇐594, 607(1)

When an appellant desires to present any point which requires consideration of the oral proceedings before a lower court he must obtain and file in the appellate court a reporter's transcript, certified by the reporter, or, where a transcript is unavailable, a settled statement of the oral proceedings prepared by the parties and settled by the judge who heard the matter, or an agreed statement prepared by the parties, consisting of a condensed statement of the relevant proceedings. West's Ann.Rules on Appeal, rules 4, 6–8.

James H. Morrison, appellant, in pro. per.

Gibson, Dunn & Crutcher, Samuel O. Pruitt, Jr., and John L. Endicott, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order denying the claim of defendant James H. Morrison for an exemption of half of his earnings, averred to have been received by him for his personal services rendered within 30 days of the levy of an attachment.

The complaint, filed November 9, 1955, alleged a common count for money had and received. On filing the complaint, plaintiff filed an affidavit for a writ of attachment alleging Morrison was indebted to plaintiff on an implied-in-law contract for the direct payment of money. A writ of attachment issued and was served on a number of banks the following day. $706.96 was attached in four bank accounts.

On September 11, 1957, nearly two years later, Morrison filed an "Exemption Claim For Earnings Under Section 690.11, C.C. P." stating that the $706.96 were his earnings for personal services rendered within 30 days next preceding the levy and that they were necessary for the use of his family, consisting of himself and his wife. Plaintiff filed a counter-affidavit stating the moneys attached were not earnings for personal services rendered within 30 days next preceding the levy; on information and belief, the moneys attached were on deposit in the banks for longer than 30 days prior to the levy. Morrison filed a supplemental affidavit stating he

was self-employed as a tax consultant and the earnings were from fees for such services; he deposited in one of the banks "fees for personal services rendered to his clients in the amount of $115.00 on November 4, 1955"; he deposited in another of the banks "fees for personal services rendered to his clients as follows: $50.00 on November 4, 1955, $340.00 on November 7, 1955, and 200.00 on November 8, 1955"; the amounts of $59.96 and $6.14, held under attachment in two other banks, "were earnings derived from personal services rendered by affiant to his clients."

On motion of appellant Morrison, a hearing was had to determine the claim of exemption. The court denied the claim. Morrison appeals from the order.

[1] Morrison first asserts his earnings as a tax consultant are earnings for personal services within the meaning of section 690.11 of the Code of Civil Procedure. The point is not in issue. Plaintiff concedes that the earnings of a self-employed person, whether he be a professional man or not, are earnings for personal services within the meaning of section 690.11.

Section 690.11 requires that earnings to be exempt must have been for "personal services rendered at any time within 30 days next preceding the levy of attachment." Morrison made no showing to come within the section. There was nothing before the court to show that the moneys attached were earnings for personal services rendered within 30 days next preceding the levy.

[2, 3] The statement in the printed form "Exemption Claim For Earnings" that the moneys attached were "earnings for personal services rendered within 30 days next preceding said levy" is a conclusion of law. "The prevailing rule is that 'one who contends for an exemption must establish his right by evidence, by facts,' and that an affidavit which merely follows the language of the statute states nothing more than a conclusion of law and proves nothing." Bertozzi v. Swisher, 27 Cal.App.2d 739, 743, 81 P.2d 1016, 1918. "[T]he burden is upon him to show that he is entitled to the exemption. * * * The affidavit of Santich merely follows the language of the statute, and states nothing but conclusions of law. Such an affidavit proves nothing. 1 Cal.Jur. 669, 670." Petrich v. Francis, 83 Cal.App. 72, 74, 256 P. 444. Also see Fay Securities Co. v. Bowering, 106 Cal. App.Supp. 771, 776–777, 288 P. 41. Morrison's supplemental affidavit merely establishes that the moneys attached were deposited within 30 days next preceding the levy. There is no averment therein that the moneys were earned within the 30-day period.

In Carter v. Carter, 55 Cal.App.2d 13, 130 P.2d 186, the defendant claimed an exemption of moneys in his bank account. He was a commission salesman in San Francisco for New York firms. His claim was rejected, the court stating (55 Cal.App. 2d at page 14, 130 P.2d at page 187):

> "He [defendant] testified that he sells drapery and upholstery goods on commission in San Francisco for two New York firms. The practice is for him to forward checks to these firms for goods sold and they in turn mail checks to him for the commissions earned. He did not recall what items made up the amount of $251.87 claimed to be exempt. He merely added up all the deposits made in his account within thirty days of the levy. He keeps no books and had no record of his earnings except his deposits and an informal record that he keeps to enable him to make an income tax return. It is obvious from this summary of his testimony that he failed to prove that any part of the sum as to which he claimed an exemption was for 'services rendered within thirty days next preceding the levy.' He failed completely in fact to prove when any of such services were actually rendered."

Morrison failed completely to prove when any of the services for which the moneys

on deposit were earned were actually rendered.

[4, 5] In his closing brief Morrison says that he appeared at the hearing of the matter "bringing with him evidence consisting of bank deposit slips, cash-book entries, and vouchers, which would show that the attached moneys were derived from services, personally rendered by appellant to his clients within the 30 days immediately prior to the date of levy" and that he "made the proffer of the evidence, explaining to the court what the evidence would show, namely, that the moneys were appellant's earnings from personally rendered services within the thirty days immediately prior to the date of attachment, or levy, and that the amounts on deposit were deposited within the same thirty days prior to levy. Respondent, by his counsel, made no objection to the proffer. However, the court declined the proffer, saying that it was not necessary to present the evidence, and that it was taking the matter under submission." He has filed two declarations in this court to substantially the same effect: one by himself, and one by an attorney who happened to be in the courtroom at the time. The statement in the brief and the declarations cannot be considered. They are not part of the record on appeal. When an appellant desires to present any point which requires consideration of the oral proceedings, he must obtain and file in the appellate court a reporter's transcript, certified by the reporter; or, where a transcript is unavailable, a settled statement of the oral proceedings prepared by the parties and settled by the judge who heard the matter; or an agreed statement prepared by the parties, consisting of a condensed statement of the relevant proceedings. Rules on Appeal, 4, 6, 7, 8. The record on appeal consists solely of the clerk's transcript. There is no reporter's transcript, settled statement, or agreed statement.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 408

FONTANA INDUSTRIES, INC., a California corporation, Plaintiff and Appellant,

v.

WESTERN GRAIN & FERTILIZER CO., a corporation, Kern Valley Packing Co., a corporation, Oscar Rudnick and Mark Futerman, Defendants and Respondents.

Civ. 5901.

District Court of Appeal, Fourth District, California.

Jan. 28, 1959.

Rehearing Denied Feb. 27, 1959.

Action was brought for unlawful detainer and for damages. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgment for the defendants, and the plaintiffs appealed. The District Court of Appeal, Mussell, Acting P. J., held that where defendant-lessee had abandoned leased premises before complaint was filed, judgment of nonsuit was proper as to the first cause of action in unlawful detainer, and that where complaint was filed more than four years after alleged breach of contract, second cause of action for damages for alleged breach of contract was barred by statute of limitations.

Judgment affirmed.

1. Landlord and Tenant ⇐288

Statutory unlawful detainer proceedings are summary in nature and are designed to determine or protect landlord's right to possession in those situations specified in the statute and cannot be used for any other purpose. West's Ann.Code Civ. Proc. § 1161.

2. Landlord and Tenant ⇐288

The primary purpose of an action of unlawful detainer is for recovery of possession of the realty, and recovery of rent is a mere incident to the main object, and, when the main object of the action fails, the incidents fall with it. West's Ann. Code Civ.Proc. § 1161.

3. Pleading ⇐354(27)

Where lessee abandoned leased premises before lessor brought action for unlawful detainer, wherein lessor sought to recover rent and damages for failure of lessee to remove structures, action was properly dismissed. West's Ann.Code Civ. Proc. § 1161.

4. Limitation of Actions ⇐21(1)

Where complaint was filed more than four years after alleged breach of contract, second cause of action for damages for alleged breach of contract was barred by statute of limitations. West's Ann.Code Civ.Proc. § 337, subd. 1.

Trent G. Anderson, Jr., Los Angeles, for appellant.

Thomas M. Eckhardt, San Bernardino, and Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

MUSSELL, Acting Presiding Justice.

This is an action for unlawful detainer and for damages. The first amended complaint contains two causes of action. In the first cause of action plaintiff alleges, among other matters, that on or about November 1, 1954, plaintiff and defendant Western Grain & Fertilizer Co., Inc., entered into a written agreement wherein plaintiff, as owner, leased to said defendant approximately 60 acres of the property commonly known as Fontana Farms, in San Bernardino county; that the lease was for a period of five years at an agreed rental per year and lessee agreed to pay the taxes; that it was further agreed that "* * * in the event the lessee abandons the premises or should the lessee default in any of the covenants herein contained, the lessor at his option may reenter and take possession of the premises and remove all persons and property thereto, and at his option terminate this lease"; that it was further provided that lessor acknowledges that certain items of fixtures were sold to the Kern Valley Packing Company; that lessee warrants that it is entitled to remove such items as were sold to the Kern Valley Packing Company primarily including the feed mill on the leased premises, and lessor consents to the removal of such items thus sold at any time during the terms of the lease. It is further alleged that defendant Western defaulted in the payments in the sum of $8,625; that plaintiff is informed and believes and therefore alleges that defendants have abandoned said premises in their entirety, and did so abandon said premises on or about the 30th day of March, 1956; that there are certain buildings, property of lessee, now located on said premises, consisting of a grain elevator building and of certain incidental structures and fence posts; that defendant Western has not removed said buildings and that the cost of removing them is the approximate sum of $15,000; that in said lease it is provided that lessee agrees to remove all rubbish from the premises; that the aforesaid grain elevator has partially burned and is therefore useless and that the expense of removing it is approximately $15,000.

The second cause of action, which relates a transaction antedating the foregoing by several years, is against the defendants Kern Valley Packing Company and Oscar Rudnick. Plaintiff alleges that on or about November 24, 1951, plaintiff was the owner of all the fixtures, buildings and equipment located on the real property described in the first cause of action; that plaintiff's assignors entered into a written agreement of sale with defendant Kern whereby said defendant purchased the fixtures located on said premises, including a grain elevator, grinding mill, with hog pens, runways and fence posts; that in said agreement defendant Kern agreed to accomplish the removal of all of said improvements within five months from the close of escrow and to leave the premises in an orderly and clean condition; that escrow was entered into between the parties, the purchase price of said buildings was paid and the escrow was closed on or about February 5, 1952; that more than five months have gone by since the close of said escrow, but defendant Kern has failed and neglected to remove

the grain elevator and certain fence posts and other buildings incidental to said elevator, and that plaintiff was damaged thereby in the sum of $15,000.

The prayer of the complaint is for judgment against Western for unpaid rental and personal property taxes, for restitution and possession of the premises, for attorney's fees, and for $15,000 for cost of removal of rubbish from the premises. Judgment is sought against Kern and Rudnick in the sum of $15,000 as the reasonable cost of removing the fixtures and equipment as alleged in the second cause of action.

The pre-trial conference order herein shows that plaintiff's statement is that the instant action is an unlawful detainer action and an effort by the lessor to regain possession of the premises demised; that in the second cause of action the sale of the personal property to Kern Valley Packing Company included a clause requiring the removal of the property and in this cause of action damages are sought against the Kern Valley Packing Company for plaintiff's alleged costs in removing the personal property.

At the close of plaintiff's case the trial court granted a nonsuit and plaintiff appeals from the judgment which was then entered.

[1] The statutory unlawful detainer proceedings are summary in nature. They are designed to determine or protect the landlord's right to possession in those situations specified in the statute (Code Civ. Proc. Sec. 1161) and cannot be used for any other purpose (30 Cal.Jur.2d, Sec. 348, page 487).

[2] In Markham v. Fralick, 2 Cal.2d 221, 227, 39 P.2d 804, 806, the court said:

> "The primary purpose of such an action is for the recovery of the possession of the property. The recovery of rent is a mere incident to the main object. Arnold v. Krigbaum, 169 Cal. 143, 146, 146 P. 423, Ann.Cas.1916D, 370. When the main object of the action fails, the incidents fall with it."

In Garfinkle v. Montgomery, 113 Cal. App.2d 149, 153, 248 P.2d 52, 54, the court said:

> "The summary remedy of unlawful detainer is primarily designed to recover possession from the defaulting lessee. As incidental to the main object the court under Section 1174 of the Code of Civil Procedure assesses damages and determines the rent due. Markham v. Fralick, 2 Cal.2d 221, 39 P.2d 804; D'Amico v. Riedel, 95 Cal. App.2d 6, 212 P.2d 52. In an unlawful detainer action where the lessee remains in possession or deprives the lessor of possession until the rendition of judgment the allowance of rental to the date of judgment is proper. Keyes v. Moy Jin Mun, 136 Cal. 129, 68 P. 476; Flournoy v. Everett, 51 Cal.App. 406, 196 P. 916. However, if the lessor enters into and assumes full control of the premises during the pendency of the action and it cannot be said that such assumption of control is for the account of the lessees under appropriate provisions of the lease or circumstances justifying such a declaration, then such entry constitutes an eviction and liability for rent is thus terminated."

[3] In the instant case the record shows that the defendant Western Grain & Fertilizer Company abandoned the premises involved about March 30, 1956, and it is alleged by plaintiff in its first amended complaint "that defendants have abandoned said premises in their entirety and did so abandon said premises on or about the 30th day of March, 1956." The complaint herein was filed on July 25, 1956. There is no pleading or proof that defendant Western was in possession of the property at the time the action was filed or that said defendant wrongfully or otherwise withheld possession of the property from plaintiff at that time. The record further shows that plaintiff finally removed the fixtures involved in April, 1957, and there was no evidence indicating that plaintiff was prevented from taking possession of the property in March, 1956, or prior

thereto. Under these circumstances a judgment of nonsuit was proper as to the first cause of action in unlawful detainer.

[4] Plaintiff's second cause of action is for damages for the breach of a contract by respondents Kern Valley Packing Company and Oscar Rudnick, who agreed therein to remove the fixtures involved within five months after close of escrow. The record shows that the escrow was closed on February 5, 1952 and the complaint herein was filed July 5, 1956, more than four years after the alleged breach of the contract. Respondents pleaded the statute of limitations and the record shows that the second cause of action in the complaint was barred by the statute. Code Civ.Proc. § 337, subd. 1.

Judgment affirmed.

SHEPARD, J., and STONE, J. pro tem., concur.

167 Cal.App.2d 496

Leo SPIVA, Plaintiff and Respondent,

v.

PHOENIX INDEMNITY COMPANY, a corporation, Defendant and Appellant.

Civ. 9478.

District Court of Appeal, Third District, California.

Jan. 30, 1959.

Insured's action against liability insurer for expenses incurred in establishing, by declaratory relief action, a breach of insurance contract. The Superior Court, Merced County, Gregory P. Maushart, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held that neither Civil Code section expressing elementary rule on measure of damages for breach of contract nor any other statutory provision authorized recovery of attorney fees for prosecution of declaratory judgment proceeding.

Modified and affirmed.

Insurance ⇐602.1

In insured's action against liability insurer for expenses incurred in establishing a breach of insurance contract by declaratory relief action, neither Civil Code section expressing elementary rule on measure of damages for breach of contract nor any other statutory provisions authorized recovery of attorney fees for prosecution of declaratory judgment proceeding. West's Ann.Civ.Code, § 3300.

Weinstock, Anderson, Maloney & Chase, San Francisco, for appellant.

Lee Alex MacNicol and Preston, Braucht & George, Merced, for respondent.

PEEK, Justice.

Defendant Phoenix Indemnity Company appeals from a judgment of the trial court entered pursuant to plaintiff's motion for judgment on the pleadings.

In September of 1952 defendant issued a liability insurance policy to plaintiff covering his business operations. By the terms of that policy defendant, among other things, agreed: "To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the hazards hereinafter defined." The policy also provided that defendant "* * shall (a) defend in his name and behalf any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiations and settlement of any claim or suit as may be deemed expedient by the Company."

In April of 1953, as a result of work then being done by plaintiff, certain liability claims for damages were asserted against him. Defendant was duly notified but refused to defend said claims upon the ground that they did not come within the coverage afforded by the policy. Plaintiff thereupon engaged his own attorney to defend the claims at the cost to him of $250. In addition plaintiff instituted an action against defendant for declaratory relief wherein he sought a declaration of the extent of the coverage under the policy. The judgment which was in favor of plaintiff provided:

"(a) That defendant is hereby required to afford to the plaintiff all of the rights and benefits of the named 'insured' under the terms of defendant's policy No. SM 30315 for and during the period extending from September 12, 1952 to and including September 12, 1953, specifically including any and all lawful claims established by the owners of any property which was damaged by plaintiff's operations on a certain parking lot in Merced, California, during April 1953;

"(b) That defendant is hereby required to perform all of its duties and obligations owing to plaintiff as the named 'insured' under the terms of defendant's policy No. SM 30315 during the policy period from September 12 1952 to September 12, 1953."

The defendant's appeal therefrom was affirmed by this court on November 28, 1956. Spiva v. Phoenix Indemnity Co., 146 Cal.App.2d 384, 303 P.2d 777.

Thereafter plaintiff filed the present action in which he seeks to recover from defendant the following items of damage for breach of contract: (1) $250 for attorney fees incurred in defending himself against third party claims; (2) $160.67 for court costs incurred in the action for declaratory relief against defendant; and (3) $1,200 for attorney fees incurred in that action. The trial court gave judgment in favor of plaintiff in the sum of $1,610.67, or the total sum sought, together with costs.

Since defendant admits liability for the items of $250 and $160.67 and is only contesting the award of $1,200 for attorney fees incurred by plaintiff in the declaratory relief action, the sole question before this court is whether or not plaintiff is entitled, as a matter of law, to attorney fees incurred by him in the prosecution of that proceeding.

It seems unnecessary to discuss at length the question presented. Plaintiff's rights, if any, to recover the sum in question must be dependent upon either (1) contract, or (2) statute, and since it is not contended that the insurance contract makes any provision whatsoever for such matters, we are concerned only with the second. In this regard it is plaintiff's contention that section 3300 of the Civil Code is controlling.

That section is merely an expression of the elementary rule on the measure of damages for breach of contract. Here the damages sought by plaintiff were expenses incurred in his endeavor to establish a breach of the contract by his declaratory relief action—not damages resulting from a breach. Those were the damages which were involved in the first action.

In the case of Bank of America Nat. Trust & Savings Ass'n v. West End etc. Co., 37 Cal.App.2d 685, 696, 100 P.2d 319, 324, the court held: "There is no express statutory provision allowing the recovery of such [attorney] fees in actions for declaratory relief * * *" Furthermore, in the case of O'Morrow v. Borad, 27 Cal. 2d 794, 167 P.2d 483, 163 A.L.R. 894, where insurance policies having provisions identical to those in the present case were before the court in a declaratory relief action, the court held: "* * * there is no basis for allowing O'Morrow the reasonable expense of counsel in the present suit for declaratory relief. He has not brought himself within any of the few exceptions to the general rule that, in the absence of contract or statutory provision, the services of an attorney must be paid for by the client who employs him." (27 Cal.2d at page 801, 167 P.2d at page 487.) It necessarily

follows that, in the absence of any like showing by plaintiff in the present case, the same result must obtain herein.

The judgment is modified by striking therefrom the award of the sum of $1,200. As so modified, it is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

167 Cal.App.2d 507

Jack SHELTON, Plaintiff and Appellant,

v.

Gibson BURKE and Lillian Burke, Defendants and Respondents.

No. 17888.

District Court of Appeal, First District, Division 1, California.

Feb. 2, 1959.

Action for personal injuries sustained by plaintiff who tripped and fell in alleyway while carrying a barrel of refuse from employer's laboratory. The Superior Court, City and County of San Francisco, Raymond J. Arata, J., entered judgment for owners of alleyway and building which it served, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where jury had deliberated several hours and asked to have reread to it the instruction of contributory negligence and requested that such instruction in written form be sent to the jury room, sending of written instruction into the jury room, while erroneous, was not prejudicial under the circumstances since the singling out of subject of contributory negligence was done by the jury in the course of their deliberations and not by the judge.

Affirmed.

1. Trial ⇐307(4)

An instruction is not one of those papers which jury is authorized to take into the jury room. West's Ann.Code Civ. Proc. §§ 612, 614.

2. Appeal and Error ⇐1069(2)

In plaintiff's action against owners of alleyway and building which it served for personal injuries received when he tripped and fell while carrying a barrel of refuse from employer's laboratory through alleyway, where jury had deliberated for several hours before it requested a rereading of the instruction on contributory negligence and after such rereading of instruction, at request of jury, instruction in written form was sent into the jury room, while sending of written instruction was irregular and therefore erroneous, it was not, under the circumstances, prejudicial since it was the jury's debate which singled out issue of contributory negligence. West's Ann.Code Civ.Proc. §§ 612, 614.

3. Appeal and Error ⇐1031(1), 1069(2)

Prejudice is not presumed from mere fact that court had sent written instructions into the jury room, and something affirmatively indicating prejudice should appear in order to justify a reversal in absence of other errors in conduct of trial. West's Ann.Code. Civ.Proc. §§ 612, 614.

R. Edward Burton, San Francisco, for appellant.

Partridge, O'Connell & Partridge, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff tripped and fell while carrying a barrel of refuse from his employer's laboratory along and through an alleyway, for deposit in garbage cans placed there for that purpose. The jury gave its verdict in favor of defendants, the owners of the alleyway and the building which it served.

The sole assignment of prejudicial error is the fact that in response to the jury's request therefor the trial judge sent a

written instruction on contributory negligence into the jury room.

[1, 2] An instruction is not one of the papers which the jury is authorized to take into the jury room. Code Civ.Proc. §§ 612–614. Accordingly, it was irregular and therefore erroneous to permit the taking of this instruction into the jury room. Melikian v. Independent Paper Stock Co., 8 Cal.App.2d 166, 168, 47 P.2d 539; Fererira v. Silvey, 38 Cal.App. 346, 359, 176 P. 371. However, we do not find it prejudicial under the circumstances of this case.

The jury was instructed, and retired for deliberations at 3:40 p. m. Deliberation continued, with time out for dinner, until 10:20 p. m., when the court recalled the jury to see if a verdict was possible. The foreman indicated that disagreement existed in regard to the issue of contributory negligence and asked that the court reread its instruction on contributory negligence. The court reread its previously given instruction on contributory negligence. Plaintiff interposed no objection. The jury retired for further deliberation.

Within a matter of a few minutes the court announced in the presence of counsel for both parties that the jury had asked for the written instruction on contributory negligence which had just been reread to them. The court complied with this request over objection of counsel for plaintiff. Counsel's objection was that it would be improper to send a written instruction to the jury room as it would tend to focus the jury's attention on a single instruction instead of the instructions as a whole. About ten minutes later, the jury returned its verdict in favor of defendants.

The instruction, to which plaintiff interposed no objection and the correctness of which he does not question, was an accurate and adequate statement on the subject of contributory negligence. Any singling out of that subject was done by the jury (not by the judge) in the course of their deliberations. Sending the instruction in to them, to be read in the jury room, would not seem to give this subject any greater emphasis than to have called them into the courtroom (which would have been proper) for the judge again to read it to them there.

[3] Here, we are "dealing with error which is collateral and without probable substantial relation to the disposition of the cause." Santina v. General Petroleum Corp., 41 Cal.App.2d 74, 77, 106 P.2d 60, 62. This, it would seem, is why prejudice is not presumed from the mere fact of sending written instructions into the jury room and why it is said that something affirmatively indicating prejudice should appear, to justify a reversal in the absence of other errors in the conduct of a trial. That appears to be the rationale of such cases as Fererira v. Silvey, supra, 38 Cal. App. 346, 359, 176 P. 371; Melikian v. Independent Paper Stock Co., supra, 8 Cal. App.2d 166, 168, 47 P.2d 539; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 237–238, 89 P.2d 718; Santina v. General Petroleum Corp., supra, 41 Cal.App.2d 74, 76–78, 106 P.2d 60; Lewis v. Southern Pacific Co., 98 Cal.App.2d 358, 362, 220 P. 2d 431; Chambers v. Southern Pacific Co., 148 Cal.App.2d 873, 876–878, 307 P.2d 662.

In Nelson v. Southern Pacific Co., 8 Cal. 2d 648, 655, 67 P.2d 682, a reversal was ordered. But there were a number of errors, including errors in the giving and refusal of instructions and the rejection of evidence in addition to communication with the jury by sending them a message (the nature of which does not appear in the printed report) by the bailiff and without the presence of counsel. The court did not single out any one of these errors. It said "we are not prepared to say that the sum of these errors was not prejudicial * * *" At page 655 of 8 Cal.2d, at page 686 of 67 P.2d.

Plaintiff relies heavily on Hammond v. Foster, 1882, 4 Mont. 421, 1 P. 757, which held it proper for the court to give the jury all of the instructions, but erroneous, even by accident, to give the jury some but not all of the instructions. 1 P. at page 759. We see no analogy between that situation and the one presented here. Ob-

viously, a different rule in respect to the furnishing of written instructions obtained there than here. Also, there the court, apparently upon its own initiative, furnished an incomplete set of instructions, analogous to orally giving incomplete instructions, as distinguished from furnishing an instruction at the jury's request, one that had just been reread to them at their request. Moreover, in the Hammond case the furnishing of incomplete instructions was not the sole error involved.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

167 Cal.App.2d 329

E. Perry CAMPBELL, Plaintiff and Appellant,

v.

Henry D. NICHOLS, as Executor of the Last Will and Testament of Alice Hagar Tubbs, Deceased, Defendant and Respondent.

Civ. 9539.

District Court of Appeal, Third District, California.

Jan. 23, 1959.

Rehearing Denied Feb. 19, 1959.

Hearing Denied March 18, 1959.

Action against respondent in his representative capacity as executor of the will of the deceased. From an order granting respondent's motion for a change of venue to San Francisco in the Superior Court, Colusa County, Arthur C. Huston, J., the plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that where the primary purpose of the action was to recover personal property respondent's motion for change of venue was properly granted.

Order affirmed.

1. Venue ⇐45

In an action against respondent in his representative capacity as executor of deceased whose estate was subject of administration in San Francisco where it appeared that respondent was a resident of Alameda County, respondent would not be entitled to have the cause transferred to San Francisco on the ground of residence. West's Ann.Code Civ.Proc. § 395.

2. Venue ⇐16½

If there is personal or in personam cause of action joined with one that is local in nature the defendant is entitled to have the proceeding transferred to the county of his residence but the action must be wholly local in nature. West's Ann.Code Civ.Proc. § 395.

3. Executors and Administrators ⇐436

In action against respondent in his representative capacity as executor of the will of the deceased whose estate was subject of administration in San Francisco where respondent averred that 95% of the appraised value of the estate consisted of personalty and that the balance consisted of real property in County of Colusa and in San Francisco, primary purpose of the action was to recover personalty and venue was properly transferred to San Francisco. West's Ann.Code Civ.Proc. § 395.1.

Donald W. Littlejohn, Colusa, and Elkins & Wright, San Francisco, for appellant.

Pillsbury, Madison & Sutro, San Francisco, for respondent.

WARNE, Justice pro tem.

This is an appeal from an order granting respondent's motion for a change of venue.

Appellant commenced this action in the County of Colusa against respondent in his representative capacity as executor of the last will and testament of Alice Hagar Tubbs, deceased, whose estate is the subject of administration in the City and County of San Francisco.

[1] In his affidavit in support of the motion for change of venue to the City and County of San Francisco, respondent avers that he is not a resident of Colusa County, but omits any reference to his place of residence. However, it appears in the briefs that respondent is a resident of Alameda County. Consequently, respondent would not be entitled to have the cause transferred to the City and County of San Francisco on the ground of residence. Sec. 395, Code Civ.Proc. Nor is respondent entitled to a change of venue unless the action herein is one "on a claim for the payment of money or for the recovery of personal property" within the purview of Section 395.1 of said code, which provides: "When a defendant is sued in his official capacity as executor, administrator, guardian or trustee, on a claim for the payment of money or for the recovery of personal property, the county which has jurisdiction of the estate which he represents shall be the proper county for the trial of the action."

The complaint herein is entitled "Complaint in Equity to Recover Trust Property Obtained by Fraud and Collusion and to Impress a Constructive Trust," against plaintiff as executor of the last will and testament of Alice Hagar Tubbs, deceased. The complaint alleges in substance that Alice Hagar Tubbs, deceased, was the daughter of George Hagar; that George Hagar died testate on September 2, 1902; that his will was admitted to probate in Colusa County, and that his daughter Alice, and her husband, Alfred S. Tubbs, were appointed executors pursuant to the terms of said will. It is further alleged that under the terms of George Hagar's will the residue of his estate was left to his daughter Alice and her husband Alfred, and the survivors of them, in trust for the use of Alice and her children during her lifetime and upon Alice's death to pass to her descendants and if none in equal shares to certain named nieces, nephews, and the widow of a deceased nephew of the testator. Alice Hagar Tubbs died testate and without issue on December 22, 1955. Her will makes no provision for the beneficiaries of the trust named in her father's will, and appellant claims to have succeeded to the interest of one of them.

The complaint further alleges that Alice and her husband fraudulently concealed from the court in which her father's estate was administered the fact that his will contained the aforementioned trust provisions and that Alice had the whole of the residue of the estate distributed to herself absolutely free and clear of the trust. The prayer of the complaint is that respondent be ordered to turn over to the court all property and assets of the estate of Alice Tubbs which had their origin in or are traceable to the residue of the estate of George Hagar, deceased, and that the court distribute such property in accordance with the provisions of George Hagar's will. Appellant further prays that a referee be appointed, an accounting ordered, and a trust impressed on all property in respondent's possession which derives from the estate of George Hagar, deceased. As stated above, the determinative question as to respondent's right to change of venue is whether this action is one "on a claim for the payment of money or for the recovery of personal property." In his affidavit in support of the motion for a change of venue, respondent, among other things not pertinent to a determination of this appeal, avers that 95% of the appraised value of the assets of the estate consists of personal property, and that the balance of 5% of the appraised value of the estate consists of real property in the County of Colusa and in the City and County of San Francisco.

[2, 3] It seems clear to us that the primary purpose of this action is to recover personal property. As to the remaining 5%, consisting of real property in the City and County of San Francisco and in Colusa County, the action to recover it does not affect the venue here.

As stated in Hardy v. White, 130 Cal. App.2d 550, 552, 279 P.2d 126, 128:

"* * * The well settled rule is that if there is a personal, or in personam, cause of action joined with one that is local in nature, the defendant is entitled to have the proceeding transferred to the county of his residence. The action must be wholly local in nature to require it to be brought in the county of the situs as designated in section 392, subdivision (a), Code of Civil Procedure. [Citing cases.]" See, also, Peiser v. Mettler, 50 Cal.2d 594, 328 P.2d 953.

We conclude that the trial court properly granted respondent's motion for change of venue based on Section 395.1 of the Code of Civil Procedure.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

167 Cal.App.2d 403

John G. VOGEL, S. E. Stewart, Elmo E. Phillips, Fred Gammel, William P. Leutenegger, Plaintiffs and Appellants,

v.

CITY OF MILLBRAE, a municipal corporation, Webb Whitmer, Douglas W. Morgan, Earl Wilms, Emilio Massolo, George Warman, Isabel Smart, Defendants and Respondents.

Civ. 18335.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1959.

Hearing Denied March 25, 1959.

Action for injunctive and declaratory relief. The Superior Court, San Mateo County, Wayne R. Millington, J., rendered judgment for defendants, and plaintiffs appealed. The defendants moved to dismiss the appeal as untimely filed. The District Court of Appeal, Draper, J., held that the essence of the action was the asserted invalidity of an assessment, and appeal was required to be perfected within 30 days.

Appeal dismissed.

1. Appeal and Error ⇐339(1)

Where complaint was denominated one for "injunction and declaratory relief" but it was apparent that asserted invalidity of proceedings of defendant city to establish special assessment district and levy of assessment thereon to construct public parking facilities was essence of action, appeal taken more than 30 days after entry of judgment for defendants was untimely. West's Ann.Rules on Appeal, rule 2(a); West's Ann.Streets & High.Code, § 10400.

2. Appeal and Error ⇐428(2)

Timely filing of notice of appeal is jurisdictional. West's Ann.Streets & High.Code, § 10400.

Ottis Miller, San Mateo, Schofield, Hanson, Bridgett, Marcus & Jenkins, San Francisco, for appellants.

Carr, McClelland, Ingersoll & Thompson, Burlingame, for respondents.

DRAPER, Justice.

Respondents move to dismiss this appeal upon the ground that it was filed too late. Judgment for defendants was entered January 30, 1958. Notice of appeal was filed March 25. "Except as otherwise specifically provided by law," notice of appeal may be filed within 60 days after entry of judgment (Rules on Appeal, Rule 2(a)). But in an action or proceeding contesting "[t]he validity of an assessment * * * levied" under Division 12, Streets and Highways Code, "[a]ny appeal from a final judgment * * * shall be perfected within 30 days after the entry of judgment" (Sts. & Hy. Code, § 10400).

[1] The present action is within the scope of Section 10400. The complaint is denominated one for "injunction and declaratory relief," but makes clear that each count asserts invalidity of the proceedings of defendant city to establish a special assessment district and levy an assessment thereon to construct public parking facilities. Both the allegations and prayer of the first count show that plaintiffs seek to enjoin the levy and collection of assessments. The second count, for declaratory relief, states plaintiffs' contention to be that "all proceedings taken * * * to create the assessments * * * are illegal and void."

A statutory provision almost identical to Section 10400 has been held valid and effective. Cohen v. City of Alameda, 168 Cal. 265, 142 P. 885. Another statute fixing a special time limit for appeal in a particular type of case has been upheld. Sheets v. Cleveland, 51 Cal.App.2d 148, 124 P.2d 200.

Appellants suggest that their action seeks to determine matters other than the validity of the assessment, but these matters are but steps in the assessment procedure, and it is apparent that the asserted invalidity of the assessment is the essence of the action. Appellants also contend that Section 10400 is ambiguous, and that in such case the ambiguity should be so resolved as to permit hearing on the merits. Santa Barbara etc. Agency v. All Persons, 47 Cal.2d 699, 306 P.2d 875. But we find no ambiguity in the language of the code section here involved.

[2] Timely filing of notice of appeal is jurisdictional. In re Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250; Anderson v. Anderson, 87 Cal.App.2d 327, 197 P.2d 65.

Appeal dismissed.

KAUFMAN, P. J., and DOOLING, J., concur.

167 Cal.App.2d 349

Edward W. GORGES et al., Plaintiffs, Appellants and Respondents,

v.

Minta H. JOHNSON, Defendant, Respondent and Appellant.

Civ. 5779.

District Court of Appeal, Fourth District, California.

Jan. 26, 1959.

Action for specific performance of contract to sell real property and for damages. From judgment of the Superior Court of Riverside County, S. Bucciarelli, J., plaintiffs appealed and defendants cross appealed. The District Court, Shepard, J., held that contract for sale of realty authorizing deferred payments but containing no provisions as to how deferred payments were to be evidenced or secured could not be specifically enforced, and description of land which did not show whether place named was in California or any other state, or whether any map thereof had been recorded, was insufficient to permit a specific performance, but inability of court to order specific performance did not necessarily preclude assessment of damages.

Portion of judgment affirmed and balance of judgment reversed.

1. Specific Performance ⇐30

Where contract for sale of realty and personal property provided for payment in cash with a deferred balance, but without any provision as to how deferred payments were to be evidenced or secured, under such conditions of uncertainty as to terms contract could not be specifically enforced.

2. Specific Performance ⇐29(1, 2)

Contract for sale of land and personal property referring to property in a certain named city but without stating whether city was in California or any other state, whether any map thereof had ever been recorded or whether street number was

that of a particular and sole residence, and without any inventory or description of furniture involved, was insufficient to permit specific performance.

3. Evidence ⇐460(2)
Frauds, Statute of ⇐158(3)

Under some conditions parol evidence can be received to assist in determining meaning of words used for property descriptions, but when the statute of frauds interposes a bar no material elements of a contract may be supplied by parol.

4. Specific Performance ⇐68

Specific performance will not lie for enforcement of contract for sale of personal property.

5. Specific Performance ⇐128(1)

Inability of court to order specific performance of contract does not necessarily cut off all legal right and since there is but one form of civil action in such matters it is the duty of court to look at problem as a whole for the purpose of doing justice between the parties if it is possible.

6. Vendor and Purchaser ⇐351(1)

Damages awarded for failure to convey real estate in accordance with contract are controlled by statute and while rental loss is an element of special damages in some cases when specially pleaded, it is not an item of general damages and where there is no plea of special damages rental loss is an improper measure of damages. West's Ann.Civ.Code, § 3306.

7. Statutes ⇐223.4

Statute relating to detriment caused by breach of contract to convey an estate in real property being a special provision, prevails over general statutes on damages. West's Ann.Civ.Code, § 3306.

8. Exchange of Property ⇐8(5)

Where contract to convey realty remained executory at all times, difference in values was proper measure of general damages bearing in mind that no special damages were ever pleaded.

9. Specific Performance ⇐134

Where action was brought to specifically enforce contract to convey realty and nothing was in record to show that handwriting expert had been appointed by court, prevailing party was not entitled to tax as costs one half of the fee charged by its handwriting expert. West's Ann. Code Civ. Proc. § 1032(a).

J. Frederick Rosen, Coachella, C. Frederick Woolpert, Indio, for plaintiffs.

Richard M. Marsh, Indio, for defendant.

SHEPARD, Justice.

This is an action for specific performance and for damages. In general, plaintiffs allege that on May 31, 1954, defendant agreed to sell to plaintiffs by the agreement hereinafter set forth the property therein described to be conveyed. Said document reads as follows:

> "Received of Grace Gorges 1 Wing foot House Cathedral City + 2000.00 cash Bal 14,500 @ 100.00 per month or more @ 6% for Home at 569 F. St. Cathedral City this also encludes all Furniture at F St. Wingfoot also has furniture
>
> "Minta H. Johnson"

The complaint also contains the allegations of fair and reasonable value, delivery of $2,000 check plus Wing foot house and furnishings, demand for conveyance, refusal by defendant to convey, and a prayer for specific performance and $24,000 damages.

Defendant's answer admits (1) the ownership of the land described in the document; admits signing some paper; denies execution of the particular receipt alleged; denies agreement to sell; denies fairness of price; admits receiving a check but alleges it was received conditionally on approval of Wing foot house and that check was returned; admits demand but denies refusal to convey. As other defenses, defendant pleads (2) a general de-

murrer to sufficiency of the complaint; (3) statutes of fraud in bar; (4) conditional signing and no final agreement; (5) a purported defense of fraud.

After a full trial, the court found that the agreement quoted was entered into; that the check was first accepted, then refused and torn up; that plaintiff has demanded and defendant refused to convey the property referred to; that reasonable rental value of plaintiffs' Wing foot house was $55 per month; that plaintiffs refrained from leasing the same for 21 months in reliance on defendant's agreement and therefore lost such rental, and are entitled to judgment therefor in the amount of $1,155 and cost. There is no finding that the Wing foot house was ever delivered to or received by defendant and the evidence would not support such a finding. The court also allowed as costs one half the amount paid to a handwriting expert for testimony as to the signature of defendant to the alleged agreement. Plaintiffs and defendant appeal.

Plaintiffs charge the trial court with error in its finding that the property subject to this action was not described with sufficient certainty to support a decree of specific performance.

[1, 2] An examination of the document immediately reveals that it contains no provision as to how the deferred payments were to be evidenced or secured. Under such conditions of uncertainty as to terms it could not be specifically enforced. Klein v. Markarian, 175 Cal. 37, 41, 165 P. 3; Gould v. Callan, 127 Cal.App.2d 1, 4(4) (5), 273 P.2d 93; Bonk v. Boyajian, 128 Cal. App.2d 153, 155, 274 P.2d 948. The description of the land itself is insufficient to permit of specific performance because it would be impossible for a stranger to locate the property on the ground. The document does not show whether the place called "Cathedral City" is in California or Maine; it does not show whether any map thereof was ever recorded; whether the street number is that of a particular and sole residence; it gives no inventory or description of the furniture involved; and no inkling of whether or not the Wing foot house is realty or personalty. Roberts v. Lebrain, 113 Cal.App.2d 712, 715(3) (4) (5), 248 P.2d 810.

[3, 4] Under some conditions, parol evidence can be received to assist in determining the meaning of the words used for property description. Ellis v. Klaff, 96 Cal.App.2d 471, 476, 216 P.2d 15. But when, as here, the statute of frauds interposes a bar no material elements of a contract may be supplied by parol. No estoppel was pleaded or proved in the case at bar. Ellis v. Klaff, supra; Joyce v. Tomasini, 168 Cal. 234, 238, 142 P. 67; McKevitt v. City of Sacramento, 55 Cal. App. 117, 203 P. 132; Pruitt v. Fontana, 143 Cal.App.2d 675, 686(5), 300 P.2d 371. Nowhere in the pleading or in the trial was any evidence offered to show that the descriptive terms could actually be applied to the land or property on the ground in any of the ways we have hereinbefore suggested, or in any other way. Under the circumstances of this case, with the evidentiary deficiencies as noted, there was no proper basis for a judgment of specific performance. If we view the matter from the standpoint of personalty, specific performance will not lie. Emirzian v. Asato, 23 Cal.App. 251, 257, 137 P. 1072.

[5] In this state the inability of a court to order specific performance does not necessarily cut off all right to relief. We have only one form of civil action in such matters, and it is therefore the duty of the court to look at the problem as a whole for the purpose of doing justice between the parties if it is possible. Bettancourt v. Gilroy Theatre, Inc., 120 Cal.App.2d 364, 372(4), 261 P.2d 351; Eastwood Homes, Inc. v. Hudson, 161 Cal.App.2d 532, 327 P.2d 29. In the case of Pascoe v. Morrison, 219 Cal. 54, 58, 25 P.2d 9, 10, quoting from Haffey v. Lynch, 143 N.Y. 241, 38 N.E. 298, it is said:

"'In addition thereto, the facts as pleaded, without any reference to any question of specific performance, en-

titled plaintiff to damages; and, as shown by the cases heretofore cited, the court was not only authorized, but it was its duty, to grant such relief as the evidence warranted.'"

[6, 7] However, damages awarded are controlled by our statute. Rental, while an element of special damage in some cases when specially pleaded, is not an item of general damage. There was no plea of special damages here. Rental was therefore an improper measure of damage. Civil Code, Sec. 3306; Smith v. Schrader, 80 Cal.App. 478, 491, 251 P. 967, Cummings v. Roeth, 10 Cal.App. 144, 153, 101 P. 434; Yocum v. Taylor, 50 Cal.App. 294, 295, 195 P. 62; Baran v. Goldberg, 86 Cal. App.2d 506, 511(5), 194 P.2d 765.

"The compensation is to be adjusted according to the rules obtaining with regard to the measure of damages for the breach of a contract in an action at law." Engasser v. Jones, 88 Cal. App.2d 171, 176(4), 198 P.2d 546, 549.

Said Civil Code Section 3306, "relating to detriment caused by breach of agreement to convey an estate in real property being a special provision, prevails over general statutes on damages. Boshes v. Miller, 119 Cal.App.2d 332, 336." Rasmussen v. Moe, 138 Cal.App.2d 499, 503 (3), 292 P.2d 226, 229.

[8] In some phases of this cause it would appear to be an attempted partial exchange, especially as to the "Wing foot" house upon the use of which the damages complained of are based. Since the contract here involved remained executory at all times, a difference in values was the proper measure of general damages, bearing in mind that no special damages were ever pleaded. Barnhart v. Blackburn, 137 Cal.App. 240, 244(4) 30 P.2d 424.

[9] Defendant complains of the court's ruling on her motion to tax costs. The only portion of this objection argued in the brief is with respect to one half the fee charged by the hand-writing expert. We agree with defendant's objection in this regard. We can find nothing in the record to show that the witness Clark Sellers was appointed by the court. He was called to the witness stand and examined on behalf of plaintiffs. There is no returned subpoena in the file. There is no way in the record that he may be deemed the witness of anyone except the plaintiffs. While the court has considerable discretion in equity actions, that discretion can be exercised only in those actions not specifically covered by section 1032, Code of Civil Procedure. The action here at bar is fully covered by Paragraph (a) of said section 1032, and since the record does not show that the witness was appointed by the court the allowance of the fee involved was not, as against the defendant, within the power of the court. Plaintiffs cite in support of their position on the cost bill Reachi v. National Auto. & Cas. Co., 37 Cal.2d 808, 813(5), 236 P.2d 151. However, it clearly appears that the expert's fees referred to therein were an item of damage claimed in a preceding action for damages on an undertaking on attachment, and not as costs. In the only other case cited by plaintiffs in support of their position (Dodge v. San Diego Electric Ry. Co., 92 Cal.App.2d 759, 769(14), 208 P.2d 37, the experts involved were, in fact, appointed by the court under the provisions of Code of Civil Procedure section 1871, and the record so showed. "The right to recover costs is entirely statutory and 'the measure of the statute is the measure of the right.'" Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 274(9), 83 P.2d 503, 507.

The portion of the judgment denying specific performance is affirmed. The balance of the judgment is reversed. The costs on appeal are allowed to the defendant.

GRIFFIN, P. J., and MUSSELL, J., concur.

167 Cal.App.2d 418

H. R. BAINBRIDGE and C. R. Watkins, Plaintiffs and Appellants,

v.

COUNTY OF RIVERSIDE, State of California, Defendants and Respondents.

Civ. 5961.

District Court of Appeal, Fourth District, California.

Jan. 28, 1959.

Proceeding for reimbursement of license tax and fine paid to county pursuant to ordinance which Supreme Court had subsequently held to be invalid. The Superior Court, Riverside County, S. Thomas Bucciarelli, J., dismissed complaint and plaintiffs appealed. The District Court of Appeal, Stone, J. pro tem., held that general statutory provisions requiring that claims against counties be filed within a year after last item accrued were applicable to proceeding, in absence of special statute providing a procedure to be followed in seeking reimbursement of license taxes or fines illegally collected by county, and action brought more than one year after payment of tax and fine could not be maintained.

Affirmed.

1. Licenses ⇐34

Statutory provision to effect that claim for refund of taxes illegally collected may be filed within three years apply only to recovery of property taxes illegally or erroneously collected and are not applicable to license taxes or fines. West's Ann.Rev. & Tax.Code, § 5097 et seq.

2. Licenses ⇐34

Fact that Supreme Court held county ordinance invalid as an attempt to raise revenue by license tax upon business undertaking did not change tax into property tax and thus place it within scope of statute providing that claim for refund of taxes illegally collected may be filed within three years. West's Ann.Gov.Code, §§ 29700 et seq., 29701, 29702.

3. Counties ⇐201, 208

Counties, as agencies of the state, enjoy protection of sovereign immunity, and therefore, when a general procedure is established to perfect claims against a county, it must be followed unless a special statute authorizing an action against county provides procedure to be followed in perfecting that particular type of claim.

4. Counties ⇐216

General statutory provisions requiring that claims against counties be filed within a year after last item accrued were applicable to proceeding for recovery of license tax paid pursuant to ordinance and fine paid for violating ordinance which was subsequently declared invalid, in absence of special statute providing a procedure to be followed in seeking reimbursement of license taxes or fines illegally collected by county, and action brought more than one year after payment of tax and fine could not be maintained. West's Ann.Gov.Code, §§ 29700 et seq., 29701, 29702; West's Ann. Rev. & Tax.Code, § 5097 et seq.

5. Limitation of Actions ⇐43

A cause of action accrues at the moment when party who owns it is entitled to bring and prosecute an action thereon.

6. Limitation of Actions ⇐49(4)

Where parties, who paid license tax and fine pursuant to ordinance, considered ordinance invalid at time of payment, right to commence proceeding to collect tax illegally assessed and fine illegally imposed accrued upon payment and was not dependent upon outcome of other litigation pending in Supreme Court pertaining to same ordinance, and did not accrue when Supreme Court handed down its decision holding ordinance to be invalid. West's Ann.Gov.Code, §§ 29700 et seq., 29701, 29702; West's Ann.Rev. & Tax.Code, § 5097 et seq.

Hennigan, Ryneal & Nixen, Riverside, for appellants.

Ray T. Sullivan, Jr., County Counsel, Justin M. McCarthy, Deputy County Counsel, Riverside, for respondent.

STONE, Justice pro tem.

This is an appeal from a judgment dismissing plaintiffs' second amended complaint. The plaintiffs Bainbridge and Watkins were engaged in a joint business venture, one of its purposes being to move houses from Oceanside, San Diego County, to land located in an unincorporated territory of Riverside County. Prior to the beginning of the business venture by the plaintiffs the Board of Supervisors of Riverside County enacted an ordinance requiring the payment of a license tax of $50 for each house moved onto land in an unincorporated area. Plaintiff Bainbridge paid under protest a tax of $1,500 imposed pursuant to the ordinance. The plaintiff Watkins was fined $500 for violating the ordinance. In the second amended complaint plaintiff Bainbridge sought reimbursement of the $1,500 license tax so paid, and plaintiff Watkins sought reimbursement of the $500 fine paid to the county. Subsequent to the payment of the tax and the fine, the Supreme Court held the ordinance to be invalid.

Defendant specified four grounds in its demurrer to the complaint and the court in sustaining the demurrer failed to indicate upon which ground or grounds the order was based. Three of the grounds of demurrer are untenable and it is unnecessary to consider them on this appeal. The remaining ground of demurrer is founded upon the statute of limitations. It is defendant's position that the plaintiffs have failed to comply with the provisions of the Government Code concerning the filing of claims against a county. The pertinent Government Code sections relating to claims against a county are as follows: Section 29700 provides in substance that the board of supervisors shall not consider or allow any claim in favor of any person against the county or any county or district fund unless it is itemized as provided therein. Section 29701 requires that the claim be verified and filed with the clerk of the board or the auditor, and section 29702 provides that "A claim shall be filed within a year after the last item accrued".

[1] Plaintiffs' second amended complaint reflects that Bainbridge paid the $1,500 illegal license tax between the dates of December 27, 1954, and March 24, 1955, and that his verified claim was filed with the clerk of the Board of Supervisors on September 4, 1956. The plaintiff Watkins it is alleged paid a $500 fine July 1, 1955, and filed his claim with the Board of Supervisors on September 4, 1956. Thus from the face of the complaint it appears that more than one year elapsed "after the last item accrued" before each verified claim was filed. Appellants contend that Government Code sections 29700 et seq. are not applicable in this case, but rather that Revenue and Taxation Code section 5097 controls. This section provides that a claim for a refund of taxes illegally collected may be filed within three years. However, Revenue and Taxation Code sections 5097 et seq. apply only to the recovery of property taxes illegally or erroneously collected and are not applicable to license taxes or fines. Chapter 5, Division 1 of the Revenue and Taxation Code, comprising sections 5096 through 5143 are reenactment of former Title IX of the Political Code, including section 3804 which provided a 3-year period of limitation. It is well established that former section 3804 of the Political Code had reference only to the payment of illegal taxes pursuant to an assessment of property. Trower v. City and County of San Francisco, 157 Cal. 762, 769, 109 P. 617; 24 Cal.Jur. p. 320, sec. 291; The California Tax System, by J. Gould (West's Revenue and Taxation Code Vol. 59, p. 2, et seq).

[2] Appellant offers the somewhat unusual argument that because the Supreme Court held the ordinance in question invalid

as an attempt to raise revenue by a license tax upon a business undertaking, the tax could not be a license tax but must be a property tax and thus within the scope of Revenue and Taxation Code Section 5097. This argument falls because the improper application of a tax does not change its nature. The Supreme Court held the ordinance in question to be invalid because it was an attempt to impose a license tax for revenue purposes only in violation of section 12, article XI of the Constitution and section 16100 of the Business and Professions Code. In re Gritton, on Behalf of Hennigan, 46 Cal.2d 856, 860, 300 P.2d 7.

[3, 4] Government Code sections 29700, et seq. provide a procedure for filing claims against a county arising by virtue of either contract or tort. Counties, as agencies of the state, enjoy the protection of sovereign immunity. Therefore, when a general procedure is established to perfect claims against a county it must be followed unless a special statute authorizing an action against a county provides the procedure to be followed in perfecting that particular type of claim. Albaeck v. County of Santa Barbara, 123 Cal.App.2d 336, 340, 266 P.2d 844; Dillard v. County of Kern, 23 Cal.2d 271, 275, 144 P.2d 365, 150 A.L.R. 1048; Artukovich v. Astendorf, 21 Cal. 2d 329, 332, 131 P.2d 831. There is no special statute providing a procedure to be followed in seeking reimbursement of license taxes or of fines illegally collected by a county. Therefore, the general provisions of Government Code sections 29700, 29701 and 29702 are applicable in this case.

Appellant advances the argument that if it is conceded that Government Code sections 29701 and 29702 are controlling, none the less the cause of action did not accrue until the Supreme Court declared the ordinance in question unconstitutional. Such an interpretation of the term "accrue" would place the filing of its claims with the Board of Supervisors well within the year specified in section 29702. Thus the question is whether the cause of action accrued when the payment was made under protest or when the Supreme Court handed down its decision holding the ordinance to be invalid.

[5, 6] A cause of action accrues at the moment when the party who owns it is entitled to bring and prosecute an action thereon. 1 Cal.Jur.2d 640, sec. 38; Lubin v. Lubin, 144 Cal.App.2d 781, 789, 302 P. 2d 49; Los Angeles County v. Metropolitan Casualty Insurance Co., 135 Cal.App. 26, 28, 26 P.2d 699; Smith v. Minnesota Mutual Life Insurance Co., 86 Cal.App.2d 581, 590, 195 P.2d 457, 84 C.J.S. Taxation § 639, p. 1298. Thus the causes of action in this case were not dependent upon the outcome of other litigation pending in the Supreme Court even though such litigation pertained to the same ordinance. That both plaintiffs considered the ordinance invalid at the time of payment is evident from the payment of the license tax under protest by Bainbridge and the payment of the fine by Watkins only after a trial defended upon the ground that the ordinance was "illegal". In this action the right to commence proceedings to collect the tax illegally assessed and fine illegally imposed accrued upon payment of the last item in each instance.

It appears from the face of the complaint that appellants failed to file a claim for reimbursement of either the license tax collected or the fine imposed within one year after the last item accrued and the demurrer on the ground that each cause of action was barred by the statute of limitations was properly sustained. The plaintiffs having failed to amend their complaint within the 20 days allowed by the court, the judgment of dismissal must be affirmed.

Judgment affirmed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.

167 Cal.App.2d 517

HARMON ENTERPRISES, INC., a corporation, Plaintiff and Appellant,

v.

Glenn A. VROMAN and Lettie B. Vroman, Defendants and Respondents.

No. 23193.

District Court of Appeal, Second District, Division 3, California.

Feb. 2, 1959.

Action to quiet title. The Superior Court of Los Angeles County, Fletcher Bowron, J., rendered judgment that neither plaintiff nor defendants were entitled to judgment quieting title to the property, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that under defendants' denial of plaintiff's allegation of ownership and that defendants had no right, title or interest in the property, defendants were entitled to produce any proof designed to establish that plaintiff was not entitled to the equitable relief which it sought.

Affirmed.

1. Quieting Title ⇐10(1)

A plaintiff, in order to prevail in a quiet-title action, must do so on the strength of his own title and not on the weakness of his adversary's title.

2. Quieting Title ⇐43

In quiet-title action, where defendants filed answer denying plaintiff's title and right to possession, a contract for sale of property to defendants was admissible even though the defendants did not plead such contract, and even though the defendants pleaded ownership by adverse possession.

3. Pleading ⇐93(1)

A defendant can plead inconsistent defenses.

4. Vendor and Purchaser ⇐187

Acceptance by vendor of payments which are past due under executory contract constitutes waiver of right to forfeit purchaser's interest by reason of breaches which have accrued at or prior to the time when such payment was made, and purchaser may not be again placed in default for the same delinquency until he has been allowed a reasonable time to perform his contract, and in such case right of forfeiture is temporarily suspended until vendor has given notice of intention to require strict performance in the future and purchaser has a reasonable time within which to perform his part of the contract.

5. Vendor and Purchaser ⇐148

Where vendor allows the whole purchase price to become due before undertaking to enforce a forfeiture, the payment of the price then becomes a dependent and concurrent condition, and nonpayment alone does not put the purchaser in default, and in such case the vendor must tender a deed as a condition to demanding payment of the price, and he cannot without such tender declare a forfeiture.

6. Vendor and Purchaser ⇐244

In quiet-title action, evidence warranted finding that plaintiff was not a bona fide purchaser without notice of defendants' claim to the property under agreement of sale.

7. Quieting Title ⇐43

Where the complaint was one to quiet title and defendants denied plaintiff's allegation of ownership and that defendants had no right, title or interest in the property, defendants could assert that plaintiff had waived right to declare forfeiture of defendants' interest under land contract notwithstanding that defendants did not in their answer seek relief from forfeiture. West's Ann.Civ.Code, § 3275.

Leon L. Gordon, Los Angeles, for appellant.

Elmer H. Howlett and Walter H. W. Weiler, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

Action to quiet title to real property.

The trial court adjudged that neither plaintiff nor defendants were entitled to a

judgment quieting title to the property in question and plaintiff appeals.

The complaint is in the usual form alleging that plaintiff is the owner of the property therein described; that defendants claim and assert an interest therein adverse to plaintiff; that the claims of the defendants are without right and that the defendants have no right, title or interest therein or thereto. Defendants Glenn A. Vroman and Lettie Vroman filed an answer denying the allegations of plaintiff's complaint and affirmatively alleging ownership in themselves by adverse possession.

There is no serious dispute with respect to the facts. The subject property consists of a lot in the city of South Gate improved with a small dwelling. On February 18, 1935, the record title stood in the name of Lew Moch, a single man, who on that date executed an agreement of sale thereof to Harold A. and Anna Belle Lamont.[1] The interest of the Lamonts was assigned to Arthur C. Wright by an instrument dated May 17, 1940. On September 16, 1940, Arthur C. Wright and his wife executed an agreement for the sale of the property to the defendant Glenn A. Vroman.[2] The latter made payments on the contract from time to time more or less irregularly from the date of the contract to November 18, 1941. Thereafter on April 18, 1942, Vroman made a payment of $15 which was accepted by the vendor. No further payments, however, were made by Vroman and the Wrights made no effort whatever to enforce the provisions of the agreement of sale. Vroman remained in possession of the property for some years and then leased it to another. He failed to pay the taxes levied and assessed against the property and on June 30, 1950, the property was sold to the state. Vroman continued in possession in person or by a tenant until September 15, 1955, when a lease was executed by the state to one Trent who was, at that time, a lessee of Vroman. On April 16, 1956, Arthur C. Wright and his wife quitclaimed all of their interest in the property to the plaintiff and in May 1956 plaintiff acquired quitclaim deeds from Joe Moch, Emma Moch Ingels and Blanche Moch Smith, who it asserts are the heirs of Lew Moch. There is, however, no proof of this fact nor that these parties succeeded as heirs or devisees to any interest in this property through Lew Moch. On May 31, 1956, plaintiff made a payment in the sum of $108.14 to the county tax collector as an initial step under the statutory 5-year plan for the redemption of delinquent taxes assessed Vroman. Following this agents of the plaintiff in the absence of Vroman entered the property, removed the furniture and personal possessions of Vroman and made some repairs to the house including the roof and front steps, put locks on the doors and attempted to rent the property. When a representative of the plaintiff went to the premises he found the defendant Vroman in possession. Plaintiff demanded that Vroman vacate the premises but Vroman refused asserting ownership to the property. On June 18, 1956, the defendant Lettie B. Vroman, mother of Glenn A. Vroman, paid all taxes due upon the property and received a certificate of redemption and

1. The sales price provided in this agreement is $2,750, of which $50 was paid down upon the execution of the agreement and the balance of $2,700 is payable in monthly installments of $25 including interest at the rate of 7 per cent per annum on the 10th day of each month commencing April 10, 1935. This agreement was not recorded until June 25, 1940, following its assignment to Wright.

2. This agreement provides that the sales price is $2,750 of which $150 was paid upon the execution of the agreement and the balance of $2,600 is payable in monthly installments of $30 including interest at 7 per cent per annum on the first day of each month commencing October 1, 1940. The agreement further recites that the vendors are purchasing the property under an agreement with Lew Moch providing for monthly payments of $25 per month, "on which there is now an unpaid balance of approximately $2,000.00." This agreement was never recorded.

on June 21, 1956, Glenn Vroman executed a grant deed to Lettie. On July 11, 1956, plaintiff filed the present action.

[1] At the outset and in view of the contentions advanced by the appellant it is necessary to advert to the elementary rule that a plaintiff in order to prevail in a quiet title action must do so on the strength of his own title and not on the weakness of his adversary's. Valle v. Ingram, 1941, 18 Cal.2d 761, 767, 117 P.2d 869. Here there is a total absence of any evidence that the Wrights ever acquired title to the property under the contract of sale executed by Lew Moch and the Lamonts,[3] hence appellant acquired only such rights as against the defendants as the Wrights could assert against the defendants under the contract of sale executed between the Wrights and Glenn Vroman. Insofar as the evidence discloses the record title to the property still stands in Lew Moch subject to the contract of sale executed between him and the Lamonts which was assigned by the latter to Wright and the contract of sale executed between the Wrights and the defendant Glenn Vroman. With these preliminary observations, we pass to a consideration of the various contentions urged by the appellant for a reversal of the judgment.

[2, 3] The first contention is that the trial court erred in admitting proof of the contract between the Wrights and Glenn Vroman because the respondents did not specifically plead the contract. There is no merit to this contention. As said in Smart v. Peek, 1931, 213 Cal. 452, 454, 2 P.2d 380, 381: "An answer denying the plaintiff's title and right to possession is always sufficient. Warden v. Stoll, 210 Cal. 374, 291 P. 835; Hinds v. Clark, 173 Cal. 49, 159 P. 153; Tilton v. Russek, 171 Cal. 731, 154 P. 860; United Land Ass'n v. Pacific Imp. Co., 139 Cal. 370, 69 P. 1064, 72 P. 988. Under such an answer the defendant may prove whatever right he may have, including a tax title. Hinds v. Clark, supra; Tilton v. Russek, supra."

Appellant further contends that the trial court erred in admitting proof of the contract last mentioned because such proof is inconsistent with the pleaded defense of ownership by adverse possession. The right of a defendant to plead inconsistent defenses has long been recognized in this state. 39 Cal.Jur.2d, p. 276, § 189. Moreover, we see no inconsistency in the defendants' answer. Their denial of plaintiff's allegation that it was the owner of the property and that defendants had no right, title or interest therein put in issue plaintiff's title and this is in no wise inconsistent with the affirmative allegation of title in themselves. The fact that the defendants could not prevail upon their plea of title by adverse possession as against the plaintiff by reason of the fact that the possession of a vendee under a contract of sale is not adverse to the vendor or his successor in interest does not prevent the vendee from challenging the right of the vendor to secure a decree foreclosing the vendee's interest under the contract.

The trial court found that, by reason of the fact that defendants' vendor accepted payments under the contract after the same became due without objection and that neither the Wrights nor the plaintiffs ever made demand upon the defendants to bring the payments due under the contract up to date, or took any steps to declare a forfeiture of the vendee's interest under the contract, the provision of the contract to the effect that time was of the essence thereof was waived by the Wrights and that plaintiff as their successor in interest is bound thereby.

[4, 5] Appellant challenges this conclusion. However, since Boone v. Templeman, 1910, 158 Cal. 290, 110 P. 947, it has been the settled law of this state that the acceptance by a vendor of payments which are past due under an executory contract

3. There is no evidence that the Wrights made any payments to Lew Moch under the Lamont contract after it was assigned to them.

constitutes a waiver of the right to forfeit the purchaser's interest by reason of breaches which have accrued at or prior to the time when such payment was made and the purchaser may not be again placed in default for the same delinquency until he has been allowed a reasonable time to perform his contract. In such case the right of forfeiture is temporarily suspended until the vendor has given notice of his intention to require strict performance in the future and the purchaser has a reasonable time within which to perform his part of the contract. Moreover, where, as here, the vendor allows the whole purchase price to become due before undertaking to enforce a forfeiture, the payment of the price then becomes a dependent and concurrent condition, and nonpayment alone does not put the vendee in default. In such case the vendor must tender a deed as a condition to demanding payment of the price and he cannot without such tender declare a forfeiture. See Community Industrial Land Co. v. Walker, 1943, 61 Cal.App.2d 298, 302–303, 142 P.2d 757; 25 Cal.Jur., p. 614, § 117 and cases there cited.

While not denying that such is the rule plaintiff asserts that defendants forfeited or waived their right to such notice by reason of the fact that when plaintiff demanded possession of the property defendant Glenn Vroman refused to vacate the same and claimed ownership thereof. We find no merit in this argument. When demanding possession of the premises it neither demanded payment of the balance of the purchase price nor tendered a deed. Indeed, a tender of a deed if made would have been ineffectual because it does not appear that plaintiff was in a position to convey title to the property upon payment of the unpaid balance of the purchase price. Plaintiff further contends that if notice of termination of the contract was required such notice was given when plaintiff demanded possession of the property. However, plaintiff, as successor in interest to the Wrights, could not under the circumstances terminate the contract by mere demand for possession without affording defendants a reasonable time within which to make payment of the unpaid balance of the purchase price. Gonzalez v. Hirose, 1948, 33 Cal.2d 213, 216, 200 P.2d 793.

[6] Plaintiff further asserts that the trial court erred in finding that it was not a bona fide purchaser for value without notice of defendants' contract. The uncontradicted evidence is to the effect that the property was assessed to Glenn A. Vroman and that this was known to the plaintiff prior to the time it acquired an assignment of the Lamont contract from the Wrights. Plaintiff adduced no proof to the effect that when they acquired the quitclaim deed from the Wrights it made any inquiry as to what if any interest Glenn Vroman had in the property or if so what information it received from the Wrights with respect thereto. The trial court was justified in inferring that if such inquiry had been made plaintiff would have ascertained the interest of Vroman in the property. Moreover, it affirmatively appears that plaintiff had notice that Glenn Vroman claimed some interest in the property by reason of the fact that almost a year before it acquired the assignment of the contract from the Wrights plaintiff addressed a letter to Glenn Vroman at the address of the subject property offering to purchase his interest therein, in response to which Vroman replied that he was not interested in selling. Under these circumstances it is clear that the trial court was fully warranted in concluding as it did that the plaintiff was not a bona fide purchaser without notice of Vroman's claim to the property.

[7] Plaintiff further contends that the court erred in finding that the Wrights and plaintiff as their successor in interest had waived their right to declare a forfeiture of defendant Glenn Vroman's interest under the contract by reason of the fact that defendants did not in their answer seek relief from the forfeiture under Civil Code, section 3275. Under the circumstances no such pleading was required. As we have seen, plaintiff's complaint was one to quiet title and under defendants' denial of plaintiff's allegation of ownership and that de-

fendants had no right, title or interest in the property, defendants were entitled to adduce any proof designed to establish that plaintiff was not entitled to the equitable relief which it sought. Selby v. Battley, 1957, 149 Cal.App.2d 659, 664–665, 309 P.2d 120.

In conclusion it is to be noted that the judgment herein does not operate to quiet title in the defendants and they may in no event be entitled to such relief unless and until they pay the balance of the purchase price.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

167 Cal.App.2d 524

Leonard PRICE, M. A. Rollnson, L. C. Schaefer, R. C. Rauch, individually and as representatives of approximately 300 former members of the Communications Workers of America Local 9503, a trade union affiliated with A. F. of L.-C. I. O., Plaintiffs and Appellants,

v.

COMMUNICATIONS WORKERS OF AMERICA LOCAL 9503, a trade union affiliated with A. F. of L.-C. I. O., Defendant and Respondent.

Civ. 23238.

District Court of Appeal, Second District, Division 3, California.

Feb. 2, 1959.

Action by expelled union members against the union to recover union dues allegedly deducted from their pay after revocation of authorization to company to deduct union dues. From adverse judgment of the Superior Court, Los Angeles County, John F. Aiso, J., dismissing the suit, the plaintiffs appealed. The District Court of Appeal, Vallée, J., held that action by named and unnamed expelled members of union who allowed employer to deduct their regular monthly dues from the pay checks after expulsion and to pay dues to union in hope that they would be reinstated as members in good standing and who allegedly subsequently terminated authorization to company either by revocation or by termination of their employment was not a proper representative or class suit.

Affirmed.

1. Parties ⇐11

A representative suit is proper only to conserve a common fund or property in which all of those represented have an interest and if rights of each member of class are dependent on facts applicable to him alone there is not requisite ascertainable class required for a representative suit. West's Ann.Code Civ.Proc. § 382.

2. Parties ⇐11

Action by named and unnamed expelled members of union, who allowed employer to deduct their regular monthly dues from pay checks after expulsion and to pay dues to union in hope that they would be reinstated as members in good standing and who allegedly subsequently terminated authorization to company either by a revocation or by termination of their employment, to recover amount of dues allegedly deducted after revocation of authorization was not a proper representative or class suit. West's Ann.Code Civ.Proc. § 382.

Pregerson & Costley, Van Nuys, for appellants.

Levy, Russell, DeRoy & Geffner and Leo Geffner, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment of dismissal in a suit claimed to be representative. The named plaintiffs are four in number. Defendant's demurrer to the first amended complaint, called the complaint, was sustained with leave to amend. Plain-

tiffs did not amend and judgment of dismissal was entered. The question is: Is this a proper representative or class suit?

The complaint alleges:

Count I

1. Defendant is a union with its principal place of business in the County of Los Angeles. It is the recognized bargaining agent by Pacific Telephone and Telegraph Company, called the company, and represents all those employees of the company who are members of the union.

2. Prior to about January 15, 1956, plaintiffs were employees of the company and were members in good standing of the union. Under an agreement between the union and the company, plaintiffs had authorized the company to deduct their monthly union dues from their regular pay checks and to pay them to the union.

3. About January 15, 1956, defendant levied an assessment on all members, which plaintiffs refused to pay. About that date, in accordance with the constitution and by-laws of the union, plaintiffs were expelled from the union. Since that date plaintiffs have not been members of or affiliated with the union.

4. After they were expelled, plaintiffs continued to allow the company to deduct their regular monthly dues from their pay checks and to pay them to defendant as plaintiffs hoped to be reinstated by the union as members in good standing. Since plaintiffs were expelled defendant has continued to collect the dues for each plaintiff from the company over varying periods of time. On information and belief, substantially all of the about 300 former members of the union who are the rightful owners of the funds held by defendant have terminated the authorization to the company either by a revocation or by the termination of their employment with the company. On information and belief, defendant has kept the funds received from the company separate and distinct from their regular funds and the funds are on deposit in a special account.

5. Plaintiffs, individually and as representatives of the above-described class, have demanded the return of the funds from defendant. Defendant has refused to return them and continues to withhold them in the approximate amount of $6,000.

6. Plaintiffs, and each of them, constitute a class so large that it is impracticable to bring them all before the court. Plaintiffs, and each of them, are members of a definite, ascertainable class which can be determined "by" the books and records of defendant, which records will show the exact moneys held by defendant which rightfully belong to the respective plaintiffs, and each of them. All of the moneys of the respective plaintiffs, and each of them, are held in a common fund which is on deposit with defendant Doe II, standing in the name of the union.

7. Plaintiffs, individually and as representatives of the above described class, have retained the office of Pregerson & Costley, attorneys, to represent them on a contingent fee arrangement specifying that the attorneys are to advance all costs of suit; from any recovery the costs advanced shall first be deducted, and the attorneys shall receive 25 per cent of all moneys recovered by settlement or 33⅓ per cent of all moneys recovered by settlement, judgment, or otherwise after a trial date has been set; if there should be no recovery no moneys shall be owing to the attorneys for costs advanced or fees; and if there is a recovery the attorneys shall have a lien for their services and costs advanced.

Count II

1. Realleges the allegation of count I.

2. As the former representative and bargaining agent of plaintiffs, defendant was in a confidential relationship with plaintiffs.

3. After plaintiffs were expelled from the union defendant came into possession of funds that rightfully belong to plaintiffs. Defendant holds the bare legal title to the funds; and all equitable right, title, and interest in the funds belongs to plaintiffs. Defendant holds the funds as con-

structive trustee under a constructive trust for the use and benefit of plaintiffs. If the funds are disposed of by defendant, plaintiffs will suffer irreparable harm.

Count III realleges the allegations of count I and a common count for money had and received, the amount alleged being about $6,000.

The prayer is for judgment against the union in the approximate amount of $6,000, the exact amount to be determined in accordance with proof, and that a receiver be appointed to distribute the funds in the following manner: first, to reimburse the attorneys for costs advanced, attorney fees in the amount of 25 per cent of settlement or 33⅓ per cent after date of trial has been set, and: second, the balance to plaintiffs in accordance with proof.

The demurrer was general and special. The record discloses that the demurrer was sustained [1] on the ground the named plaintiffs may not prosecute the action as a representative suit on behalf of the unnamed about 300 former members of the union.

Code of Civil Procedure, section 382, in pertinent part provides:

> "* * * when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

A party may therefore sue for the benefit of many in one of two cases: (a) where the question is one of a common or general interest of many persons, or (b) where the parties are numerous and it is impracticable to bring them all before the court. "Section 382 of the Code of Civil Procedure permits an action to be brought by one or more parties on behalf of others when the parties are numerous. This is a statutory provision based upon the common law theory of convenience to the parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy. It is known as the doctrine of virtual representation, and such representees if sufficiently represented are bound by the order or judgment made. The sufficiency of the representation is generally gauged by the good faith of the representors and the effect of the order or judgment upon the unnamed parties." Fallon v. Superior Court, 33 Cal.App.2d 48, 50, 90 P.2d 858, 859.

[1] A representative suit is proper only to conserve a common fund or property in which all of those represented have an interest. Watson v. Santa Carmelita Mut. Water Co., 58 Cal.App.2d 709, 718–719, 137 P.2d 757. If the rights of each member of the class are dependent on facts applicable to him alone there is not the requisite ascertainable class required for a representative suit. Barber v. California Emp. Stab. Comm., 130 Cal.App.2d 7, 14, 278 P.2d 762.

The leading case enumerating the rules as to when a representative suit may be maintained is Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 198 P.2d 514. The court stated (32 Cal.2d at page 835, 198 P.2d at page 515):

> "Four plaintiffs—'on behalf of themselves and all others similarly situated'—brought this action in the Superior Court of Los Angeles County, each seeking to recover the $100 statutory penalty imposed for the wrongful refusal of admission to the Rose Bowl Game at Pasadena on January 1, 1947—a 'place of public amusement or entertainment.' * * *
>
> "[32 Cal.2d at page 837, 198 P.2d at page 517.] But in any event and regardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, it has been uniformly held that there must be a well-defined 'community of interest' in the questions of law and fact involved as affecting the parties to be represented. [Citations.]
>
> "Plaintiffs contend that 'all the individuals,' whether 'named or un-

1. Judge Chantry sustained the demurrer; Judge Aiso signed the judgment.

named,' who waited in line but were denied tickets to the Rose Bowl Game 'have the same interest in the subject matter and the recovery'; that 'the facts necessary to prove the cause of action of any one of them are the same [as those] necessary to prove the cause of action of any one or all of the others'; and that the number of interested individuals, 'amounting to several hundred,' renders it 'impracticable to bring them all before the court.' Accordingly, they urge that this action comes within the provisions of either of the statutory conditions sustaining the prosecution of a representative suit, and particularly within the second category. But plaintiffs misconstrue the nature of this litigation. The causes of action of the several plaintiffs and the other unnamed aggrieved individuals are separate and distinct. The question, as to each individual plaintiff, is whether *he* 'as a person over the age of twenty-one years' presented himself and demanded admittance to the game, whether *he* tendered the price of the ticket, and whether, as to *him,* the refusal of admission was wrongful under section 53 of the Civil Code, entitling him 'to recover * * his *actual damages,* and one hundred dollars in addition thereto.' Civ.Code, sec. 54; emphasis added. Moreover, other independent factors of consideration arise in connection with the respective individual claims by reason of the provision that a 'person under the influence of liquor, or who is guilty of boisterous conduct, or [who is] of lewd or immoral character, may be excluded from any such [public] place of amusement.' Civ.Code, sec. 53. Thus, a decision favorable or adverse to these plaintiffs—or any of them—could not determine the rights of any of the unnamed parties whom plaintiffs purport to represent. True, the plaintiffs, and perhaps others who waited in line and were refused tickets of admission, have an interest in a common question of law, that is, whether the statutory recovery is authorized when an operator of a 'place of public amusement or entertainment' advertises 7,500 tickets for sale to the general public and then later, after selling only 1,500, closes the box office upon announcing that 'all of the available tickets had been sold.' But the determination of such question in the present case would still leave to be litigated the right of any other person to recover on his statutory claim in the light of whether *he,* in reliance upon the advertised sale, stood in line, received an identification stub, was denied tickets before the promised 7,500 had been sold, presented himself at the Rose Bowl as a 'sober, moral person,' demanded admission, tendered the price, and was refused, entitling him 'to recover * * * his actual damages' as well as the fixed statutory penalty of $100.

"In general, a representative suit is proper because it is in behalf of a common or joint interest of an *ascertained class* in the subject matter of the controversy * * *. [32 Cal.2d at page 839, 198 P.2d at page 518.] In the present case there is no ascertainable class, such as the stockholders, bondholders, or creditors of an organization. Rather there is only a large number of individuals, each of whom may or may not have, or care to assert, a claim against the operators of the 1947 Rose Bowl Game for the alleged wrongful refusal of admission thereto. Each of such claimants must establish separately that he was refused admission, and that such refusal was wrongful under section 53 of the Civil Code. Moreover, each claimant would have the independent right, under section 54 of said code, to litigate the question of his recovery of 'actual damages' in addition to the $100 penalty imposed by the statute. While each would be 'similarly situated' in that his cause of action arises under the same statute, his recovery would rest on a distinct prem-

ise correlative with varying proof as to the facts of his particular case. In such circumstances there is not the necessary 'common or general interest' in the subject-matter of the litigation appropriate to the maintenance of a representative action as that type of proceeding has been analyzed in the adjudicated cases. * * *

"[32 Cal.2d at page 841, 198 P.2d at page 519.] So the fact that 'numerous parties' have separate and distinct claims against the same person or persons will not alone suffice to sustain a representative suit where there is no community of interest. To hold otherwise would nullify the equitable concept of section 382 of the Code of Civil Procedure as a procedural convenience for the maintenance of representative litigation. * * *

"[32 Cal.2d at page 842, 198 P.2d at page 520.] In concluding this discussion, there is one further point to be noted. In cases properly falling within the category of representative litigation, the judgment or decree would be res judicata for or against the class sought to be represented."

Also see Most Worshipful Sons, of Light Grand Lodge, etc. v. Sons of Light Lodge No. 9, 118 Cal.App.2d 78, 257 P.2d 464; Watson v. Santa Carmelita, etc. Co., supra, 58 Cal.App.2d 709, 718, 137 P.2d 757.

[2] The complaint alleges that the plaintiffs allowed deduction of dues after expulsion in the hope they would be reinstated in the union as members in good standing. Each expelled member of the union whose dues were paid to the union may have had a separate claim therefor, no doubt varying in amount. In disposing of his claim questions would arise as to whether he revoked his authorization to the company to deduct his dues and pay them to the union; as to whether he wished the union to collect his dues and, if not, when did he disapprove the practice and revoke his authorization; as to whether he wishes the union to collect the dues from the company in order to satisfy the assessment; as to whether he voluntarily permitted the company to pay the dues to the union in consideration of receiving union representation; as to whether he desires to apply for reinstatement in the union and wishes the collected dues to be applied to the reinstatement and the payment of back dues. Desire of reinstatement would seem to follow from the fact that an expelled member permitted deduction of dues when he could have stopped it by revocation of his authorization. The allegation of the complaint with respect to revocation of the authorization is that "substantially all of the approximately 300 former members" have revoked their authorizations to the company either expressly or by termination of employment. There is no allegation that the named plaintiffs have revoked their authorizations. The factual allegation as to why there was no revocation of the authorizations for any period of time is separate as to each expelled member. So it is with respect to when each expelled member who terminated his employment with the company did so. The questions whether an unnamed plaintiff intended that the company should deduct his dues and pay them to the union and whether he has no desire to bring a lawsuit or assert any claim to the moneys are factual questions.

The complaint alleges the named plaintiffs have a contingent fee contract with their attorneys and the prayer is that the fees be deducted from the recovery. There is no allegation that the about 300 former members of the union agreed to this arrangement. Yet if the suit were maintained they might be bound by the contract and the judgment would be res judicata.

The unnamed plaintiffs may have rights which are independent of those of the named plaintiffs, and defendant may have rights against the unnamed plaintiffs or some of them which it does not have against the named plaintiffs. There is no community of interest regarding questions of law and fact between the named and the unnamed plaintiffs. In fact, there is no

definite, ascertainable class. There is only a large number of individuals, each of whom may or may not have or care to assert a claim against the union. There could be an indefinite number of factual situations applicable to the about 300 of those claimed to be similarly situated whom the named plaintiffs seek to make parties to this action without their knowledge, consent, participation, and, so far as appears, regardless of their wishes. A decision favorable or adverse to the named plaintiffs or any of them could not determine the rights of any of the unnamed plaintiffs whom the named plaintiffs purport to represent. To permit this as a representative suit might deprive defendant of the right to assert any defenses it might have against individual, unnamed plaintiffs. A judgment that the named plaintiffs are or are not entitled to recover should not operate as res judicata against either the unnamed plaintiffs or against defendant union.

Zaleski v. Local 401 of United E. R. & M. Workers, 9 N.J.Super. 206, 75 A.2d 740, concerned the method of paying dues to a labor union local. The named plaintiffs, seven in number, and perhaps all the members severally, empowered their employer to "deduct or check-off" their dues and pay them to the local. The plaintiffs, becoming dissatisfied with this procedure, brought suit on behalf of themselves and all members of the union who had authorized the employer to check-off their dues, and obtained an injunction that restrained the employer from paying to the union not only their own dues but the dues of any members. Reversing, the court said (75 A.2d at page 741):

"The device of the class action, the prosecution or the defense on behalf of many by a few, is of great social utility and has earned a constantly widening application, since it was first employed in equity. * * * In the suit before us, the rights of the employees are several and not joint; each is concerned with his own dues and has separately empowered the employer as his agent to pay his dues. They do not appear to constitute a single class for the purpose of the present controversy, but at least two classes, namely, those who want the check-off discontinued and those who do not want it discontinued. Hansberry v. Lee, 1940, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741. Obviously the plaintiffs do not represent the latter group, and yet the plaintiffs pretend to speak for them and have obtained an injunction interfering with the relation between the members of that group and the Union. * * *

"Where the circumstances are such that all the persons severally possessing the right which is the basis of the suit would naturally want the right enforced—for instance, where the right has great value—such persons may be considered a single class, although actually there are dissenters among them. But where the wish of many to enforce the right is doubtful, the possessors of the right do not constitute a class. That was the situation in Hansberry v. Lee, supra, and is the situation here. But let us follow through on plaintiffs' theory. Since the check-off of each employee's dues depends on the separate authorization which he signed, the rights of the employees are several and not joint; and the action before us is of the kind that has come to be known as a spurious class suit."

The trial court properly determined this is not a representative or class suit.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 391

R. M. LADDON, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 18481.

District Court of Appeal, First District. Division 2, California.

Jan. 27, 1959.

Rehearing Denied Feb. 26, 1959.

Hearing Denied March 25, 1959.

Original proceeding for writ of prohibition or mandate to nullify order overruling objections of defendant, against whom malpractice action has been brought, to interrogatories asking whether defendant carried malpractice insurance and, if so, name and address of insurer and policy limits. The District Court of Appeal, Draper, J., held that existence and extent of liability insurance of defendant in malpractice case was relevant to subject matter within statute to effect that discovery may be had as to any matter relevant to subject matter involved in pending action, although policy was not strictly within issues raised by pleadings, plaintiff was entitled to serve interrogatories upon defendant and discovery would not be relegated to a proceeding to perpetuate testimony but could be had in personal injury action itself.

Writs denied and alternative writs discharged.

1. Insurance ⊂591½

Statute requiring provision for direct action by injured party against insurer, after judgment against insured, in all policies against loss or damages resulting from liability for injury suffered by another person other than a policy of workmen's compensation, is applicable to policy insuring against liability for negligent practice of healing arts. West's Ann.Insurance Code, § 11580.

2. Discovery ⊂29

Discovery act which became effective January 1, 1958 is to be liberally construed. West's Ann.Code Civ.Proc. §§ 2016(b), 2030(a, b).

3. Discovery ⊂41

Existence and extent of liability insurance of defendant in malpractice case was relevant to subject matter within statute to effect that discovery may be had as to any matter relevant to subject matter involved in pending action, although policy was not strictly within issues raised by pleadings, plaintiff was entitled to serve interrogatories upon defendant asking whether he carried malpractice insurance, and, if so, the name and address of insurer and policy limits and discovery would not be relegated to a proceeding to perpetuate testimony but could be had in personal injury action itself. West's Ann.Code Civ. Proc. §§ 2016(b), 2017(a) (1), 2030(a, b), 2083–2090; West's Ann.Insurance Code, § 11580.

Peart, Baraty & Hassard, Robert D. Huber, San Francisco, for petitioner.

Allen Spivock, San Francisco, for respondent.

DRAPER, Justice.

This original proceeding presents the question whether the existence and extent of liability insurance of a defendant may be obtained in discovery proceedings. Shirley Ross, the real party in interest here, brought an action against petitioner and others for injuries allegedly resulting from malpractice, and served interrogatories upon defendant, Dr. Laddon, asking whether he carried malpractice insurance at the time in issue, and, if so, the name and address of the insurer and the policy limits. Petitioner filed objections to these questions. Code Civ.Proc. § 2030(a). His objections were overruled and he promptly petitioned for writ of prohibition or mandate to nullify the order. We granted alternative writs.

Interrogatories may relate to "any matter, not privileged, which is relevant to the subject matter involved in the pending ac-

tion." Code Civ.Proc. §§ 2030(b), 2016(b). Since these code sections did not become effective until January 1, 1958 (Stats.1957, Chap. 1904, § 4), there is no decision of an appellate court of California dealing with this problem in the precise context now before us. The present California discovery statutes are based largely upon the Federal Rules of Civil Procedure. Comparable rules, varying somewhat in their language, are in force in several states.

In the federal courts themselves there is a difference of opinion as to discoverability of the existence and limits of insurance. The Eastern District of Tennessee has both granted (Brackett v. Woodall Food Products, D.C., 12 F.R.D. 4) and denied (McNelley v. Perry, D.C., 18 F.R.D. 360) discovery. Discovery has been allowed in one other U. S. District Court (Orgel v. McCurdy, D.C.S.D.N.Y., 8 F. R.D. 585) and denied in three (McClure v. Boeger, D.C.E.D.Pa., 105 F.Supp. 612; Roembke v. Wisdom, D.C.S.D.Ill., 22 F. R.D. 197; Gallimore v. Dye, D.C.E.D. Ill., 21 F.R.D. 283). There is also a division of authority in states having comparable rules or statutes. Discovery has been allowed in Illinois (People ex rel. Terry v. Fisher, 12 Ill.2d 231, 145 N.E.2d 588), Kentucky (Maddox v. Grauman, Ky., 265 S.W.2d 939, 41 A.L.R.2d 964), and Michigan (Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539); but denied in Nevada (State ex rel. Allen v. Second Judicial District Court, 69 Nev. 196, 245 P.2d 999), South Dakota (Bean v. Best, 76 S.D. 462, 80 N.W.2d 565), Florida (Brooks v. Owens, Fla., 97 So.2d 693), Minnesota (Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649), Oklahoma (Peters v. Webb, Okl., 316 P.2d 170) and Arizona (Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746).

These decisions may be distinguishable from the case at bar upon the language of the statute involved or upon the facts, but they fairly represent the division of opinion in other jurisdictions and show that the weight of authority favors denial of attempts to discover the existence and extent of public liability insurance carried by a defendant.

While the decisions favoring discovery are persuasive in their reasoning, we might be inclined to follow the majority view if the question were wholly new in California. But it is not. Although no California case passes upon the precise language of the present discovery act, discovery of the existence and limits of insurance was permissible under the much more restricted procedure in effect before 1958.

In 1937, our Supreme Court held that a plaintiff in a personal injury action is entitled, in a collateral proceeding to perpetuate testimony, to examine defendant's public liability insurance policy. Demaree v. Superior Court, 10 Cal.2d 99, 73 P.2d 605. In 1951, the Supreme Court made it clear that the rule of Demaree extends to the limits of the insurance, and not merely to the insuring clauses of the policy. Superior Insurance Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833. The court quoted from Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, at page 33, 255 P. 512, at page 513, which pointed out that under a 1919 statute comparable to our present Insurance Code, section 11580, the policy evidences "a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy." The court in Superior Insurance points out (37 Cal.2d at page 754, 235 P.2d at page 835) that "[t]he provisions of such a policy are not, therefore, a matter for the sole knowledge of the named assured and the insurance carrier to the exclusion of the injured person; the very pendency of an action by the injured person brought in good faith against the named insured person gives the former a discoverable interest in the policy."

[1] Demaree, Superior Insurance and Malmgren all concern policies of automobile liability insurance, whereas the case at bar deals with malpractice insurance. But that

difference does not distinguish the cases. The code (Ins. Code, § 11580) requires the provision for direct action by the injured party against the insurer, after judgment against the insured, in all policies of insurance "[a]gainst loss or damage resulting from liability for injury suffered by another person other than a policy of workmen's compensation insurance." A policy insuring against liability for negligent practice of the healing arts is quite as much within this provision as is a policy insuring against liability for the negligent operation of an automobile.

Since 1937, and even more clearly since 1951, the California rule has permitted discovery of the existence and extent of liability insurance. We must and do assume that this rule of law has been known to the legal profession generally. Thus, even though the additional step of a proceeding to perpetuate testimony has been required, it is reasonable to conclude that plaintiffs' attorneys have, where they deemed it necessary, been able to secure such information either through proceedings to perpetuate testimony or by the mere statement that they intend to institute such proceedings.

Petitioner, however, contends that the 1957 discovery act removes this right. It is true that the new act, while enlarging the right to discovery in an action presently pending, places somewhat greater procedural restrictions upon proceedings to perpetuate testimony (Code Civ.Proc. § 2017 (a) (1)) than were contained in the old act (Code Civ.Proc. §§ 2083–2090). However, there is no apparent effort to limit the scope or subject matter of the inquiry in a perpetuation proceeding. Certainly the new statute evidences no intent to negative the "discoverable interest" which Superior Insurance holds to exist in the liability insurance carried by a defendant. In the absence of express language compelling such a result, it would be anomalous to construe the discovery act of 1957 as eliminating the discoverable interest so long recognized in the rule of Demaree and Superior Insurance. An act designed to broaden discovery cannot lightly be construed as narrowing it.

[2, 3] The remaining question is whether discovery may be had in the personal injury action itself, as is sought to be done here, or must be relegated to a proceeding to perpetuate testimony. The present discovery act is to be liberally construed. Grover v. Superior Court, 161 Cal.App.2d 644, 327 P.2d 212. Under discovery rules comparable to ours, "[t]he question of relevancy is more loosely construed upon pre-trial examination than at the trial." Maddox v. Grauman, supra, Ky., 265 S.W. 2d 939, 941, 41 A.L.R.2d 964 at page 966. In jurisdictions which have accepted the view of Demaree and Superior Insurance Company, the modern discovery rules have been held to permit discovery as to liability insurance in the action itself. Maddox v. Grauman, supra; People ex rel. Terry v. Fisher, supra, 12 Ill.2d 231, 145 N.E.2d 588. In California, Superior Insurance has recognized that plaintiff's "discoverable interest" in defendant's liability insurance arises with the "very pendency" of the action against the assured. The conclusion is inescapable that under this decision the insurance policy is relevant to the subject matter involved in the personal injury action, although not strictly within the issues raised by the pleadings. Now that discovery may be had as to "any matter * * * relevant to the subject matter involved in the pending action." (Code Civ. Proc. § 2016(b)) there is no reason to require an ancillary proceeding as the only means of exercising the long-recognized "discoverable interest" of plaintiff in defendant's policy. A principal purpose of the new discovery act is to facilitate expeditious disposition of litigation. It would contravene that purpose to require two steps in a discovery proceeding where one suffices.

Writs denied and alternative writs discharged.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

167 Cal.App.2d 560

PEOPLE of the State of California, Plaintiff and Respondent,

v.

John WARDWELL, Defendant and Appellant.

Cr. 1250.

District Court of Appeal, Fourth District, California.

Feb. 3, 1959.

Hearing Denied April 1, 1959.

Prosecution for sale of marijuana by defendant to a special investigator on February 21, who at the time of such sale negotiated for an additional sale of a larger amount the following day. From adverse judgment and order of the Superior Court, Kern County, Norman F. Main, J., the defendant appealed. The District Court of Appeal, Shepard, J., held that evidence of the sale on the succeeding day was properly admitted when all of the circumstances of place, time, persons and methods in both sales were inextricably interwoven.

Judgment and order affirmed.

1. Criminal Law ⇐369(2)

In prosecution for sale of marijuana by defendant to a special investigator on February 21, who at the time of such sale negotiated for an additional sale of a larger amount on following day, evidence of sale on succeeding day was properly admitted when all of the circumstances of place, time, persons, and methods in both sales were inextricably interwoven. West's Ann. Health & Safety Code, § 11500.

2. Criminal Law ⇐741(1, 2), 747

In a criminal prosecution, weight of testimony, identifications, conflicts and witness uncertainties are in the province of the jury at the trial.

3. Criminal Law ⇐369(2)

Except when it shows merely criminal disposition, evidence that is relevant is not excluded because it reveals commission of an offense other than that charged.

4. Criminal Law ⇐369(2)

In a criminal prosecution, evidence is admissible if it tends logically, naturally, and by reasonable inference to establish any fact material for the state, or to overcome any material matters sought to be proved by the defense, regardless of whether evidence embraces commission of another crime, whether other crime be similar in kind or not, and whether it be part of a single design or not.

5. Criminal Law ⇐1171(1)

In prosecution for sale of marijuana wherein defendant left clear impression that person who had assisted special investigator was almost a complete stranger to defendant, district attorney did not commit prejudicial error in asking defendant whether it was a fact that in previous year he was in jail in the same "tank" as such assistant. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law ⇐1171(1)

In prosecution for sale of marijuana wherein defendant in response to a question stated that when he was arrested he did not know what was going on, it was not prejudicial error to ask defendant whether he had been arrested previously by two other persons to show that defendant's pretense of lack of understanding was a mere sham.

7. Criminal Law ⇐1171(1)

In prosecution for sale of marijuana wherein defendant had volunteered statement that he had never had any connection with anything like they were talking about, it was not prejudicial error to inquire of defendant whether he had used narcotics before.

8. Criminal Law ⇐780(2)

In prosecution for sale of marijuana to a special investigator who was assisted by certain person in making contact with defendant, evidence was insufficient to warrant the giving of an "accomplice instruction" by reason of aid of such other person. West's Ann.Health & Safety Code, § 11500.

9. Criminal Law ⇐1162

Primary purpose of all rules of procedure is to secure for the people and for defendant a reasonably fair trial, in which

all relevant truth is made known to the trier of fact, and no case should be reversed unless it is reasonably probable that a result more favorable to appealing party would have been reached in absence of error.

10. Poisons ⇐9

Evidence was sufficient to sustain conviction for sale of marijuana. West's Ann. Health & Safety Code, § 11500.

Morris B. Chain, Backersfield, for appellant.

Edmund G. Brown, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

SHEPARD, Justice.

[1] Appeal from a judgment and order denying a new trial after conviction of violation of section 11500 of the Health and Safety Code (sale of marijuana).

Appellant complains of alleged improper admission of proof of other crimes; misconduct of district attorney in insinuating other crimes and in argument to the jury; error in excluding evidence offered by defendant; error in the court's remarks during trial; and error in instructions to the jury.

[2] It appears from the record that a special investigator for the Kern County sheriff's office in the course of his work made contact with one Joe Arvizu, commonly and hereinafter called "Pepi". Pepi was asked by a deputy sheriff known to him to assist the special investigator, whom we will hereinafter call Van Ness, by introducing Van Ness as a buyer to a seller of narcotics. Pepi did so introduce Van Ness to defendant near a place called "Eight Ball Pool Hall", and arrangements were made to purchase narcotics. The three entered an auto and drove to an alley location near 21st and Pine Streets, where defendant delivered a "tin" of marijuana to Van Ness for the price of $10.00. This was on February 21st, 1958. During the trip to receive delivery of the "tin" the defendant negotiated with Van Ness for an additional sale of a larger amount, and concluded arrangements for a meeting next day at the Eight Ball Pool Hall for that purpose. On February 22, 1958, Pepi again made contact with Van Ness at the pool hall with practically identical procedure and method of approach by defendant, except that on this occasion defendant took into his car only Pepi and he stopped at his apartment and there picked up some cigarettes (assumed to be marijuana), then drove to the same alley location, went through the same gate, reappeared as before with the marijuana and received payment of $40 therefor (a larger amount.) He then returned Pepi to the point of departure, near where Van Ness was waiting and went away. Pepi was aware of the part the law officers were playing in the whole matter. Later Van Ness, with the law officers listening in, had some partly corroborative telephone conversations with defendant. The identity of defendant in these conversations was somewhat corroborated by the coincidence of his immediately subsequent actions in accordance with intentions announced in the telephone conversations. After defendant's arrest, and while awaiting trial, defendant approached Pepi's divorced wife in an effort to persuade Pepi to return to Mexico so he would not testify against defendant. In addition, there was other corroborative evidence. There was, of course, conflicting evidence but we must assume the foregoing presents the truth as the jury saw it. The weight of testimony, identifications, conflicts and witness uncertainties are in the province of the jury at the trial. People v. Weems, 157 Cal.App.2d 753, 755(3), 321 P.2d 884; People v. Winston, 46 Cal.2d 151, 156(3), 293 P.2d 40.

[3, 4] Plaintiff complains that the evidence of the sale on February 22, 1958, should not have been admitted. The sale of the 22nd was in the process of negotiation during and as a part of the sale of the 21st, and considering all the circumstances of place, times, persons, and methods in both sales they seemed to be so

inextricably interwoven that each is partially corroborative of the other, and the recital of one is incomplete without the recital of the other so that they bear very definitely in all aspects on knowledge, intent, planning and financial purpose.

> "It is settled in this state, however, that except when it shows merely criminal disposition (citations), evidence that is relevant is not exluded because it reveals the commission of an offense other than that charged. 'The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.'" People v. Peete, 28 Cal.2d 306, 314(1), 169 P.2d 924, 929.

This rule is stated in various ways but it is consistently adhered to in this state. People v. Citrino, 46 Cal.2d 284, 288(4), 294 P.2d 32; People v. Edwards, 159 Cal. App.2d 208, 212(2), 323 P.2d 484; People v. Kostal, 159 Cal.App.2d 444, 450(5), 323 P.2d 1020; People v. Freytas, 157 Cal.App. 2d 706, 719(11), 321 P.2d 782.

[5, 6] Next the defendant complains that the district attorney committed prejudicial error in various questions. For example: "Mr. Wardwell, isn't it a fact that last year you were in jail in the same tank as this Joe (Pepi) Arvizu?" This question was called forth by a series of questions and answers of defendant in which he left the clear impression that Pepi was almost a complete stranger to defendant. It is true that the question might have been framed differently, but when any indirect evasion or fabrication by defendant compels a question that indirectly brings an inference of another brush with the law in order that the truth may be known, the defendant must take the consequences and there is no error. People v. Teshara, 141 Cal. 633, 638, 75 P. 338; People v. Zerillo, 36 Cal.2d 222, 228(7), 223 P.2d 223. Defendant was asked the question "Now, isn't it a fact Mr. Wardwell, you have been arrested before by Mr. Mulligan and Mr. Dodd?" This was in response to a statement by defendant that, when he was arrested on the occasion now at bar he did not know what was going on. It is evident that the district attorney was seeking to show that defendant's pretense of lack of understanding was a mere sham. Without ruling on the question of the validity of the district attorney's question it is clear that most of the harm done, if any, must be attributed to the insistence of defendant's counsel in arguing the matter in the presence of the jury after the court had already indicated a ruling in his favor, and readiness to admonish the jury to disregard the question. We cannot, under the circumstances, find any prejudicial error.

[7] Next was the question: "Mr. Wardwell, isn't it a fact you have used narcotics before?" This was apparently in response to defendant's having volunteered the statement in a prior answer: "I never had any connection with anything like they are talking about." A defendant who, by his voluntary testimony, seeks to strengthen a presumption of innocence in the particular crime charged by attempting to create a halo of complete innocence about his head, can rightly expect that halo to be promptly dispelled if there are facts with which the prosecution can truthfully do so. People v. Westek, 31 Cal.2d 469, 479, 190 P.2d 9.

Next, defendant alleges error by the district attorney in his argument to the jury. We have gone over these assignments of error at length and they all present the aspect of legitimate arguments of the evidence or replies to arguments advanced by the defendant. We find nothing in them worthy of note.

Next defendant contends that at one point in the testimony the court sustained an objection to defendant's attempt to put

in the record a self-serving statement under the guise of an explanation of silence at the time of arrest. The chronological time involved in this statement was at the jail during interrogation, which was a long time after arrest. As defendant's counsel has stated in his brief, the circumstances at the time of arrest would probably not have been considered by the jury as needing any denial. Further, defendant appears to have already given whatever explanation of that particular affair he desired to give when he said "I was too scared and too mixed up to say anything." There was no contention by the prosecution that at the jail interrogation the defendant was silent or admitted the truth of the charge.

Defendant next complains that the court was guilty of prejudicial misconduct in certain remarks made during the trial. As is true of all strongly contested cases, there were occasional exchanges between the court and counsel. In this case they were in the minimum, and did not in any way suggest or intimate anything to the jury regarding the guilt or innocence of the defendant. Furthermore, counsel did not assign them as error nor voice any objection at the time. People v. Knocke, 94 Cal.App. 55, 57(1), 270 P. 468. We can see no prejudice to the defendant in any event. Time limitations are within the discretion of the court, and counsel here makes no complaint that he had an insufficient amount of time to present his material to the jury. People v. Young, 136 Cal.App. 699, 706(5), 29 P.2d 440. Defendant complains that the instruction by the court on the subject of other crimes is prejudicially erroneous. We would not choose that instruction as a model of clarity. However, it did contain the main ingredients of the subject correctly; the jury was clearly informed that the defendant was charged with only one crime; that the evidence of other crimes was received solely for a limited purpose; and that the jury must weigh the evidence on the subject of identity, intent, familiarity with the means and plan, scheme, system or design. We do not believe the jury was misled by it.

[8] Defendant complains that no "accomplice" instructions were given. The evidence is uncontradicted that whatever contact Pepi made was done in aid of the sheriff's office. There was no evidence that he was an accomplice, and the giving of an accomplice instruction could only have confused the jury improperly.

Respecting defendant's complaint that the court failed to give Instruction 7 and 7a, relating to the court's comment on evidence, the jury was fully informed that weighing the evidence and deciding the facts were entirely within the hands of the jury, and that the jury should not take any intimation from the judge's ruling on the evidence. We have found no place in the evidence where the judge commented on the evidence, and the defendant has pointed to none. Other instructions complained about were merely repetitive expressions of matters covered in other instructions which were, in fact, given. While repetition of instructions sometimes accidently occurs, certainly it is not good practice and no party has a right to have the same thought repeated over and over again, even in different language.

Some points contained in the instructions were, it is true, surplusage, but the jury was adequately informed that they must not pay attention to those instructions which apply to facts which they, the jury, found not to be true or do not exist. In the particular case here at bar, we see no way in which the minds of the jury were confused.

[9] Viewing the case as a whole, we deem it worthy of comment that no judge, district attorney, defense counsel or appeals court ever tried a case or wrote an opinion that was absolutely perfect. The primary purpose of all the rules of procedure is to secure for the people and for the defendant a reasonably fair trial, in which all the relevant truth is made known to the trier of fact. No case should be reversed unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the

error." People v. Watson, 46 Cal.2d 818, 836(12), 299 P.2d 243, 254. The case here at bar bears no resemblance to such cases as People v. Tucker, 164 Cal.App.2d 624, 331 P.2d 160.

[10] From a review of the entire record it appears to us that the defendant received a fair trial, and that the evidence sufficiently supported the decision of the jury.

The judgment and the order denying a new trial are affirmed.

MUSSELL, Acting P. J., and STONE, J. pro tem., concur.

167 Cal.App.2d 479

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert William HOLSTUN and Thomas Burke, Defendants,

Robert William Holstun, Appellant.

Cr. 6161.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1959.

Rehearing Denied Feb. 17, 1959.

Hearing Denied March 25, 1959.

Prosecution for conspiracy to commit grand theft and to violate certain sections of Alcoholic Beverage Control Act. The Superior Court of Los Angeles County, Beach Vasey, J., entered judgment finding one of the defendants guilty of conspiracy to violate regulatory provisions of Alcoholic Beverage Control Act and he appealed. The District Court of Appeal, Parker Wood, J., held that statute subjecting to felony punishment parties guilty of conspiracy to violate certain statutes, even though violation of those statutes themselves would constitute only misdemeanors, is not unconstitutional since conspiracy is a distinct offense and it is for the legislature to determine the propriety of statute making a conspiracy to do an act punishable more severely than doing of act itself.

Affirmed.

1. Criminal Law ⇐1206(1)

Statute subjecting to felony punishment parties guilty of conspiracy to violate regulatory provisions of Alcoholic Beverage Control Act, even though violations or attempted violations of the particular regulatory provisions would constitute misdemeanors only, is not unconstitutional since conspiracy is a distinct offense and propriety of making conspiracy to do an act punishable more severely than doing of act itself is a matter for legislative body. West's Ann.Bus. & Prof. Code, §§ 23000 et seq., 25657, 25658, 25663; West's Ann.Pen.Code, § 182.

2. Criminal Law ⇐13

Statute making it unlawful for any person to employ upon any licensed on-sale premises any hostess or entertainer for purpose of procuring or encouraging the purchase or sale of alcoholic beverages is not unconstitutional on ground that it was vague and uncertain in that it failed to define word "hostess". West's Ann. Pen.Code, § 182; West's Ann.Bus. & Prof. Code, § 25657; West's Ann.Const. art. 1, § 13.

3. Intoxicating Liquors ⇐116

Under statute making it unlawful for any person to employ upon any licensed on-sale premises any hostess or entertainer for purpose of procuring or encouraging purchase or sale of alcoholic beverages, it is legislative intent to prohibit direct procuring or encouraging of the purchase of alcoholic beverages by female attendants employed at on-sale premises if duties of such attendant include dispensing hospitality by such methods as receiving, entertaining, or drinking with, male customers. West's Ann.Bus. & Prof.Code, § 25657.

4. Criminal Law ⇐824(2)

In prosecution for conspiracy to violate provisions of Alcoholic Beverage Control Act, there was no error by court failing to instruct jury as to meaning of words "hostess" and "B girls" as used in information when such instruction was not requested by defendant and court had already instructed respecting substance of statutes. West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 25657, 25658, 25663.

5. Criminal Law ⇐829(10)

In prosecution for conspiracy to violate certain regulatory provisions of Alcoholic Beverage Control Act growing out of alleged employment of "B girls" to solicit purchase of drinks, serving of drinks to minors and employment of minor girls to act as "B girls", there was no error in refusing to instruct jury, as requested by defendant, that if crime of conspiracy to violate Alcoholic Beverage Act was committed as a matter of law the girls testifying against defendant were accomplices, where court had already instructed jury with reference to definition of an accomplice and requirement that testimony of accomplice must be corroborated. West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 25657, 25658(a, b), 25663.

6. Conspiracy ⇐47

Evidence including testimony as to defendant's employment of "B girls" to solicit purchase of drinks, serving of intoxicating beverages to minors and employment of minors to act as "B girls" was sufficient to sustain conviction of defendant for conspiracy to violate regulatory provisions of Alcoholic Beverage and Control Act. West's Ann.Bus. & Prof.Code, §§ 25658, 25663.

Albert C. S. Ramsey, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In an information defendant Holstun and one Thomas Burke were charged, in count 1, with conspiracy to commit grand theft; in count 2 with grand theft; and in count 3 with conspiracy to violate certain sections of the Alcoholic Beverage Control Act. Business and Professions Code, § 23000 et seq. Burke pleaded guilty as to count 1, and further proceedings as to him were continued to a later date. Holstun pleaded not guilty as to the three counts. In a jury trial Holstun was found guilty on count 3, and not guilty on count 2. The jury could not agree upon a verdict as to count 1; and a mistrial was declared as to that count. (Later count 1 was dismissed.) Holstun was sentenced, on count 3, to imprisonment in the county jail for one year. He appeals from the judgment and the order denying his motion for a new trial.

In count 3 it was alleged that Holstun and Burke committed the crime of conspiracy to violate the regulatory provisions of the Alcoholic Beverage Control Act in that about July, 1957, they unlawfully conspired together to violate the provisions of sections 25657, 25658, and 25663 of said act.

As overt act 1, it was alleged therein that said defendants "employed female persons commonly known and described as 'B' girls to solicit the purchase of drinks of intoxicating beverages for said female persons and for male customers on premises operated by said defendants."

As overt act 2, it was alleged that the defendants "served and caused to be served drinks of intoxicating beverages to minor persons in on-sale premises."

As overt act 3, it was alleged that the defendants "employed two minor girls, * * [Judy and Connie], to act as so-called 'B' girls, that is, to solicit male customers of on-sale liquor premises to purchase drinks of intoxicating beverages for said minor girls and male customers."

As overt act 4, it was alleged that the said minor girls (Judy and Connie) "did solicit the purchase of drinks of intoxicating beverages under the direct instructions of the said defendants" at the Gyro Room and the Captain's Table.

Appellant asserts that certain code sections, involved herein, are unconstitutional; the court erred in instructing the jury; and the evidence was insufficient to support the verdict.

At various times, beginning in 1953, the defendant Holstun (appellant) owned and operated six bars or saloons in Long Beach. At the time of the alleged offenses involved herein, he was operating four of the bars. Two of the bars he was then operating were adjacent bars which were known as the Gyro Room and the Captain's Table. Defendant Thomas Burke was the manager of those two bars.

On April 25, 1957, about 11 p. m. a sailor entered the Gyro Room, and at that time he had more than $500 on his person. Rusty, a girl employee in that bar, introduced him to Judy, another girl employee therein. Then he and Judy sat at a table and he bought drinks for her and himself. Soon thereafter, another girl employee therein, by the name of Connie, sat at the table with them. Judy and Connie "wanted" champagne, and he bought it for them. Rusty waited on them. He bought at least three or four bottles of champagne. When a bottle was brought to the table he paid for it with a $20 bill. He was intoxicated and did not notice whether each bottle was a new bottle or the same bottle that had been on the table. He also drank some beer and a drink known as a screwdriver, consisting of vodka and orange juice. He was affectionate with the girls. There was a discussion about the three of them going to an apartment. They remained at the table until approximately 2:30 a. m., when he, Judy, and Connie left the barroom. They entered a taxicab and traveled several blocks. Then they walked down a stairway to the beach. During the walk the girls had their arms around his waist and he had his arms around their necks. When they arrived at the beach Connie "disappeared." While he and Judy continued along the beach, he put his hand in his pocket and found that all his money, except $11, was gone. Thereupon they returned to the boulevard. A taxicab, in which Connie was riding, came there and stopped for a second. Judy jumped into the cab, and the cab went away. He telephoned the police. Soon thereafter the police arrested Judy and Connie.

Judy was 19 years of age. Two or three days before April 25, she was employed by Burke to work at the Gyro Room. Burke introduced her to appellant (Holstun) and said that appellant was the owner of the place. Neither Burke nor appellant asked her how old she was. With respect to her duties, Judy testified that she was supposed to be a cocktail waitress; Burke told her to "hustle up" the drinks and keep the drinks coming in, to sit down and drink with the customers, and try to get them to buy as much champagne as possible; about 11 p. m. on April 25, she sat at a table in the Gyro Room with a sailor (McWilliams); she observed that he had a large amount of money consisting principally of $20 bills; part of the money was counted in her presence, and that part was $500; soon thereafter Connie sat at the table with them, and at that time a bottle of champagne was on the table; Rusty (a waitress) poured champagne from the bottle into glasses, and then she took the bottle away; the sailor complained about the high price charged for a bottle of champagne; he ordered another bottle of champagne; during the time they were sitting there, Rusty brought a bottle of champagne to the table four or five times; when Connie began pouring drinks on the side of the chair, Burke motioned to Judy indicating that she also should "pour out" her drinks; thereafter Judy and Connie "poured out" their drinks; while they were there the sailor kissed them and they kissed him; before Connie arrived at the table, appellant had told Judy that any money she got from the sailor would be split three ways—divided among Burke, appellant, and Judy; after Connie was at the

table appellant told Judy that money obtained from the sailor would be split four ways; appellant and Burke told Judy to keep the sailor there as long as she could keep him; Burke told her to keep the sailor there after the closing hour; after the place was closed about 2 a. m., and while the sailor was still there, appellant told Judy to take the sailor out and try to get the rest of the money from him, and to promise him anything he wanted; Burke told her to promise him anything; Judy, Connie and the sailor left the place, entered a taxicab, and traveled several blocks; then the three of them started to walk down a stairway to the beach; during the walk, the sailor had his arms around the girls; when Connie showed money to Judy, the girls ran away from the sailor; the sailor "caught up" with Judy, but Connie entered a taxicab and went away; after Judy and the sailor had returned to the top of the stairway, Connie came there in a taxicab, and Judy entered the cab and they went to their apartment; soon thereafter police officers came to the apartment, recovered the money, and took the girls to the police station.

Connie was 20 years of age. On April 25, about 11:30 p. m., she entered the Gyro Room and sat at the bar and drank beer. She told appellant that she was Judy's roommate. She testified that appellant asked her if she would like to work for him; she asked him what she would have to do; he said that all she would have to do would be to sit with the customers and drink, and promise them anything; he told her he would guarantee $50 a week, that some girls made from $15 to $25 a night in tips or what they can "take the fellow for"; soon thereafter, appellant told her that the sailor (McWilliams) had $1,300, and if she would work with Judy, he (appellant) would see that she and Judy would go home together; he also told her to order all the champagne she could order, and to try to get the sailor to buy a lot of drinks; he said that anything they took in or any money they took from the sailor would be split four ways; appellant did not ask how old she was; she sat at the table with Judy and the sailor; Rusty brought a bottle of champagne to the table; after the bottle was partially empty, Rusty took it back to the bar; Rusty brought champagne to the table seven or eight times; Connie and Judy were affectionate with the sailor; appellant told Connie to try to keep the sailor there after hours and "we will try to get the money then." The testimony of Connie, with respect to occurrences after leaving the bar, was substantially the same as the testimony of Judy with respect thereto.

Rusty testified that, when she was 19 years of age, she was employed by Burke to wait on the tables at the Gyro Room and to drink with the customers if so requested by them; on April 25, while she was in that bar but was not working there at that time, appellant asked her if she would like to make some money by serving the table where Judy, Connie, and a sailor were sitting; appellant told her that the sailor had a considerable amount of money and they would like to have it; she waited on the table and took champagne to the table about three times; Burke told her when to take the first bottle away from the table.

Five other girls, who had been employees of appellant, testified in substance the same as Judy, Connie, and Rusty had testified with respect to the general instructions given by appellant and Burke regarding duties. The five other girls testified that appellant and Burke had instructed them to associate and drink with the men customers and induce them to spend money. They also testified that they followed those instructions.

Mr. McGrail testified that in April, 1957, when he was paying for a highball which he had ordered in the Gyro Room, he handed a $100 bill to the bartender; there was a delay in giving the change; meanwhile, two girls came to his table and drank from "bottles that were labeled champagne"; he asked them who was paying for their drinks; they told him not to worry; about an hour later, Burke came to the table and gave him $60 as change.

Defendant Burke, called as a witness by the People, testified that on April 25, 1957, he was manager of the Gyro Room and the Captain's Table; soon after he commenced working for appellant in 1955, appellant told him to have the girls push the sale of champagne and to get a good price for it; appellant also told him that the girls should associate and drink with the customers and induce them to spend money, and if the girls had any outside activities, that was approved; pursuant to appellant's instructions, Burke told all the girls that in the matter of getting money from men customers they should promise the men anything; he told Judy to come to work at the Gyro Room; he did not know she was 19 years of age; he did not ask how old she was; he gave her instructions with respect to her duties; on April 25, about 11 p. m., while the sailor was sitting at a table with Judy and Connie, appellant told Burke that one of the girls said that the sailor had a considerable amount of money; appellant instructed Connie in the bar business and discussed with her the method of "a split" and "the inducement of separating a person from his money"; Burke told Judy and Connie to sell as much champagne as possible to the sailor and to keep him spending money; Burke told Rusty to take the bottle of champagne to the table and to take it back; on one occasion, appellant told Burke that a girl named Valerie, who had been employed there, was a good person to contact men, bring them into the bar, and induce them to spend money; on another occasion, appellant told Burke that he paid money to Valerie for selling champagne at a high price; appellant also told him to tell the other girls that they would receive $5.00 on a bottle of champagne if they sold it for a price from $15 to $25; Burke heard appellant tell a bartender (at another bar owned by appellant) to keep the girls hustling to see that the house got its "end," and that there were "no stops."

The testimony of appellant on direct examination was in effect a denial of the statements and acts attributed to him, in the testimony of the prosecution witnesses, with respect to the duties of the girls or the instructions to them as employees. On cross-examination, he testified that Judy told him that the sailor had a considerable amount of money; he (witness) told her to talk to Burke; his purpose in telling her to talk to Burke was that she should tell Burke that a man was there to spend money; he would not have told Judy to "get all you can," but he might have given her a word of praise, and it was probable that he gave her "a little urge"; he was interested in Judy getting all the money she could get for the house; he saw Judy, Connie, and the sailor sitting and drinking at the table.

Mary Ambrosio, called by the People as a rebuttal witness, testified that she was a police officer; pursuant to an assignment she went to the Gyro Room on April 30, 1957, and told appellant she wanted to work for him; appellant said he would like to employ her; he told her she would receive $10 a day if she stayed there; she said she received more than that where she had worked, and she had received "so much" on every drink she sponsored; he said he could not do anything like that but he would split "50-50" with her on champagne, and that a smart girl could make $90 a week there and that "plenty of them do."

[1] Appellant asserts that section 182 of the Penal Code, under which he is charged with conspiracy in count 3, is unconstitutional. That section provides that if two or more persons conspire to commit any crime, they are punishable as follows: when they conspire to commit any felony, they shall be punishable in the same manner as is provided for the punishment of said felony; when they conspire to do any other acts described in said section, they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine or both fine and imprisonment. Appellant argues to the effect that he and Burke could have been charged with violating sections 25657,

25658, and 25663 of the Business and Professions Code, referred to in the information, or with an attempt to violate those sections, and then, if they were convicted, they would have been subject only to misdemeanor punishment, whereas they were charged with conspiring to violate those same sections and, having been convicted, they became subject to felony punishment; and that such discrepancy between the punishments deprives him of his constitutional right of equal protection of the laws. He argues further that such a discrepancy is unfair in that the punishment for agreeing to commit a misdemeanor is far greater than the punishment would be if the misdemeanor were actually committed. In People v. Keene, 128 Cal.App.2d 520, at page 529, 275 P.2d 804, at page 810 it was said: "Conspiracy is a distinct offense from the actual commission of the offense or offenses forming the object of the conspiracy; and the fact that the conspirators succeeded in perpetrating the acts which of themselves constitute the offense or offenses which they conspired to commit, in nowise relieves them from liability for conspiracy under section 182 of the Penal Code." In Clune v. United States, 159 U.S. 590, 16 S.Ct. 125, at page 126, 40 L.Ed. 269, it was said: "A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body." Appellant's contention regarding unconstitutionality of said section 182 is not sustainable.

[2, 3] Appellant asserts further that section 25657 of the Business and Professions Code (referred to in the information as having been violated by appellant) is unconstitutional in that it is so vague and uncertain that it violates the due process clause of the Constitution. Const. art. 1, § 13. That section provides, in part, that it is unlawful "For any person to employ, upon any licensed on-sale premises, any hostess or entertainer for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such hostess or entertainer a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises." Appellant argues that the section is vague and uncertain in that it fails to define the word "hostess" which is used therein; and that the meaning of that word is left open to speculation and conjecture. He quotes from the testimony of Judy, Connie, Rusty and others wherein the girls are referred to as waitresses, and argues that the girls employed by appellant were not hostesses. In Cooper v. State Board of Equalization, 137 Cal.App. 2d 672, 290 P.2d 914, a license to sell intoxicating liquor had been revoked on the basis that the licensee had violated said section 25657 and other statutes. In that case there was evidence that waitresses solicited male customers to purchase drinks for them and that the waitresses received money from the bartender for soliciting the purchases. It was contended therein that said section and another section (Pen.Code, § 303) were void for uncertainty. (The word "hostess" was not discussed specifically therein.) The court said 137 Cal. App.2d at page 680, 290 P.2d at page 919: "Appellants argue that the language of the statutes 'to employ * * * any person for the purpose of procuring or encouraging the purchase or sale of such beverage' is so broad as to apply to legitimate entertainers, who by providing entertainment necessarily encourage the sale of drinks or to a waitress who asks a patron if he desires a drink. The contention requires but scant consideration. The Legislature obviously intended to prohibit the direct 'procuring or encouraging the purchase' of alcoholic beverages, and not the incidental increase of consumption of liquor by persons watching entertainment furnished by the management. We have no difficulty in holding that the statute clearly and

without ambiguity only prohibits direct solicitation of drinks, and does not prohibit the purchase of drinks by patrons of their own initiative and volition while watching entertainment or when asked by a waitress if they desire service." In People v. Hallner, 43 Cal.2d 715, at page 720, 277 P.2d 393, at page 396, it was said: "A statute will not be declared void as being indefinite if it contains 'a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided.'" The word "hostess" is defined as: "A female host; in public resorts, an attendant in charge who dispenses hospitality." Webster's New International Dictionary, Second Edition, Unabridged, page 1205. A "host" is defined as: "One who receives or entertains another, whether socially or for pay * * *." Ibid. The word "hostess" is one of common usage and understanding. It is apparent that it was the legislative intent to prohibit the direct "procuring or encouraging of the purchase" of alcoholic beverages, by a female attendant employed at on-sale premises, if her duties as such attendant include dispensing hospitality by such methods as receiving, entertaining, or drinking with, male customers. Appellant's contention regarding unconstitutionality of said section 25657 is not sustainable.

[4] Appellant also asserts that the court erred in not instructing the jury as to the meaning of the words "hostess" and "B girls," as used in the information. He did not request such an instruction. He argues that the court of its own motion should have given such an instruction so that the jury would have known the meaning of the charge in count 3. The court gave an instruction which stated the substance of said section 25657 of the Business and Professions Code. It also gave an instruction to the effect that, as a prerequisite for determination of guilt, the jury must find that an overt act was committed, as alleged in the information. The information was read twice to the jury. As above shown, overt act 3, in count 3, alleged that defendants employed the two minor girls, Judy and Connie, "to act as so-called 'B' girls, that is, to solicit male customers of on-sale liquor premises to purchase drinks of intoxicating beverages for said minor girls and male customers." Rachel Brann, a witness called by the People, who was employed about three years as a waitress at bars owned by appellant, testified that a "B girl," as she understood the term, was one "Just to sit and drink and try to make extra money." As above stated, in discussing the next preceding contention, the word "hostess" is one of common understanding. The court, in instructing the jury with reference to finding as to the alleged overt acts, sufficiently directed the jury's attention to the meaning of the expression "B girls." This contention regarding the giving of additional instructions on the court's own motion is not sustainable.

[5] Appellant asserts further that the court erred in refusing to instruct the jury, as requested by appellant, that if the crime of conspiracy to violate the Alcoholic Beverage Act, as alleged in count 3, was committed by anyone, then under the evidence and *as a matter of law* Burke, Judy, Connie, Rusty, and four other girls (specifically mentioned in the requested instruction) were accomplices. The four other girls, who had been employed as waitresses at some of appellant's bars, testified in substance the same as Judy, Connie, and Rusty had testified regarding their duties and the instructions given them by appellant. The court instructed the jury properly with reference to the definition of an accomplice and with reference to the requirement that the testimony of an accomplice must be corroborated. Also an instruction was given which was to the effect that the jury should determine from the evidence whether a witness was an accomplice, unless the court specifically instructed the jury that a witness was an accomplice. There was a given instruction, with reference to count 3, that as a matter of law Burke was an accomplice. The jury was also instructed that a barmaid or bartender could

be guilty of conspiracy to violate said act, and that a person need not be a licensee or a manager of a bar to be guilty of so conspiring, but that any person who entered into an agreement with one or more persons that they would join together to violate the act was guilty of conspiracy. Reference should be made to the three sections of the Business and Professions Code which it is alleged that appellant and Burke conspired to violate. Section 25657, subdivision (a), which relates to employing a "hostess" for the purpose of procuring purchases of alcoholic beverages, has been quoted hereinabove. Subdivision (b) of said section provides in substance that it is unlawful, in any place of business where alcoholic beverages are sold to be consumed on the premises, to employ or knowingly permit anyone to loiter in the premises for the purpose of begging or soliciting any patron therein to purchase such beverages for the one begging or soliciting.

Section 25658, subdivision (a), provides: "Every person who sells, furnishes, gives * * * any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor. (b) * * * (c) Any on-sale licensee who knowingly permits a person under the age of 21 to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor."

Section 25663 provides: "Every person who employs or uses the services of minors in or on that portion of any premises, during business hours, which are primarily designed and used for the sale and service of alcoholic beverages for consumption on the premises is guilty of a misdemeanor."

Even if it be assumed that those witnesses were accomplices, it appears that the evidence was sufficient to show that their testimony was corroborated. As above stated, appellant testified he saw Judy, Connie, and the sailor at the table, and saw them drinking champagne; Judy told him that the sailor had a considerable amount of money; he told her to tell that to Burke; he might have given Judy a "word of praise" regarding her conduct with the sailor, and it was probable that he gave her "a little urge." The court did not err prejudicially in refusing to give said requested instruction.

[6] Appellant contends further that the evidence was insufficient to support the verdict of guilty of conspiracy to violate said sections 25658 and 25663, as charged in count 3. He argues that there was no evidence that he knew that Judy, Connie, or Rusty was a minor; and there was no evidence that he conspired with any one to sell to, or furnish the girls with, any alcoholic beverage or to employ them, knowing that they were minors. The jury could infer from the evidence that he knew that those girls were minors. He did not ask their age. It is reasonable to assume that their appearances placed him on notice that there was a question as to their minority. The jury could infer that the acts and conduct of appellant and Burke in employing Judy, Connie, and Rusty, in using their services, and furnishing them with intoxicating liquor were based upon an understanding between appellant and Burke "to make as good use of the girls as possible" in selling drinks and inducing the male customers to spend money. Burke testified that appellant told him to have the girls "push" the sale of champagne, and that the purpose of the girls was to associate and drink with male customers and induce them to spend money. He also testified that he and appellant discussed making "as good use of the girls as possible" in selling drinks and inducing the male customers to spend money. Judy and Connie testified to the effect that appellant and Burke told them to sit at the table and drink with male customers if the customers so requested, and to get the customers to buy as much champagne as possible, and to keep the sailor there as long as they could. As above shown, appellant testified to the effect that, after he saw Judy and Connie at the table with the sailor, and after she had told him that the sailor had money, he encouraged her with respect to her conduct with the

sailor. Rusty testified to the effect that appellant instructed her to serve champagne to Judy, Connie, and the sailor at the table where they were sitting. It is not necessary to refer specifically to other evidence, hereinabove mentioned, which indicates appellant's implication in a conspiracy to violate said sections. The evidence was sufficient to support the verdict.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLEE, J., concur.

167 Cal.App.2d 510

Thomas W. AMES and Eileen H. Ames, Plaintiffs and Appellants,

v.

CITY OF PASADENA, Board of City Directors: Warren M. Dorn, Chairman, Seth Miller, Vice-Chairman, Alson E. Abernethy, A. Ray Benedict, Milton S. Brenner, Clarence A. Winder, Ray G. Woods; Don C. McMillan, City Manager; Robert D. McCue, Superintendent of Buildings; Douglas McKensie, City Engineer and Superintendent of Streets; Marcia C. Purpus, a.k.a. Marcia C. Brown, Defendants and Respondents.

No. 23175.

District Court of Appeal, Second District, Division 3, California.

Feb. 2, 1959.

Rehearing Denied Feb. 25, 1959.

Mandamus proceeding to compel the board of directors of city to annul its order affirming decision of zoning committee in granting a variance and exception and to dismiss the proceeding. From a judgment of the Superior Court, Los Angeles County, Jerold E. Weil, J., the plaintiffs appealed. The District Court of Appeal, Patrosso, J. pro tem., held, inter alia, that the granting of variance and exception from zoning ordinance permitting resident to construct a swimming pool, etc., did not operate to give such resident any right which was not theretofore vested in her, but merely removed certain restrictions imposed by zoning ordinance, and exception did not restrict neighbors or those they purported to represent in use of their property and they had no vested right in maintenance of the restrictions.

Affirmed.

1. Mandamus ⇐187(4)

In proceeding for mandamus to compel board of city directors to annul its order affirming action of zoning committee in granting a variance and exception from city ordinance, since it was incumbent upon plaintiffs to prepare and file in superior court a transcript of evidence adduced upon hearing before the committee and the board if they wished to urge contention that evidence was insufficient to support board's order, failure to do so precluded an attack upon sufficiency of the evidence upon appeal from judgment denying writ of mandate.

2. Municipal Corporations ⇐621.47

The affirmance by board of city directors of action of zoning committee in granting a variance and exception from zoning ordinance to permit construction of a swimming pool, etc., was not invalid on ground that board failed to make required finding where aside from fact that ordinance did not require board to make findings the board and the committee made findings to effect that all of conditions prescribed by ordinance as prerequisite to granting of variance and exception had been met.

3. Municipal Corporations ⇐621.47

An express finding by board of city directors in affirming action of zoning committee in granting variance and exception from zoning ordinance that "in order to carry out the general purpose and intent of zoning plan and code of the City of Pasadena, the said decision of the zoning committee hereby is sustained" was tanta-

mount to a finding that variance granted was not in conflict with general purpose and intent of zoning plan and code as required by ordinance as a prerequisite to grant of variance and exception.

4. Municipal Corporations ⇐621.47

The affirmance by board of city directors of action of zoning committee in granting variance and exception was not invalid for failure to find that variance was necessary "to prevent unreasonable property loss or unnecessary hardship" where such finding was implicit in the one to effect that "such variance and exception are necessary for the preservation and enjoyment of a property right".

5. Municipal Corporations ⇐621.47

The determination of board of city directors that its action in affirming action of zoning committee in granting a variance and exception from zoning ordinance was necessary "in order to carry out the general purpose and intent of the zoning plan and code of the City of Pasadena" necessarily implied a finding that all of requirements thereof had been complied with.

6. Municipal Corporations ⇐621.40

A written application for variance and exception from zoning ordinance was not deficient for failure to set forth sufficient facts showing that variance was "necessary for the preservation and enjoyment of a property right", since such applications need not conform to nicety required of pleadings in judicial proceedings, and such provisions are directory.

7. Municipal Corporations ⇐621.47

The findings of board of city directors in affirming decision of zoning committee granting a variance and exception from zoning ordinance were not insufficient because they were in language of ordinance and did not set forth probative facts upon which they were based, where there was nothing in ordinance to suggest that board or zoning committee was required to do more than find the ultimate facts prescribed by the ordinance as a condition to granting of a variance or exception.

8. Municipal Corporations ⇐621.39

The granting or denial of a variance rests largely in discretion of body designated by zoning ordinance for that purpose.

9. Evidence ⇐83(2)
Municipal Corporations ⇐621.53

Where a variance is granted, it is presumed that official duty was performed in making of required investigation and that existence of necessary fact was found, and decision of municipal body in granting or denying a variance will not be disturbed by the courts in absence of a clear and convincing showing of an abuse of discretion.

10. Municipal Corporations ⇐621.46

The granting of variance and exception from zoning ordinance permitting resident to construct a swimming pool, etc., did not operate to give such resident any right which was not theretofore vested in her, but merely removed certain restrictions imposed by zoning ordinance, and exception did not restrict neighbors or those they purported to represent in use of their property, and they had no vested right in maintenance of the restrictions.

Robertson & Poindexter, Los Angeles, for appellants.

Frank L. Kostlan, City Atty., Wendell R. Thompson, Asst. City Atty., Pasadena, David E. Golay, Deputy City Atty., San Gabriel, for respondent City et al.

Hahn & Hahn and Allyn H. Barber, Pasadena, for respondent Purpus.

PATROSSO, Justice pro tem.

The Board of Directors of the city of Pasadena upon appeal affirmed the action of the zoning committee in granting to the defendant Purpus a variance and exception from certain provisions of the city zoning ordinance. The variance and exception so granted permitted the defendant Purpus, in addition to a single family dwelling and garage, to construct a swimming pool 20 feet from a private roadway located at the rear of her property prior to the construc-

tion of the dwelling and garage; to erect a pool terrace building containing kitchen facilities, a pool equipment building and a 5-foot high chain-link fence on top of the existing wall located 5 feet from the property line of the private roadway and along the northwest and southwest side property lines.[1]

The appeal is from a judgment denying a writ of mandate to compel the board to annul its order and dismissing the proceeding.

Briefly stated, the second amended complaint as further amended by an amendment thereto alleges that the plaintiffs are the owners of property in the Oak Knoll area of the city of Pasadena "near" the property owned by the defendant Purpus which is located at 1344 Hillcrest Avenue and they bring the proceeding on behalf of themselves and other neighboring property owners; that the zoning committee of the city granted to the defendant Purpus a variance from the requirement of the zoning ordinance as hereinabove mentioned; that the zoning committee in granting said variance and the board in affirming the latter's action acted in excess of their jurisdiction and the same constitutes an abuse of discretion in that (1) the defendants "failed to make any finding whatsoever as required by said ordinance 'that the variance requested is not in conflict with the general purposes and intent of this code,'" and the said variance is in fact "in conflict with the general purpose and intent of said zoning ordinance"; and (2) that the findings made by the board are not supported by substantial evidence in the light of the whole record. With their amendment to the second amended complaint plaintiffs filed what they allege to be a "certified copy of the transcript of record and proceedings before the defendant Board of City Directors" which they state is "a complete and full, true and correct copy of the record of said appeal except that it does not include a drawing and two large site plans presented on behalf of the defendant Purpus" which said drawing and site plans it is further alleged "are not material or relevant to this proceeding and that all material and relevant portions of said proceedings are filed concurrently herewith."

Defendants city of Pasadena and its board of directors filed a return consisting of a demurrer and answer as did also the defendant Purpus. The demurrers were sustained without leave to amend, following which the judgment appealed from was entered.

The issue here is whether upon the showing thus made the plaintiffs were entitled to the relief requested.

[1] We may at once dismiss plaintiffs' contention that the action of the zoning committee and the board of directors in granting the variance and exception is not supported by substantial evidence in the light of the whole record by reason of the fact that, while the certified copy of the record filed by the plaintiffs discloses that both the zoning committee and board received oral and documentary evidence, such evidence is not included in the record filed by the plaintiffs. Since it was incumbent upon the plaintiffs to prepare and file in the superior court a transcript of the evidence adduced upon the hearing before the committee and the board if they wished to urge the contention that the evidence was insufficient to support the board's order, failure to do so precludes an attack upon the sufficiency of the evidence upon this appeal. Fickeisen v. Civil Service Com., 1950, 98 Cal.App.2d 419, 420–421, 220 P.2d 605.

[2] Plaintiffs further contend that the board of directors in affirming the action of the zoning committee failed to make findings warranting the granting of the

1. Under the terms of the zoning ordinance the pool terrace building is not a permitted use in an R–1 zone; a swimming pool is not permitted to be built before the dwelling; the required setback for a swimming pool is 25 feet; the location of the pool equipment building was within the prescribed front and side yard setbacks and the height of fences is limited to 3½ feet.

variance and exception. The contention is without merit. Aside from the fact that the ordinance does not require the board to make findings both the board and the zoning committee made findings to the effect that all of the conditions prescribed by the ordinance as a prerequisite to the granting of the variance and exception had been met.

Section 6.02(B) of the ordinance sets forth the conditions under which a variance may be granted as to use of property and front yard restrictions while section 6.02(C) sets forth the requirements with respect to exceptions to side yard and height of fence restrictions.

Section 6.02(B) provides that a variance may be granted by the zoning committee if, from the facts, it is found: "(1) That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same zone so that a denial of the petition would result in undue property loss, and (2) That such variance is necessary for the preservation and enjoyment of a property right of the petitioner, and also (3) That such variance will not be detrimental to the public welfare or convenience nor injurious to the property or improvements of other owners of property."

Section 6.02(C) provides that exceptions to side yard and height of fences restrictions may be granted if the zoning committee finds from the facts: "(1) That the variance requested is not in conflict with the general purpose and intent of this code; and (2) That the variance will not be detrimental to the public welfare or convenience; and (3) That such variance is necessary for the preservation and enjoyment of a property right of the petitioner and to prevent unreasonable property loss or unnecessary hardship and will not be detrimental nor injurious to the property or improvements of other owners of property."

The order of the zoning committee reads in part as follows: "(1) That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same zone so that a denial of the petition would result in undue property loss. (2) That such variance, as granted, is necessary for the preservation and enjoyment of a property right of the petitioner. (3) That such variance, as granted, will not be detrimental to the public welfare or convenience nor injurious to the property or improvements of other owners of property."

The resolution of the board affirming the action of the zoning committee reads in part as follows:

"Whereas, the Board finds that:

"1. There are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same zone so that a denial of the petition would result in undue property loss; and

"2. Such variance and exceptions are necessary for the preservation and enjoyment of a property right of the petitioner; and

"3. Such variance and exception will not be detrimental to the public welfare or convenience nor injurious to the property or improvements of other owners of property.

"Now, Therefore, in order to carry out the general purpose and intent of The Zoning Plan and Code of the City of Pasadena, the said decision of the Zoning Committee hereby is sustained and said appeal of Thomas W. Ames and Eileen H. Ames, being Appeal No. 41426 in the files of the City Clerk, hereby is denied."

From the foregoing it is apparent that the board made findings in strict conformity with the provisions of section 6.02(B). Plaintiffs, however, contend that the board did not make all of the findings required by section 6.02(C) in that the board did not find that the variance was "not in con-

flict with the general purpose and intent of this code" or that the variance was necessary "to prevent unreasonable property loss or unnecessary hardship."

[3] As to the first the board in its order expressly found that "in order to carry out the general purpose and intent of The Zoning Plan and Code of the City of Pasadena, the said decision of the Zoning Committee hereby is sustained." This is tantamount to a finding that the variance granted is not in conflict with the general purpose and intent of the zoning plan and code.

[4, 5] As to the second objection while the board did not expressly find that the variance was necessary "to prevent unreasonable property loss or unnecessary hardship" such a finding is implicit in the one to the effect that "[s]uch variance and exception are necessary for the preservation and enjoyment of a property right." Obviously, if this is true it is equally true that to deny the variance would result in "unnecessary hardship" to the owner of the property. Moreover, the board's determination that its action in affirming the action of the zoning committee was necessary "in order to carry out the general purpose and intent of The Zoning Plan and Code of the City of Pasadena" necessarily implies a finding that all of the requirements thereof had been complied with. See Miller v. Planning Commission, 1956, 138 Cal.App.2d 598, 603, 292 P.2d 278.

[6] Plaintiffs further contend that the defendant Purpus, in her written application for a variance and exception, did not set forth sufficient facts showing that such variance and exception was "necessary for the preservation and enjoyment of a property right." Applications of this character addressed to zoning boards, however, need not conform to the nicety required of pleadings in judicial proceedings. Moreover, as said in Miller v. Planning Commission, supra (138 Cal.App.2d at page 604, 292 P.2d at page 282), in rejecting a similar contention:

"* * * The furnishing of such information *with the application* is not made a condition, either expressly or by implication, of its approval. These provisions are clearly directory and simply specify a proper time and occasion for supplying this information. * * *"

[7] Finally, plaintiffs contend that the findings of the board are insufficient because they are in the language of the ordinance and do not set forth the probative facts upon which they are based. We find nothing in the ordinance to suggest that the board or the zoning committee is required to do more than find the ultimate facts prescribed by the ordinance as a condition to the granting of a variance or exception.

[8, 9] It is necessary to repeat what has frequently been said that the granting or denial of a variance rests largely in the discretion of the body designated by the zoning ordinance for that purpose. Where a variance is granted it is presumed that official duty was performed in the making of the required investigation and that the existence of the necessary facts was found. And the decision of the municipal body in granting or denying a variance will not be disturbed by the courts in the absence of a clear and convincing showing of an abuse of discretion. Jackson v. City of San Mateo, 1957, 148 Cal.App.2d 667, 307 P. 2d 451.

[10] Finally, it is to be observed as pointed out in Steiger v. Board of Supervisors, 1956, 143 Cal.App.2d 352, 357, 300 P.2d 210, that the granting of the variance and exception did not operate to give the defendant Purpus any right which was not theretofore vested in her. It merely removed certain restrictions imposed by the zoning ordinance in an R–1 zone. The exception does not restrict plaintiffs or those they purport to represent in the use of their property and they have no vested right in the maintenance of the restrictions.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

167 Cal.App.2d 369

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,
Plaintiff and Respondent,

v.

PACIFIC INDEMNITY COMPANY,
Defendant and Appellant.

No. 17903.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1959.

Hearing Denied March 25, 1959.

Action by a construction company's comprehensive liability insurer against construction company's motor vehicle insurer for recovery of an amount paid by comprehensive insurer to an employee of a trucking company who was injured when a piece of steel sheet piling fell off a truck being loaded under supervision of construction company's employees. The Superior Court, County of San Mateo, Louis B. DeMatteis, J., entered judgment for comprehensive insurer, and motor vehicle insurer appealed. The District Court of Appeal, Bray, J., held that where motor vehicle insurer insisted that its policy did not cover the accident, but that comprehensive insurer's policy did cover the accident, comprehensive insurer's action in contributing toward the settlement of the claim in question could not be deemed to have been an act exclusively in its own interest, or to have been an act of a volunteer, but was an act to protect the best interests of comprehensive insurer, construction company, and motor vehicle insurer and in view of the fact that motor vehicle insurer's policy actually covered the accident, and comprehensive insurer's policy did not, comprehensive insurer, under the doctrine of subrogation, was entitled to recover its contribution to the settlement from motor vehicle insurer.

Affirmed.

1. Appeal and Error ⇐110

An order denying a new trial is not appealable, and a purported appeal therefrom would be dismissed.

2. Insurance ⇐435.24

Where a comprehensive liability policy issued to a construction company, covering liability arising out of construction of a certain power plant, provided that policy did not apply to motor vehicles while away from premises owned, rented, or controlled by construction company, and an accident giving rise to contingent liability against construction company arose away from premises owned or controlled by named insured, during a truck-loading operation, such comprehensive policy did not cover the accident.

3. Insurance ⇐435.17

Where a motor vehicle policy issued a construction company covered liability arising out of the use by any person of an owned or hired automobile or truck, insurer was liable under such policy to construction company for liability arising out of an accidental injury to an employee of a company which leased a truck to construction company, where injury occurred while the truck was being loaded under supervision of construction company's employees.

4. Insurance ⇐435.17

Where a motor vehicle liability policy specifically included coverage for accidents arising out of loading of automobiles and trucks, even though policy provided that a power crane was not included in the coverage, under such policy, accidents in loading automobiles by whatever means, including cranes, would be deemed covered.

5. Subrogation ⇐1

Subrogation is an equitable doctrine, recognized at law, and not depending upon contractual relationships, and is administered so as to secure justice without regard to form.

6. Subrogation ⇐1

Subrogation applies in all cases in which one party, not a volunteer, pays a debt for which another is primarily liable, which in equity and good conscience, should have been paid by the latter party.

7. Subrogation ⇐1

Requisites of subrogation are that payment must have been made by the subrogee

to protect his own interests, that the subrogee did not act as a volunteer, that the debt was one for which the subrogee was not primarily liable, that the entire debt was paid, and that subrogation will not work any injustice to the rights of others.

8. Subrogation ⇐1

Subrogation extends to those parties who pay in the performance of a legal duty by contract or rules of law, who pay in order to protect their own rights or interest, and whose payments are favored by public policy.

9. Insurance ⇐606(5)

Where construction company's motor vehicle insurer insisted that its policy did not cover an accident in which a trucking company employee was injured, but that construction company's comprehensive insurer's policy covered the accident, comprehensive insurer's action in contributing toward the settlement of claim arising out of the accident could not be deemed to have been an act exclusively in its own interest, or to have been an act of a volunteer, but was an act to protect the best interests of comprehensive insurer, construction company, and motor vehicle insurer, and in view of the fact that motor vehicle insurer's policy actually covered the accident, and comprehensive insurer's policy did not, comprehensive insurer, under the doctrine of subrogation, was entitled to recover its contribution to the settlement from motor vehicle insurer.

10. Subrogation ⇐26

Where a reasonable doubt exists as to a person's own liability to a third party, his act in making a payment for that party which should have been made by that party cannot be considered to have been an act of a volunteer or interloper, and thus cannot preclude his right to subrogation.

11. Insurance ⇐512½

Where an employee of a trucking company which leased its truck to a construction company was injured through the negligence of employees of the construction company, liability of such negligent employees was primary, and therefore, policy covering liability of construction company arising out of its negligence had to be exhausted before an insurer's policy on the truck, or an insurer under a comprehensive policy issued construction company, could be resorted to.

12. Insurance ⇐606(1)

Remedy of declaratory relief is not exclusive, and therefore, an insurer was not required to bring an action in declaratory relief in seeking subrogation rights, even though question of liability of various insurers under various policies was involved. West's Ann.Code Civ.Proc. § 1062.

13. Insurance ⇐539(5)

Where a motor vehicle insurer failed to show any prejudice from failure to receive notice during a 10-month period which elapsed from time of an accident until it was notified thereof, such fact did not constitute a defense even though the policy contained a provision requiring written notice by the insured as soon as practicable after knowledge of injury.

Boyd & Taylor, Frederic G. Nave, San Francisco, for appellant.

Connolly & Farbstein, San Francisco, for respondent.

BRAY, Justice.

[1] Defendant Pacific Indemnity Company appeals from a judgment in favor of plaintiff for $17,500 and $446.78 attorneys' fees, both amounts to bear interest from specified dates. Defendant purports to appeal from the order denying new trial.[1]

Questions Presented.

Is plaintiff entitled to recover under the doctrine of subrogation? Corollary thereto is the question of whether defendant's policy covered the accident and plaintiff's did not.

Facts.

The action grows out of an injury sustained by one Borges who was employed as

1. As this order is not appealable, the purported appeal must be dismissed.

a truck driver by McLaughlin Draying Co. The truck and driver were rented to Guy F. Atkinson Co., a corporation. His employer instructed him to take one of its trucks to the Southern Pacific railroad spur track at Folsom to be loaded with steel piling. He was to report to Atkinson's men and take orders from them. Borges parked the truck adjacent to a railroad gondola car in the Southern Pacific railroad yard at Folsom. The truck was being loaded with steel sheet pilings, which were hoisted from the gondola car to the truck by a crane owned by George Pollock Co. and operated by a Pollock employee. The crane and operator were rented to Atkinson. In the gondola car were employees of Atkinson. Loading of the truck commenced with those employees attaching a single piling to the crane boom hooks. They then signalled the crane operator, who transported the piling over to the Borges' truck, where it was placed at the direction of Borges and two Atkinson men who were on the truck. After 12 pilings had been loaded, the Atkinson men attached a piling to the crane hooks. In some manner an additional piling became wedged into the secured piling. Borges called the crane operator's attention to this. The latter attempted to dislodge the extra piling by banging it within the gondola car. Atkinson men signalled the operator to lift the load from the car. The operator lifted it, moved it over to the bed of the truck and lowered it into the truck, under the direction of Borges and the Atkinson men. When about 6 inches from the bed of the truck, the wedged piling broke loose from the secured piling, bounced off the truck bed and struck Borges, severely injuring him. Borges brought suit in April, 1953, against both companies and the individual employees who were concerned in the loading of the truck, for damages in the sum of $105,000 for the injuries suffered. Plaintiff had issued to Atkinson a comprehensive liability insurance policy for risks other than automobile. Defendant also had issued a policy to Atkinson covering automobile risks. Plaintiff received notice of the action May 26, 1953, and after investigation, tendered to defendant the defense of Atkinson. This offer was declined by defendant. On April 14, 1954, plaintiff again tendered the defense to defendant, which defendant refused. One Rhodes, foreman of Atkinson, was a defendant in the Borges action. Plaintiff tendered to McLaughlin and its automobile insurer, Travelers Insurance Company, the defense of Rhodes, which tender was accepted. Travelers also accepted the defense of Atkinson tendered by plaintiff. (Pollock was insured under a Travelers comprehensive policy.) Before trial and after considerable negotiations for settlement the Borges action was settled for $50,000, Travelers paying $15,000 under its policy with McLaughlin and $17,500 under its policy with Pollock. Plaintiff on behalf of Atkinson contributed $17,500. Defendant previously had been notified to undertake Atkinson's defense and now was notified of the settlement negotiations, and refused to participate in either. Plaintiff then brought this action to recover the amount it had contributed to the Borges settlement, claiming to be subrogated to Atkinson's rights under defendant's policy.

The trial court found that the accident was the result of the negligence of Atkinson employees in loading the truck hired by Atkinson from McLaughlin, that Pollock and McLaughlin were not independent contractors in relation to Atkinson in the loading of the truck, that defendant's policy specifically covered loading of the truck with coverage extended to any company legally responsible for the use of a hired truck, that the premises where the accident occurred were not owned, rented or controlled by Atkinson, that plaintiff's policy specifically excluded automobile accidents including the loading and unloading thereof, that plaintiff was entitled to recover the sum paid in settlement as it succeeded to all rights of Atkinson under the equitable doctrine of subrogation.

Plaintiff's Policy.

It covered Atkinson only for "Construction of Folsom Power Plant * * * and elsewhere in connection with said project." The steel pilings being loaded on the Atkin-

son truck at the time of the accident were for this project. The following provisions of the policy are pertinent here:

"I. Coverage A—Bodily Injury Liability—Automobile Included. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law or by written contract for damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person."

Included as an insured is "any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured, or with his permission * * *" "Automobile" includes a hired automobile used under contract or loaned to the named insured. But a power crane is excluded. Endorsement No. 1 provides:

"It is agreed that this policy does not apply under coverage A, except with respect to operations performed by independent contractors, to automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining, or the loading or unloading thereof."

[2] It is clear from an examination of the policy and the circumstances of the accident that, contrary to defendant's contention, plaintiff's policy did not cover the accident, and hence plaintiff's payment of a portion of Borges' damages was not required by the direct terms of the policy. It expressly excluded coverage of Atkinson's automobiles (under the definition of the policy the truck is an automobile) while away from premises owned, rented or controlled by the named insured, including the loading and unloading thereof on such premises. The accident took place on premises neither owned, rented nor controlled by Atkinson. Nor did the exception "except with respect to operations performed by independent contractors" apply. The court found and the evidence supported the finding, that Borges' injuries were caused by Atkinson's negligence, and that Pollock and McLaughlin were not "independent contractors" in relation to the loading of the truck.

Defendant's Policy.

[3] Under it defendant agreed to insure Atkinson:

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person."

By Endorsement No. 1, "Insured" was defined: "The unqualified word 'insured' includes the named insured and also includes (1) under coverages A and C, any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such, and (2) under coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured * * *"

The word "automobile" in the policy includes: "(2) Hired Automobile—an automobile used under contract in behalf of, or loaned to, the named insured provided such automobile is not owned by or registered in the name of (a) the named insured * * *" But a power crane was excluded from the definition, and "use" of an automobile included the loading or unloading thereof.

Thus, it clearly appears that defendant was liable to Atkinson under the policy, as the truck (defined as an automobile in the policy) was hired by Atkinson and was being used by Borges, its employee, in the scope of his employment, and that the accident occurred while the truck was being loaded. In the definition portion of the policy it is stated that "power crane" is not included in the words "motor vehicles" except when being towed. Based upon this fact plus the fact that the operation of the crane was involved in the accident and that Travelers (whose policy did cover the Pollock crane) by paying $17,500 towards the

settlement, indirectly recognized that the crane was at fault in the accident, defendant contends that its policy did not apply.

[4] In the exclusions portions of the policy power cranes are not mentioned. The only reasonable interpretation of the policy which specifically included loading accidents, is that while the crane is not insured, accidents in loading automobiles by whatever means, including cranes, are included. As pointed out in Bituminous Cas. Corp. v. Travelers Ins. Co., D.C., 122 F.Supp. 197, a truck is not provided with a self-loading device and the only way it could be loaded would be by hand or some outside instrumentality.

Subrogation.

[5–8] Defendant being bound under its policy to indemnify and defend Atkinson and plaintiff not being bound under its policy so to do, was the payment made by plaintiff for Atkinson's protection one entitling it to subrogation to Atkinson's rights against defendant, or was plaintiff a mere volunteer not entitled to subrogation? Subrogation is an equitable doctrine, recognized also at law and not depending upon contractual relationships, which is administered so as to secure justice without regard to form. (23 Cal.Jur. 917.) It applies in all cases in which one party, not a volunteer, pays a debt for which another is primarily liable, which in equity and good conscience should have been paid by the latter party. The requisites of subrogation are: "(1) Payment must have been made by the subrogee to protect his own interest. (2) The subrogee must not have acted as a volunteer. (3) The debt paid must be one for which the subrogee was not primarily liable. (4) The entire debt must have been paid. (5) Subrogation must not work any injustice to the rights of others." Grant v. De Otte, 1954, 122 Cal.App.2d 724, 728, 265 P.2d 952, 955. Subrogation extends to those parties who pay in the performance of a legal duty by contract or rules of law, who pay in order to protect their own rights or interest, and whose payments are favored by public policy. Fresno Investment Co. v. Brandon, 1926, 79 Cal.App. 387, 389, 249 P. 548.

[9] There can be no question but that requisites (3), (4) and (5) are met in this case. While the meeting of requisites (1) and (2) is not so clearly shown as the others, nevertheless the evidence fully justifies a finding that they are met. Even though there was no legal obligation on plaintiff to make the payment it nevertheless had an interest to protect in making it. That interest arose from the fact that there was a dispute between it and defendant as to which policy, plaintiff's or defendant's, covered the accident. That this was such a dispute as justified plaintiff in settling for a less sum than it might have been liable for if its contention that its policy did not cover the accident were incorrect, is shown by defendant's insistence here that the policy did cover the accident. Thus defendant contends that, as plaintiff's policy was a comprehensive liability one covering the "Construction of Folsom Power Plant and appurtenant works on American River * * and elsewhere in connection with said project" and as the truck was being loaded with pilings for the project, the policy did cover this accident. However, as we have shown, the limitation of coverage under the automobile portions of the policy limited its comprehensiveness. Nevertheless, in view of defendant's insistence that plaintiff's policy covered the accident and that defendant's did not, plaintiff's action in joining in a settlement of Borges' claim for an amount far less than it might have had to pay, if liable, and an amount which was also far less than defendant would have to pay under the clear terms of its policy, was a reasonable action, which took plaintiff out of the officious intermeddler or volunteer class. Additionally, plaintiff was under a moral obligation to protect Atkinson since Atkinson in getting insurance from both companies had attempted to get, and thought it had, sufficient coverage to be fully protected. If plaintiff had followed defendant's course of conduct, Atkinson would have been thrown on its own resources although it had paid premiums for protection. Moreover, plaintiff in making the payment acted on the invitation and at the request of

Atkinson. To leave Atkinson unprotected would have injured the very valuable business relationship between Atkinson and plaintiff and likewise would have injured the insurance business generally. Also plaintiff's action helped defendant's relationship with Atkinson, for by the lower settlement amount defendant would pay in compromise, defendant's rates to Atkinson would be lower than if defendant paid out the full amount for which it was liable. Borges was badly injured. He was demanding over $100,000. Atkinson was clearly liable for Borges' injuries. Atkinson had insured with Pacific for automobile risks, and for other than automobile risks (with exceptions) with plaintiff. Plaintiff's manager knew all this and that if the case were not settled, the verdict could have gone well over the $50,000 which Borges in settlement was willing to take. Further, there was a good chance that Pollock could have been exonerated by a jury (Pollock's crane operator was acting under the direction of Atkinson's employees) and thus Travelers' $17,500 contribution would be lost and that plaintiff, if liable and defendant not, would have to pay all of Borges' recovery except the $15,000 contributed by Travelers on behalf of McLaughlin.

The court found and the evidence supports the finding that plaintiff's manager in paying the $17,500 on behalf of Atkinson was not acting freely and voluntarily but was acting in order to protect the best interests of his company, Atkinson and defendant.

Defendant contends that Fidelity & Casualty Co. of New York v. Fireman's Fund Indemnity Co., 1940, 38 Cal.App.2d 1, 100 P.2d 364, is applicable here. We do not agree. There the policies of two coinsurers provided for *pro rata* coverage. Fireman's refused coverage on the ground of breach of its policy by failure to give notice of loss. Fidelity, before suit filed, settled with the injured party and sought contribution from Fireman's. The reviewing court upheld a denial of recovery upon the ground that in California as well as elsewhere, where both policies contain a *pro rata* clause, "the insurers are to be deemed coinsurers and not cosureties, and neither can recover from the other any amount that it may have paid in excess of its *pro rata* share of the entire loss sustained by the insured." 38 Cal.App.2d at page 5, 100 P.2d at page 366. The case points out, however, that "The authorities hold that, where two or more insurance companies fully insure the same risk and one company pays the total loss, that company may force contribution from the others." 38 Cal.App.2d at page 4, 100 P.2d at page 366. The court went to some length to distinguish the situation in *pro rata* policies from that of policies of full coinsurance. Thus, this case has no application to our situation, where only one of the policies was not of the *pro rata* type. Moreover, we are not dealing with contribution between coinsurers, but with subrogation to the rights of the insured in favor of one who because of interest in the matter has paid the obligation of a defaulting obligor. Thus, the above mentioned case and the other cases cited by defendant dealing with contribution between excess insurers, *pro rata* insurers and other coinsurers do not apply.

The courts have applied the right of subrogation to one who discharges a lien on property not his own but which he mistakenly believes to be his, and have held that he is subrogated to the rights of the lienholder. See Stein v. Simpson, 37 Cal. 2d 79, 84, 230 P.2d 816, and cases there cited. Thus, the courts have given a very liberal interpretation to the "interest" required to distinguish a person from being a volunteer. "It would seem that one acting in good faith in making his payment, and under a reasonable belief that it is necessary to his protection, is entitled to subrogation, even though it turns out that he had no interest to protect." (50 Am. Jur. p. 699, § 23.)

In United States Guarantee Co. v. Liberty Mut. Ins. Co., 1943, 244 Wis. 317, 12 N.W.2d 59, 150 A.L.R. 632, both the plaintiff and the defendant had insured the insured under *pro rata* policies. The defendant refused to defend an action brought

against the insured by a person injured by a tractor operated by the insured. The plaintiff did defend and settled the case on the second day of the trial, paying an excess over its *pro rata* share as well as its share. The plaintiff then sought to recover that excess from the defendant, claiming subrogation as to the excess. The defendant set up two defenses, (1) that its policy provided that no action should lie against it unless the loss had been determined by final judgment after trial of the issues in an action against the assured or by its agreement, and (2) that the payment of the excess was voluntary. The court held that in making the payment which the defendant should have made, the plaintiff was not an interloper or volunteer, but was subrogated to the rights of the assured, saying that subrogation "is a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by one who in good conscience ought to pay it," (12 N.W.2d at page 61), and that as to the first defense the defendant's failure to defend the assured as its policy required it to do, constituted a waiver of any right to object to the settlement. See also Maryland Cas. Co. v. Employers Mut. Liability Ins. Co., D.C., 112 F.Supp. 272.

[10] Had Atkinson itself made the settlement with Borges, there can be no question but that it would have been entitled to recover the amount paid from defendant. Equity would be performing a very poor function if by refusing under the circumstances of this case to consider plaintiff as the subrogee of Atkinson, it permitted defendant to escape its clear liability to Atkinson. Where, as here, a reasonable doubt exists as to his own liability to a third party, a person making a payment for that party which should have been made by a second party, cannot as to such payment be considered a volunteer or interloper.

As said in Commercial Standard Ins. Co. v. American Emp. Ins. Co., 6 Cir., 209 F.2d 60, at page 64, where it was contended that subrogation would not lie as to the payment by one coinsurer of more than its *pro rata* share of a judgment against the assured on the ground that the payment of the excess was voluntary as to the other coinsurer who had refused to participate in payment of a judgment against the assured: "If a person has any palpable interest which will be protected by the extinguishment of the debt, he may pay the debt and be entitled to hold and enforce it just as the creditor could. Katschor v. Ley, 153 Kan. 569, 113 P.2d 127. Payment of the debt of another under a moral obligation will support equitable subrogation; and the remedy will be applied in all cases where demanded by the dictates of equity, good conscience, and public policy. Federal Land Bank of Louisville v. Marvin, 228 Ky. 242, 245, 14 S.W.2d 762, 70 A.L.R. 1392."

In Massachusetts Bonding & Ins. Co. v. Car. & General Ins. Corp., D.C.1957, 152 F.Supp. 477, 482, the court said in response to a voluntary payment defense, after stating that the defendant had refused coverage as to the action brought against the assured: "Plaintiff thus was compelled to act on the assumption, as defendant well knew, that the burden was the plaintiff's alone. In so acting the plaintiff decided, wisely, to join with Reading Company in a reasonable settlement before any suit, and to have judicially determined thereafter the truth or falsity of defendant's representation of noncoverage. Faced with this suit for such determination defendant staunchly adhered to falsity until trial and then, forced into reluctant admission of the truth, sought to turn to its own advantage its former falsity by asserting that the very payment which its own misrepresentations obliged constituted the plaintiff a volunteer. Whether the legal principles in the Murphy case [Murphy & Co. v. Manufacturers' Casualty Co., 89 Pa.Super. 281], supra, or equitable principles of estoppel are applied, the defendant cannot now be heard to complain of the consequence of its own conduct.

"Moreover, a 'volunteer', under the principle defendant seeks to apply, is a stranger or intermeddler who has no interest to protect and is under no legal or moral obligation to pay under the circumstances. [Citations.] Under the facts we conclude that neither was the plaintiff a volunteer nor may the defendant, by reason of its own conduct, so assert. Judgment as prayed for will be entered for the plaintiff and against the defendant on submission by counsel of an appropriate order."

"Recently, the courts have happily retreated from application of the harsh 'volunteer' rule, and have allowed recovery from the other pro rata insurer following a payment in excess of the ratable share. While not confined to such a situation, there are more compelling reasons for allowing recovery when the other insurer has not entered the case at all or has refused to defend the insured against suit by the injured party. Nevertheless, this view represents the current trend and better rule in the 'volunteer' situations." 38 Minn.Law Rev. 838, 850. See also Detroit Automobile Inter-Insurance Exchange v. Detroit Mut. Auto. Ins. Co., 337 Mich. 50, 59 N.W.2d 80; United States Fidelity & Guaranty Co. v. Elam, 198 Tenn. 194, 278 S.W.2d 693.

Travelers paid $15,000 towards the settlement under the omnibus clause of its policy with McLaughlin which covered automobiles only. This payment was not made for McLaughlin, but for Atkinson and the other persons using the McLaughlin truck in the loading operation. Borges being employed by McLaughlin could not sue the latter, but was entitled to damages from the others responsible for his injuries.

[11] Travelers also paid $17,500 under its comprehensive policy with Pollock. Defendant contends in effect that under this policy Travelers should have paid the entire $50,000. The evidence failed to show any negligence on the part of Pollock or its employees. Moreover, the policy merely covered Pollock. It did not cover McLaughlin, the McLaughlin employee or Atkinson. The omnibus clauses of the Travelers' policy on the McLaughlin truck and defendant's policy on Atkinson for use of the hired truck covered the employees of Atkinson and Pollock. Under Continental Casualty Co. v. Phoenix Construction Co., 46 Cal.2d 423, 296 P.2d 801, 57 A.L.R.2d 914, the liability of the negligent employees was primary and hence the policies covering the employees must be exhausted before Travelers' policy on Pollock or plaintiff's policy on Atkinson (if it had covered Atkinson) could be resorted to. This fact answers, too, the contention of defendant that as plaintiff's policy was a *pro rata* one and defendant's an excess one, defendant should be, at most, only liable for the proportion of $50,000 (the amount of defendant's automobile coverage of Atkinson) to $100,000 of plaintiff's alleged coverage of Atkinson.

[12] Defendant contends that plaintiff before making the payment should have brought an action in declaratory relief joining all of the insurance companies involved. Such remedy, however, is not exclusive. Section 1062, Code of Civil Procedure, expressly provides that such remedy "shall not be construed as restricting any remedy, provisional or otherwise, provided by law * * *" Moreover, defendant could litigate in this proceeding any question that could be raised in a declaratory relief proceeding and could have brought into this case the other insurance companies.

[13] Some ten months elapsed from the time of the accident until plaintiff notified defendant of it. Defendant's policy contains a provision requiring written notices by the assured as soon as practicable after knowledge of the injury. Defendant has failed to show any prejudice from failure to receive notice prior to the ten months period, nor from the fact that the notice was given by plaintiff instead of by the assured. There is nothing in the evidence to show that defendant would have defended Atkinson or indemnified it even though notice had been given it by Atkinson immediately after the accident.

The purported appeal from the order denying new trial is dismissed. The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

167 Cal.App.2d 429

The PEOPLE of the State of California, Plaintiff and Respondent.

v.

Ira ROBERSON, Defendant and Appellant.

Cr. 3496.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1959.

Hearing Denied March 25, 1959.

Defendant was convicted of sale of narcotics. The Superior Court, City and County of San Francisco, Walter Carpenti, J., entered judgment, and defendant appealed. The District Court of Appeal held that where the case depended on a determination of whether one prosecution witness or the defendant was to be believed by the jury, one error which deprived defendant of evidence which circumstantially supported defendant's testimony and another error which tended erroneously to impeach him were prejudicial.

Reversed.

Kaufman, P. J., dissented.

1. Criminal Law ⇐419(3)

In prosecution for sale of narcotics, where the only evidence of sale by defendant was testimony that narcotics agent bought heroin from defendant, and defendant denied the sale, and to support circumstantially his denial the defendant testified that he knew that agent was police officer, defendant should have been permitted to corroborate his state of mind by testimony of witness that witness had told defendant that witness had heard that agent was police officer.

2. Criminal Law ⇐419(3)

Whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned.

3. Witnesses ⇐274(1)

In prosecution for sale of narcotics, where defendant's character witness, who was defendant's former employer, testified only to defendant's reputation for truth and veracity, character witness could be cross-examined only about specific misconduct inconsistent with the trait as to which he testified on direct examination, and therefore, it was error to permit cross-examination of character witness as to defendant's narcotics and petty theft convictions.

4. Criminal Law ⇐1170(1), 1170½(1)

When the case depends on a determination of whether one prosecution witness or the defendant is to be believed by the jury, one error which deprives the defendant of evidence which circumstantially supports the defendant's testimony and another error which tends erroneously to impeach him are prejudicial.

5. Criminal Law ⇐1202(1)

A prior conviction is not a part of the offense charged, but serves only to aid ascertainment of the proper term of punishment.

6. Indictment and Information ⇐159(1)

Under statute permitting amendment before plea where amendment does not change the offense charged, indictment charging sale of narcotics could be amended, before plea, so as to allege prior conviction for misdemeanor offense of unlawful use of narcotics, since the prior conviction was not a part of the offense charged but served only to aid ascertainment of the proper term of punishment.

West's Ann.Health & Safety Code, §§ 11713, 11721; West's Ann.Pen.Code, § 1009.

7. Criminal Law ⇐1032(1)

Where defendant accused of sale of narcotics did not object to amendment of indictment, prior to the plea, so as to charge prior conviction for misdemeanor offense of unlawful use of narcotics, but admitted the prior conviction and defendant did not show that he had been prejudiced by the amendment, defendant could not for the first time on appeal assert that such addition to indictment could be made only by resubmission to grand jury. West's Ann. Health & Safety Code, §§ 11713, 11721; West's Ann.Pen.Code, § 969a.

Gregory Stout, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Tried upon an indictment charging sale of narcotics, defendant was found guilty by a jury and sentenced to prison. He appeals.

The prosecution charges that appellant sold heroin to James Shepherd, a Hayward policeman employed for five weeks in the spring of 1957 as an undercover agent for the State Bureau of Narcotics. The only evidence of the sale of narcotics by appellant is found in Shepherd's testimony that he bought heroin from appellant. Appellant flatly denied this sale and on that issue the jury had to resolve the question of credibility between those two witnesses and those two witnesses alone.

[1, 2] To support circumstantially his denial of sale to Shepherd appellant testified that he knew that Shepherd was a police officer. To corroborate this state of mind he produced Pitman and sought to prove that Pitman had told appellant that Pitman had heard that Shepherd was a police officer. The refusal of the trial court to allow this testimony was error. The applicable rule is stated in VI Wigmore on Evidence, 3d ed., sec. 1789, p. 235:

"Whenever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned." (Emphasis the author's.)

This rule is well settled in California. Swan v. Thompson, 124 Cal. 193, 197, 56 P. 878; Smith v. Whittier, 95 Cal. 279, 290–294, 30 P. 529; Treadwell v. Whittier, 80 Cal. 574, 601–602, 22 P. 266, 5 L.R.A. 498; People v. King, 140 Cal.App.2d 1, 4–5, 294 P.2d 972; Aitken v. White, 93 Cal.App.2d 134, 145, 208 P.2d 788; cf. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892.

[3] Appellant further argues that the cross-examination of his character witness was improper. The character witness, appellant's former employer, testified only to appellant's reputation for truth and veracity. On cross-examination, the witness was examined over objection about appellant's narcotic and petty theft convictions. The rule is that a character witness can be asked only about specific misconduct inconsistent with the trait as to which he testified on direct. People v. Tucker, 164 Cal. App.2d 624, 331 P.2d 160; People v. Logan, 41 Cal.2d 279, 260 P.2d 20. The crimes inquired about are not inconsistent with truth and veracity. It was error to permit cross-examination of appellant's character witness in this fashion. People v. Tucker, supra, 164 Cal.App.2d 624, 331 P.2d 160.

[4] When the case depends on a determination of whether *one* prosecution witness or the defendant is to be believed by the jury, one error which deprives the defendant of evidence which circumstantially supports the defendant's testimony and another error which tends erroneously to impeach him cannot be said not to be prejudicial.

[5–7] At the time of appellant's conviction, Health and Safety Code, section 11713 provided that punishment for sale of narcotics carried a longer minimum term of imprisonment if a prior conviction "of any offense described in this division" were charged and found true or admitted. After filing of the indictment, but before plea, it was amended by the district attorney to allege appellant's prior conviction of violation of Health and Safety Code, section 11721, which although a misdemeanor, is an offense described in the same division of that code which contains section 11713. Appellant contends that this addition to the indictment could be made only by resubmission to the Grand Jury. He argues that Penal Code, section 969a permits amendment only to charge additional prior felonies. We need not determine the validity of this contention. A prior conviction is not a part of the offense charged, but serves only to aid ascertainment of the proper term of punishment. People v. Ashcraft, 138 Cal.App.2d 820, 825, 292 P.2d 676. Thus Penal Code, section 1009, permitting amendment before plea where the amendment does not change the offense charged, is applicable. Further, appellant did not object to the amendment, but admitted the prior conviction. He has shown no prejudice, and he cannot raise his question for the first time on appeal. People v. Huerta, 148 Cal. App.2d 272, 275, 306 P.2d 505.

Judgment reversed.

DRAPER, J., concurs.

KAUFMAN, P. J., dissenting.

Before this court can reverse a judgment for the improper admission or rejection of evidence, an examination of the entire cause must show that the errors complained of resulted in a miscarriage of justice. Cal.Const. art. VI, § 4½; Code Civ. Proc. § 475. In this case, the evidence was demonstrative of the guilt of the appellant.

I cannot say that the errors complained of deprived appellant of a fair trial.

I would affirm the judgment.

Clara FERGUSON, Plaintiff, Cross-Defendant and Respondent,

v.

H. SCHUENEMANN and Hellmuth Schuenemann, Jr., Defendants, Cross-Complainants and Appellants.

Civ. 5924.

District Court of Appeal, Fourth District, California.

Jan. 28, 1959.

Rehearing Denied Feb. 27, 1959.

Hearing Denied March 25, 1959.

Action to establish plaintiff's equitable interest in certain real and personal property acquired during time that she and defendant were living together as husband and wife. The Superior Court of San Bernardino County, A. D. Mitchell, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Shepard, J., held that the law relating to licensing of real estate brokers has as its purpose the protection of the buying and selling public, and was not intended to invalidate any over-all agreement such as that between husband and wife to engage in real estate business and share equally in earnings thereof.

Affirmed.

1. Husband and Wife ⇐232(3)

In action to establish plaintiff's equitable interest in certain real and personal property acquired during time that she and defendant were living together as husband and wife, evidence sustained finding that the parties had agreed to, and during the years they had lived together had, operated under an agreement that all expenses, income and acquisitions of both of them would be shared equally, including real estate business.

2. Husband and Wife ⇐229(1)

In action to establish plaintiff's equitable interest in certain real and personal property acquired during time that she and defendant were living together as husband and wife, pleading recital that parties had agreed to "share equally in their joint accumulations" was sufficient to support finding that parties had agreed to share in real

estate business "as well as moneys derived from any sources other than said business," where only property specifically identified in evidence as having previously been owned by one of parties was automobile of plaintiff and it appeared that if there was other property, it had been so merged in common property that it could no longer be traced.

3. Brokers ⇐3

The law relating to licensing of real estate brokers has as its purpose the protection of the buying and selling public, and was not intended to invalidate any over-all agreement such as that between husband and wife to engage in real estate business and share equally in earnings thereof.

4. Brokers ⇐3

The Real Estate Broker's License Act did not prohibit broker and salesman from working together and dividing commission; but even if it did, it would not be applicable to agreement by husband and wife to engage in real estate business and share equally in earnings thereof.

5. Appeal and Error ⇐1050(1)
Husband and Wife ⇐232(2)

In action to establish plaintiff's equitable interest in certain real and personal property acquired during time that she and defendant were living together as husband and wife, evidence, apparently intended to indicate affection borne by defendant toward plaintiff during period of time involved, might have been unnecessary, but it had at least some corroborative value in showing intent of defendant in his dealings with plaintiff, and it was neither harmful nor improper.

Swing & Swing, San Bernardino, for appellants.

Wilson & Wilson, San Bernardino, for respondent.

SHEPARD, Justice.

This is an action in which plaintiff seeks to establish her equitable interest in certain real and personal property, acquired during the time that she and defendant Schuenemann (who will hereinafter be referred to as defendant) were living together as husband and wife and had agreed to pool their interest in income and property.

After a 9-day trial and voluminous evidence and arguments of counsel, the court found in general substance that in October, 1948, plaintiff and defendant agreed to pool and share equally their income, expenses and property accumulations; that said parties did so pool their earnings and share equally any expense and acquisition of property from said October, 1948, continuously until March 1, 1955; that they accumulated certain real and personal property during said period of time as is specifically described in the findings and judgment; that certain other defendants, who have not appealed, are entitled to specified reimbursements for beneficial expenditures on one of the parcels of property; that plaintiff is an equal owner with defendant of the property described; for a money judgment to adjust the division of certain monies; and for a certain monthly stipend while plaintiff is held out of possession of certain property. Judgment was entered for plaintiff accordingly, and defendant appeals.

[1] Defendant's first complaint is that the evidence is insufficient to support the finding that plaintiff had an oral agreement to engage in the real estate business and share equally in the earnings thereof. While defense counsel recognized the rule that on appeal an appellate court has "no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom" (Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370, 210 P.2d 757, he nevertheless contends that the whole record does not present substantial evidence to support the finding.

Neither party has attempted to give this court any over-all résumé of the evidence, but we have nevertheless reviewed the transcript to discover whether or not defendant's assertion has any foundation. In

the interest of brevity we refrain from attempting any great detail, but it does appear clearly from defendant's own testimony that plaintiff and defendant, late in 1947, assumed what is ordinarily called the relationship of common law husband and wife and lived together in that relationship until about February, 1955; that they took some of the property in their names as husband and wife, bought and sold, executed deeds of trust and notes, and borrowed money representing themselves to public institutions and in many business transactions as husband and wife. Plaintiff made direct contributions as to some of the property. For most of this period she held a real estate salesman's license, which defendant assisted her to obtain, and worked with defendant in the real estate business as a licensed saleswoman. All of this testimony and other testimony of the defendant amply corroborates the testimony of the plaintiff that from the time they first started living together in the Clifton Hotel in October, 1947, they shared expenses and he used her car; that about the time they first started living together they had a conversation in which each agreed to share equally any earnings and expenses; that when they first joined hands she was making $60 to $75 per week as a beauty operator; that through the years she cooked and scrubbed and maintained the home, kept the garden, did secretarial work at the office, shared her own car for all the needs of the business, went on listing tours, acted as hostess to patrons who came to purchase property, advised and consulted with defendant on the house construction, improvement and furnishings, and did actual sales work during the five or six years she held a license.

Other witnesses testified in corroboration as to various of these matters. For example, one witness testified that when a client protested about defendant taking over the closure of a real estate transaction which plaintiff worked up, defendant in reply to said protest stated that the real estate commissions earned by plaintiff and defendant were "all in the family."

In our opinion, the sum total of the evidence amply warrants the conclusion that the parties had agreed to and, during the years they lived together, did operate under an agreement that all expenses, income and acquisitions of both of them would be shared equally, including the real estate business.

Such agreements have received recognition from California courts throughout the State's history. Cline v. Festersen, 128 Cal.App. 380, 275 P.2d 149; Garcia v. Venegas, 106 Cal.App.2d 364, 235 P.2d 89. What we have hereinbefore said concludes further discussion of defendant's second and third points, in which he also challenges the general sufficiency of the evidence to support the court's conclusion as to what was done as well as what was agreed upon.

[2] By defendant's fourth objection he would appear to be questioning the breadth or inclusiveness of the words in plaintiff's pleading "share equally in their joint accumulations", contending that such words are insufficient as a basic support for the court's finding that the parties agreed to share in the real estate business "as well as moneys derived from any sources other than said business." Counsel has not called to our attention by his brief, and we have been unable to discover any evidence of identifiable property belonging to or held by defendant prior to the commencement of the parties' relationship, or of property received by gift, devise or inheritance. The only property specifically identified in the evidence as having previously been owned by one of the parties was the automobile of plaintiff. If there was other property, it appears to have been so merged in the common property that it can no longer be traced. There was some testimony that defendant was at one time in the "surplus" business, but nothing to show whether he was a clerk or actually owned something, or if so how much. The record, as we see it, gives no comfort on this score to defendant.

[3, 4] Defendant's next contention is that such an agreement would be void as in

violation of the California statutes and regulations relating to licensing of real estate brokers and salesmen, and he cites in support of that contention the cases of California Employment Stabilization Comm. v. Morris, 28 Cal.2d 812, 172 P.2d 497, which relates to unemployment insurance liability for his employee salesman who was paid solely by commission; Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418, which relates to the validity of the Real Estate Broker's License Act of 1919, St.1919, p. 1252; Gray v. Horne, 48 Cal.App.2d 372, 119 P.2d 779, which relates only to whether or not a real estate broker's license is required for refinancing and refunding services, marshalling, reduction and compromise of debts; Koeberle v. Hotchkiss, 8 Cal.App.2d 634, 48 P.2d 104, in which payment to a real estate broker for prior services was being accomplished through an agreement to pay a percentage of oil royalties, and Wilson v. Stearns, 123 Cal.App.2d 472, 267 P.2d 59, relating to the effect of failure to fix a definite termination date on the realty broker's right to collect a commission.

As was said in Wilson v. Stearns, supra, 123 Cal.App.2d 480(5), 267 P.2d 65:

> "In determining whether a contract is invalid the courts should strive to deal with the transaction so as to give effect to the fundamental purpose of the legislature and to a wise public policy."

In our opinion, the law relating to licensing of real estate brokers has as its purpose the protection of the buying and selling public, and was not intended to invalidate any over-all agreement between people acting in the relationship here at bar. Furthermore, during the vast majority of the time involved plaintiff held a license as a salesman. We can find nothing in the act which prohibits a broker and salesman working together and dividing the commission, but even if there was we still think it would not apply to the type of situation we have at bar.

[5] Defendant complains of the admission of certain evidence apparently intended to indicate the affection borne by defendant toward plaintiff during the period of time involved. Such evidence might well have been deemed unnecessary, but it had at least some corroborative value in showing the intent of the defendant in his dealings with the plaintiff.

We cannot say that it was either harmful or improper. It is certainly a very natural and honorable thing for a man to divide with a woman for whom he held a strong affection the accumulations arising under a situation of this kind, especially where it appears that the woman involved was, during the whole period, working with constant industry on behalf of both of them. In our opinion, the case was fairly tried and fairly decided.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

167 Cal.App.2d 555

Patricia Ann EDWARDS, Formerly Patricia Ann Palleschi, Plaintiff and Appellant,

v.

Larry PALLESCHI, Jr., Defendant and Respondent.

Civ. 9383.

District Court of Appeal, Third District, California.

Feb. 3, 1959.

Proceeding brought by father for change of custody of child. The Superior Court, Stanislaus County, David F. Bush, J., entered order changing custody of child to father, and mother appealed. The District Court of Appeal, Van Dyke, P. J., held that where mother in prior custody proceeding had sworn falsely that relations with man who frequented her apartment were wholly innocent and concealed that she was living in mere-

tricious relations with man and legal custody of child was awarded to probation officer with physical custody in mother's parents with whom mother alleged she lived, determination in instant proceeding, wherein it appeared that wife had been about four months pregnant when she testified at prior hearing, that best interests of child lay in giving its custody to father was not an abuse of discretion.

Affirmed.

1. Parent and Child ⇐2(5)

Although no appeal was taken from order awarding legal custody of child to probation officer, with physical custody in mother's parents, upon filing by husband of application for change of custody court could exercise its continuing jurisdiction over subject-matter of child's custody and issuance of order to show cause was not an abuse of discretion.

2. Infants ⇐19.3(5)

A custody order has no such finality as to be beyond change.

3. Parent and Child ⇐2(7)

Even if affidavit of father supporting application for order to show cause for purpose of changing physical custody of child from mother's parents to father failed to meet change of circumstances test, jurisdiction of court to proceed was not affected and validity of ensuing order for change of custody would be tested by sufficiency of evidence to support a change order.

4. Infants ⇐19.3(5)

Sufficiency of affidavit for order to show cause issued in custody proceeding to state a cause for modification of custody order does not affect jurisdiction of court to proceed, and ensuing order for change of custody must be tested by sufficiency of evidence to support a change order.

5. Infants ⇐19.3(5)

Change of circumstances rule with respect to orders issued in custody cases is not so hard and fast that it does not admit of exceptions.

6. Parent and Child ⇐2(3.3)

Where mother in custody proceeding swore falsely that relations with man who frequented her apartment were wholly innocent and concealed that she was living in meretricious relations with man and legal custody of child was awarded to probation officer with physical custody in mother's parents, with whom mother allegedly lived, determination in subsequent proceeding, wherein it was learned that wife was pregnant and that she had been about four months pregnant when she testified at prior hearing, that best interests of child lay in giving its custody to father, was not an abuse of discretion.

7. Divorce ⇐312.6(8)

Court which tries divorce action, which has parties before it frequently during custody proceedings, and which has advantage of observing both parents as they testified before it, is in best position to judge what ought to be done concerning child's custody, and, under such circumstances, reviewing court is seldom justified in setting aside decree of trial court.

Colley & Sakuma, Sacramento, for plaintiff-appellant.

Robert Carter, Modesto, for defendant-respondent.

VAN DYKE, Presiding Justice.

This is an appeal by the mother of a minor son born to her May 3, 1954, from an order of court changing the custody of the child from appellant to the child's father. The parents had been divorced and by the divorce decree the custody had been awarded to appellant.

On December 6, 1956, respondent initiated a proceeding for a change of custody. An order to show cause was issued. It appears that for some time after the original custody order, appellant, with her child, had resided at the home of her parents in Modesto, in which city the father also resided. She then moved to Los Angeles, taking the child with her. After service on her of the order to show

cause she returned to Modesto and resumed residence with her parents. At the hearing on the order appellant testified that in Los Angeles she had been living in a basement apartment. The status of one John Edwards respecting his relations with her was the subject of inquiry at the hearing. She testified that he was frequently in her apartment, occasionally stayed overnight there, but she denied that she and John Edwards were engaging in meretricious relations. She testified she had no intention of marrying John Edwards, and intended to continue to reside with her parents. After having partially heard the matter, the court referred the case to the probation officer of the county for investigation. The court took further testimony in May of 1957. It appeared that respondent had recently remarried. The court, apparently dissatisfied with the domestic situation of both the father and mother, made an order giving legal custody of the child to the probation officer, with physical custody in the appellant's parents. No appeal was taken from that order. Shortly thereafter respondent discovered that appellant was pregnant and, shortly after the order had been made, had married John Edwards. He obtained a new order to show cause. A hearing on this order was held September 18, 1957. Appellant testified that she had married John Edwards July 3, 1957 and was presently living with him in Los Angeles, where he was employed; that she intended to continue to reside there with him; that she was expecting a child; that it was John Edwards' child; that the child was expected in November. (This would fix the date of conception in the preceding February, so that she had been about 4 months pregnant when she had testified at the last hearing on the preceding show cause order, denying in that testimony that she had ever engaged in meretricious relations with John Edwards.) She testified further that when she gave her testimony at the prior hearing she had not known she was pregnant. She made no attempt, however, to justify her testimony that she had not been engaging in meretricious relations with John Edwards.

The court, in this proceeding, made the following findings: From the probation officer's report received in evidence and the other evidence taken, the court found that respondent had a home which was adequate for the care of his son; that he was regularly and gainfully employed in Modesto and able to give his son proper support, care and guidance; that his new marriage appeared to be stable and the child would find in respondent's home a proper environment; that, on the other hand, appellant did not have a fit and proper home for the rearing of the child; that the best interests of the child lay in committing it to the care, custody and control of the father, subject to reasonable visitation rights to be accorded appellant; that a change of circumstances had taken place since the prior custodial orders in that appellant had married Edwards, moved to Los Angeles, and intended to reside there; that appellant had deliberately misled the court in prior proceedings with respect to her plans for the care of the child and had deliberately and intentionally misled the court with respect to her conduct and relationship with Edwards, particularly as to her moral conduct as affecting her fitness to have the custody of her son; that she had represented to the court that she had ceased all relationship with Edwards when in fact she was at the time having meretricious relations with him; that on one occasion when she was before the court, she was pregnant by Edwards and must have known of that fact, although still representing that she had never had meretricious relations with Edwards; that the best interests respecting the moral, temporal and economic welfare and security of the child would be served by awarding the custody of the child to respondent.

[1–4] Asserting that the order of the court made June 28, 1957, awarding legal custody of the child to the probation officer was a valid order which had become final in that no appeal therefrom had been

taken and that, the court having decreed in that order that neither parent was at that time a fit and proper person to have the custody of the child, appellant contends the court abused its discretion in issuing its order to show cause August 19, 1958. Appellant argues that the affidavit of respondent supporting the order to show cause failed to meet the change of circumstances test (16 Cal.Jur.2d sec. 268, p. 558; Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719), in that it contained only allegations that at the time of making the June 28th order appellant had represented to the court that she was then residing in the home of her mother with said child and that she would continue to reside there and give the child the loving care and affection of a mother; that appellant no longer lived with her mother, had remarried and intended to move to Los Angeles. We find no abuse of discretion. A custody order has no such finality as to be beyond change and upon the filing of the affidavit and the application for an order to show cause, the court could exercise its continuing jurisdiction over the subject-matter of the child's custody. The sufficiency of the affidavit to state a cause for modification does not affect that jurisdiction to proceed and the ensuing order for change must be tested by the sufficiency of the evidence to support a change order.

[5] The change of circumstances rule is not so hard and fast that it does not admit of exceptions. In Foster v. Foster, supra, 8 Cal.2d at page 728, 68 P.2d at page 723, the Supreme Court said:

> "We do not wish to be understood as holding that 'the change of circumstance' rule is an absolutely iron-clad rule, and that there can be no possible exception to it. * * * It is also possible to conceive of some theoretical case in which some fact, secret and hidden at the time of the entry of the former judgment, would in the interest of the welfare of the child justify a court in modifying the former order of custody despite the fact that there had been no actual change of circumstances since the entry of the former order."

[6, 7] It is apparent from the record and from the findings of the trial court that we have such a case as was foretold in Foster v. Foster. The trial court was fully warranted in concluding: (1) That prior to its recently-made order giving custody to the probation officer, appellant had left her home in Modesto and taken the child to Los Angeles where she began living in an apartment to which John Edwards frequently repaired; that she was unlawfully cohabiting with him; that when met with inquiry as to her relations with him, she had sworn falsely to the court that those relations were wholly innocent; that by such false swearing she had concealed from the court her secret that she was in fact living in her apartment in meretricious relations with John Edwards; that in testifying as to the innocence of her relations with John Edwards she did so knowing that she was then pregnant by him; that when in this proceeding she was driven by the course of nature from her false position she attempted to better her position by again falsely swearing that when she testified falsely before she had not known that she was pregnant. The trial court, without any thought of punishing her for her derelictions, could well conclude, as it did, that the best interests of the child lay, for the present at least, in giving its custody to respondent, appellant having demonstrated grave character faults justifying the court's preferring the child's father to her in the matter of custody. The court that tried the divorce action, that had the parties before it frequently during the custody proceedings, and that had the advantage of observing both parents as they testified before it, was in the best position to judge what ought to be done concerning the child's custody. It is seldom that under such circumstances a reviewing court is justified in setting aside the decrees of the trial court. Regardless of the change of circumstances rule the situation justified the order granting custody to respondent.

We think it unnecessary to follow appellant in her discussion of specific findings and the asserted lack of the evidence to support such findings, for, from a reading of the whole record, we are satisfied the order made is fully supported by the record.

The order appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

167 Cal.App.2d 291

S. P. KRAEMER et al., Plaintiffs, Cross-Defendants and Respondents,

v.

Walter KRAEMER et al., Defendants, Cross-Complainants and Appellants.

Civ. 5733, 5756.

District Court of Appeal, Fourth District, California.

Jan. 22, 1959.

Rehearing Denied Feb. 18, 1959.

Hearing Denied March 18, 1959.

Action was brought to quiet title to realty, and defendants filed a cross complaint against oil company. The trial court, Robert Gardner, J., entered judgment and certain orders after judgment, and the defendants appealed therefrom. The District Court of Appeal, Coughlin, J. pro tem., held that trial court properly determined that plaintiffs had good record title under deed and good title by adverse possession under entry and occupancy by the plaintiffs.

Judgment and orders affirmed.

1. Deeds ⇐93

Intention of parties to a grant is to be gathered, if possible, from language itself and is determined by a proper construction of language used rather than by resorting to extrinsic evidence.

2. Deeds ⇐93

Intention of parties to a grant must be gained from consideration of entire document, and every part thereof must be given effect if it is reasonably practicable to do so. West's Ann.Civ.Code, § 1641.

3. Deeds ⇐93, 99

When deed refers to other instruments, the other instruments become a part of the deed, and all must be considered as a whole to determine intention of parties.

4. Waters and Water Courses ⇐165

Where testator shortly before his death conveyed to water company an easement to use 47.61 acres of land for reservoir purposes, and thereafter testator died leaving will devising 3,000 acres to two sons, and sons, after receiving title as cotenants through decree of distribution, executed deeds partitioning the land, and deeds executed by them referred to map showing reservoir site, and deed of first son to second son described 212-acre block, which encompassed the reservoir site, and deed recited "excepting" and "reserving" from operation of the deed the 47.61-acre tract conveyed for reservoir purposes, there was an intention to except from operation of the deed only the easement conveyed to the water company, and not the fee to the 47.61-acre tract subject to the easement.

5. Deeds ⇐101

Where language of deed is uncertain, that is, fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, circumstances surrounding its execution and subsequent conduct of parties with respect thereto may be considered to determine their intention in consonance with language used, and to determine what they meant by what they said. West's Ann. Civ.Code, § 1647.

6. Evidence ⇐461(5)

If it be assumed that deed did not clearly express intention to except from its operation only easement given to water company, neither did the deed clearly ex-

press an intention to except entire fee of tract subject to the easement, and therefore action of trial court, in quiet title action, in permitting introduction of extrinsic evidence, and in finding that parties actually intended to except only the easement, which was adequately supported by the record, was proper, and trial court's conclusion was sound.

7. Appeal and Error ⇐1050(1)

Where deed clearly excepted only an easement, as contended by plaintiffs in quiet title action, and did not except the fee of the tract covered by the easement, as contended by defendants, admission of extrinsic evidence to show that parties to deed actually intended to except only the easement was not prejudicial as to defendants.

8. Adverse Possession ⇐114(1)

In action to quiet title, evidence sustained finding that whatever interest defendants may have had in the realty was terminated by adverse possession of the plaintiffs. West's Ann.Code Civ.Proc. § 325.

9. Adverse Possession ⇐13

To establish title by adverse possession, there must be actual, open, notorious occupancy of the subject property, which is hostile and adverse to the owner's title, under such circumstances as to give reasonable notice thereof, either actual or constructive, to the true owner, by an occupant claiming the property exclusively as his own, under claim of right or color of title, which is continuous and uninterrupted for five years, and is accompanied by occupant's payment of all taxes levied or assessed against the property during that period of time. West's Ann.Code Civ.Proc. § 325.

10. Adverse Possession ⇐58

Requirement of "hostility" on part of adverse possessor means, not that parties must have a dispute as to title during period of possession, but that adverse possessor's possession must be adverse to the record owner, unaccompanied by any recognition, express or inferable from the circumstances, of right in record owner.

See publication Words and Phrases, for other judicial constructions and definitions of "Hostility".

11. Tenancy In Common ⇐15(7)

Exclusive occupancy of cotenant is deemed permissive and does not become adverse until tenant out of possession has had notice, either actual or constructive, that possession of cotenant is hostile to him, and when entry into occupancy is avowedly as tenant in common with others, possession thus gained is possession of the others and continues as such until tenancy in common is disclaimed.

12. Tenancy In Common ⇐15(2)

In order to constitute evidence of disclaimer by cotenant, who has gone into possession, that his possession is in common with others, conduct of tenant in possession must be such as amounts to ouster of the other cotenants and consists of acts of the most open and notorious character, clearly giving notice to the world, and to all having occasion to observe the condition and occupancy of the property, that the intention is to exclude and does exclude the cotenants.

13. Tenancy In Common ⇐15(5, 10)

Entry by grantee under deed from cotenant in exclusive possession, which purports to convey the whole of the property, without notice of cotenancy, is presumed to be assertion of an exclusive right in severalty, and is equivalent to an express declaration by grantee that he claims the whole interest, and constitutes an ouster of cotenants out of possession, and is such a disseisin as sets statute of prescription in motion in his favor and against them.

14. Adverse Possession ⇐71(1)

Where entry and claim of plaintiffs were made under deeds, which implied full ownership, entry and claim rested on color of title for purpose of adverse possession.

15. Adverse Possession ⇐71(2)

Estate purporting to be conveyed, not estate actually conveyed, characterizes entry of adverse possessor.

16. Adverse Possession ⇐25, 71(1)

Acceptance by plaintiffs, who claimed title by adverse possession, of deeds, which conveyed to them oil and gas rights, and subsequent exercise by plaintiffs of acts of ownership were the equivalent of an entry into possession of those rights under color of title to the whole interest in severalty, and possession of the lessee was the possession of the plaintiffs.

17. Tenancy in Common ⇐15(7)

Recordation of deeds of plaintiffs constituted constructive notice that plaintiffs' claims were hostile and adverse to any interest of alleged cotenant or defendants, who claimed under alleged cotenant.

18. Tenancy in Common ⇐15(7)

Where tenant in common enters into possession and claims under invalid deed purporting to convey the property to him, recordation of the deed is notice to his cotenants of such existence and therefore of the adverse character of his claim, so as to start statute of limitations running, at least where he knew nothing of the existence of the other cotenants.

19. Adverse Possession ⇐31, 33

A person claiming title by adverse possession is not required to establish that the record owner knew of his own rights in the land in question, and all that claimant must show is that his occupation was such as to constitute reasonable notice to the true owner that the claimant claimed the land as his own, and fact that record owner was unaware of his own rights in the land is immaterial.

20. Adverse Possession ⇐92

Where, pursuant to lease, lessee paid all taxes, and lessors reimbursed lessee for their agreed share, payment made by lessee was made on behalf of the lessors and constituted payment by the lessors within meaning of statute prescribing payment by occupant of all taxes levied and assessed on the subject property during possessory period, as an element of adverse possession. West's Ann.Code Civ.Proc. § 325.

21. Adverse Possession ⇐94

Statute prescribing payment by occupant of all taxes levied and assessed on subject property during possessory period, as an element of adverse possession, does not require that such taxes be paid with money obtained from sources other than the property claimed. West's Ann.Code Civ.Proc. § 325.

22. Appeal and Error ⇐903

There was a presumption that clerk's minutes correctly related order to which objection was made.

23. Appeal and Error ⇐843(2), 1074(3)

Where any inaccuracies in reporter's transcript did not relate to matters involving title dispute between plaintiffs and defendants in quiet title action, but related to proceedings under cross complaint and concerned solely issues therein raised respecting relationship between cross complainants and cross defendant, based on premise that cross complainants were owners of a cotenancy interest in realty, and judgment that plaintiffs were sole owners of realty rendered those issues moot, no prejudice to cross complainants resulted from order settling reporter's transcript as corrected, and it was unnecessary on appeal to determine whether trial court abused its discretion under circumstances.

24. Appeal and Error ⇐980
New Trial ⇐93

Exercise of power by court under statute providing that court shall have power to order new trial where reporter's transcript of proceedings becomes unavailable, is discretionary, and order denying motion made pursuant thereto should not be reversed on appeal except for abuse of discretion. West's Ann.Code Civ.Proc. § 953e.

25. New Trial ⇐128(1)

Party moving for new trial under statute providing that court shall have power to order a new trial where reporter's transcript of proceedings becomes unavailable, must indicate substantial controversial issues concerning which a judgment on the merits would depend. West's Ann.Code Civ.Proc. § 953e.

26. Appeal and Error ⇐1072

Where motion for new trial under statute providing that court shall have

power to order a new trial where reporter's transcript of proceedings becomes unavailable, stated that issue involved pertained to cross complainants' rights and contentions against cross defendant, and the judgment did not depend on such issue, and issue was moot, cross complainants were not prejudiced by denial of motion. West's Ann. Code Civ.Proc. § 953e.

C. Paul Du Bois, John E. Sisson, Los Angeles, Otto Jacobs and Robert Corfman, Santa Ana, Samuel Hurwitz, Orange, William E. Burby, Los Angeles, and Wise, Kilpatrick & Pulley, Long Beach, for appellants.

Mize, Larsh, Mize & Hubbard, R. C. Mize and Marjorie Mize, Santa Ana, Marcus Mattson, L. B. Conant, and Lawler, Felix & Hall, Los Angeles, for respondents.

COUGHLIN, Justice pro tem.

This is an action to quiet title to 47.61 acres of land commonly referred to by the parties as the "Reservoir Site". The primary issues presented on this appeal concern the effect of an allegedly ambiguous deed and the sufficiency of the evidence to sustain a finding of adverse possession by a cotenant.

In 1881 Daniel Kraemer "granted and conveyed" to the Anaheim Water Company "the right and privilege" of using the 47.61 acres of land in question for reservoir purposes, including the right to do whatever was necessary to construct dams and store water thereon, together with rights of way for ditches and canals. The "Reservoir Site" was described by metes and bounds.

The following year Daniel died testate and two of his children, Samuel and Jonathan, as the principal beneficiaries under his will, were devised in excess of 3,000 acres of land, receiving title as cotenants through a decree of distribution describing the property by the description used in the deed conveying title to their father, "excepting such portions thereof as were conveyed by Daniel Kraemer in his life time to various parties" including "a tract containing 47.61 acres conveyed by said Daniel to the Anaheim Water Company for a Reservoir Site, recorded in Book 82 of Deeds, page 335 * * * reference being made for more particular description of said excepted portions to said deeds respectively."

In 1886 Samuel and Jonathan, by deeds, partitioned the property distributed to them as cotenants. For descriptive purposes, these deeds referred to a simultaneously recorded map of the Kraemer Tract, which divided the property into blocks and showed the "Reservoir Site" located on the southerly portion of Blocks E and F of that tract. A description of the northerly portion of said Blocks E and F, consisting of 452.50 acres, was included in the deed from Samuel to Jonathan, and a description of the southerly portion, consisting of 450.40 acres, was included in the deed from Jonathan to Samuel. The latter deed is the one heretofore referred to as containing an alleged ambiguity; it described all of the property which Jonathan conveyed to Samuel and consists of three paragraphs; the first paragraph contains the granting clause and a description of all property conveyed, except that described in the second paragraph which sets forth a description of the southerly 450.40 acres of Blocks E and F; the portion of Block F contained in this description consists of approximately 212 acres and includes all of the "Reservoir Site" with the exception of a small part thereof in Block E; the third paragraph recites the following: "Excepting and reserving from the operation of this deed the forty-seven and 61/100 (47 61/100) acre tract conveyed by Daniel Kraemer to the Anaheim Water Company for Reservoir purposes—the boundaries of which tract are shown on the said map."

One of the issues on this appeal concerns the effect of the foregoing third paragraph. Although the terms "excepting" and "reserving" may be contradictory (Victory Oil Co. v. Hancock Oil Co., 125 Cal.App.

2d 222, 232, 270 P.2d 604), their use in this instance, when considered in context, relates a singular intention to effect an exception from the operation of the deed, i. e., from the grant. Van Slyke v. Arrowhead, etc. Power Co., 155 Cal. 675, 680, 102 P. 816; Butler v. Gosling, 130 Cal. 422, 62 P. 596; Victory Oil Co. v. Hancock Oil Co., supra, 125 Cal.App.2d 222, 232, 270 P.2d 604. The real controversy between the parties involves the subject matter of this exception. Does the language used identify a tract of land as the subject of the exception, or does it identify an interest in the land as such subject? Defendants contend that the language referring to a 47 61/100 acre tract *conveyed* by Daniel to the Anaheim Water Company for reservoir purposes, the boundaries of which are shown on the Kraemer tract map, clearly indicates an intention to except from the operation of the deed the land to be used as a reservoir site. Plaintiffs counter with the claim that Daniel *did not convey* a tract of land to the Water Company, but rather, *conveyed* an easement, and contend that the exception refers only to this easement, arguing that the language used indicates an intention to except from the operation of the deed that property which Daniel, in fact, did convey to the Water Company, which was an easement. That the original deed to Anaheim Water Company conveyed only an easement is conceded by all parties.

In 1888, two years after the partition deeds had been executed, Samuel and Jonathan, each, executed a deed to the other for the purpose of correcting errors. By his correction deed Jonathan conveyed to Samuel all of his interest "in and to that tract of land * * * described in the second paragraph of the description" in the 1886 partition deed to Samuel, the land here "referred to being the land therein last described as granted." The 1888 deed also contained the following: "This deed is given to correct an error in a deed heretofore made" by Samuel to Jonathan "*and* to establish the Eastern boundary of said tract as described in said deed first aforesaid as the true boundary between the lands of the parties hereto." (Italics ours.) The only boundary between the lands of the parties was Samuel's northern boundary and Jonathan's southern boundary. The eastern boundary of Samuel's property did not separate it from Jonathan's property. The foregoing correction deed made no mention of the exception contained in the prior partition deed, and whether the correction deed gave Samuel a clear title to the southerly portion of Blocks "E" and "F", freed of any alleged interest Jonathan might have had in the "Reservoir Site", is a subject of further controversy between the parties to this action.

In 1893, Jonathan, having suffered financial reverses resulting in the loss of all his property, left the area and eventually settled in Mexico, where he was visited by Samuel and his son in 1910.

In the meantime, the Anaheim Water Company, and its successor, Anaheim Union Water Company, had abandoned their efforts to maintain a reservoir on the 47.61 acre site, and in 1906 Samuel purchased the water company's interest in that site for $1,000, receiving a deed, which was recorded, conveying such interest to him individually.

After acquiring the water company's interest in the "Reservoir Site", Samuel made various uses of the 212 acres in Block "F", including this site, and otherwise exercised acts of ownership over the property; the whole property was leased on two occasions, the leases being recorded; the fences around the "Reservoir Site" were removed, leaving the property enclosed by a fence around the 212 acre plot, which later was removed in part; the land was cleared, planted to walnut trees and thereafter interset with orange trees; part of the property was used as a gravel pit and other parts were used for farming purposes, such as the raising of bees, the growing of corn and beans; in 1916 Blocks "E" and "F", including the "Reservoir Site", were subdivided into eight lots each and a map thereof recorded which designated the subdivision as "Tract No. 56-Kraemer Tract

No. 2"; this map carried a certificate signed by Samuel and his wife declaring they were the owners of and the persons whose consent was necessary to pass a clear title to the land therein described, and dedicating to public use all highways, drives and alleys shown thereon.

In 1917 Jonathan returned from Mexico, and visited with his relatives in California. On one occasion during this visit, Jonathan, accompanied by Samuel, his brother Ben and Samuel's son, made a trip to an oil drilling project on land formerly owned by Jonathan, which took them through Block "F", past the "Reservoir Site", and Jonathan expressed surprise at the change effected by the clearing of the wilderness and the planting of walnut trees. While at the site of this oil well, when Samuel expressed a belief that the entire property to the south, which included the "Reservoir Site" along with other property in Block "F", would be oil property, Jonathan expressed the hope that oil would be discovered both on Samuel's property and on Ben's. There was a great deal of "oil activity" in this area at this time, including efforts by different oil companies to obtain oil leases, together with attendant newspaper notoriety. The evidence does not disclose that Jonathan, at any time, made any claim to any interest in the "Reservoir Site". After concluding a four-month visit in California, Jonathan left and, eventually, took up residence in Texas, where he died in 1921 and his estate was probated. The individual defendants are his heirs at law, or their successors in interest. Most of these defendants have lived in the immediate vicinity of the property for a great number of years.

In 1919 Samuel leased the 212 acre parcel in Block "F", including the 47.61 acres in the "Reservoir Site", to the Standard Oil Company, for 25 years. This lease purported to affect all interests in the property; was executed by Samuel individually as sole lessor; did not separately describe the "Reservoir Site"; was recorded, and received considerable newspaper notoriety. The lessee went into possession; erected and installed derricks, buildings, tanks, camps, extraction plants and pipe lines; drilled a great number of oil producing wells, including five or six on the "Reservoir Site", and paid rents and royalties to Samuel and his successors.

In the meantime, houses, barns and sheds were erected on and moved from various locations on or near the "Reservoir Site" and parts of this site were used for farming activities of various types. Samuel, in his sole name, conveyed easements across the property for pipe line purposes, which were recorded. In some instances, the exact location of these possessory acts, with respect to the boundaries of the "Reservoir Site" is not clearly indicated by the evidence. However, they support the conclusion that Samuel and his successors considered the property as a whole, not segregating the "Reservoir Site" from the balance thereof for ownership purposes.

Between 1920 and 1934 Samuel and his wife deeded to each of their eight children, who are the plaintiffs in this action, one of the lots in Block of Tract No. 56, reserving the oil and gas rights therein, but conveying to each child an undivided one-tenth interest in all oil and gas rights appurtenant to all eight lots, i. e., the 212 acre parcel. Five conveyances were made in 1920, one in 1927, and two in 1934. Each of these deeds was recorded; was executed by the grantors as sole owners and not as cotenants; and purported to convey the entire fee to the property therein described, less the oil rights reserved by the grantors; no exception of property within the "Reservoir Site" was made; and no acknowledgment of an outstanding interest in Jonathan, or his successors, was expressed. Each of the eight deeds contained a conveyance of the aforesaid one-tenth oil and gas interest; the remaining two-tenths interest was retained by Samuel and his wife until they died in 1937 and 1941, respectively, whereupon it was distributed to their children in equal shares.

After the execution of the foregoing conveyances, these children went into possession of their respective lots; continued in possession for a period covering between

nineteen and thirty-three years; executed agreements, which were recorded, extending and modifying the 1919 lease to "Standard Oil"; received the royalties paid under that lease and its extension; conveyed several rights of way to that and other companies, which were recorded; constructed improvements, farmed, leased, excavated, encumbered, occupied and exercised other acts of ownership on and concerning their respective property, making no distinction between that portion within and that portion without the "Reservoir Site"; and annually paid all the taxes levied upon the property described in their deeds, which included that site.

In 1953 probate proceedings in the estate of Jonathan were commenced in Orange county. Thereafter, the plaintiffs, Samuel's children, brought this action to quiet their title against the defendants, who claim an interest in the "Reservoir Site" as personal representatives, heirs at law, or successors in interest of Jonathan, based on a contention that his rights as cotenant never were transferred or terminated. The defendants filed a cross-complaint, seeking to quiet title to their alleged interest in this property, and for an accounting. The Standard Oil Company of California was included as a cross-defendant. In substance, the trial court concluded that the 1886 deed by Jonathan transferred to Samuel, in severalty, the entire title to the property described in the complaint, except for the easement theretofore conveyed to the Anaheim Water Company, which Samuel subsequently acquired, and further concluded that, in any event, the facts established by the evidence created a title by adverse possession in Samuel and in the plaintiffs, freed of any alleged cotenancy interest. In accord with its conclusions, and upon the authority of H. & J. Mabury Co. v. Bryant, 9 Cal.2d 586, 590, 71 P.2d 1111, the trial court made a finding of good record title as well as a finding of good title by adverse possession. Thereupon judgment was entered in favor of the plaintiffs and cross-defendants, from which the defendants and cross-complainants appeal, contending that both the finding of a good record title and the finding of title by adverse possession are conclusions of law not supported by the evidence; that the 1886 deed from Jonathan to Samuel clearly excepted the 47.61 acre "Reservoir Site" from the grant; that the court erred in concluding that this deed was ambiguous and uncertain, in permitting the introduction of evidence to interpret the deed or determine the intention of the parties thereto, and in finding that the deed excepted from its operation only an easement in and not a fee to the disputed 47.61 acres; that the 1888 correction deed did not convey to Samuel the outstanding cotenancy interest; and that errors were committed in rulings on matters of evidence as related to the issues raised by the pleadings. Defendants also appeal from orders made after judgment, contending that there was error in the preparation of the record on appeal, and in ruling on a motion for new trial under section 953e of the Code of Civil Procedure.

[1, 2] "The intention of the parties to a grant is to be gathered if possible from the language itself and is determined by a proper construction of the language used rather than by resorting to extrinsic evidence." Pinsky v. Sloat, 130 Cal.App.2d 579, 588, 279 P.2d 584, 590. In accord: Hartwig v. Central-Gaither Union School Dist., 200 Cal. 425, 427, 253 P. 733; Mitchel v. Brown, 43 Cal.App.2d 217, 221, 110 P.2d 456. This intention must be gained from a consideration of the entire document, and every part thereof must be given effect if reasonably practicable. Civ.Code, Sec. 1641; Burnett v. Piercy, 149 Cal. 178, 189, 86 P. 603; Weber v. Graner, 137 Cal.App.2d 771, 774, 291 P.2d 173; Paddock v. Vasquez, 122 Cal.App.2d 396, 400, 265 P.2d 121; Moakley v. Los Angeles Pacific Ry. Co., 139 Cal.App. 421, 423, 34 P.2d 218.

[3] The 1886 partition deed from Jonathan to Samuel described the property to be excepted from its operation as "the forty-seven $^{61}/_{100}$ ($47^{61}/_{100}$) acre tract *conveyed* by Daniel Kraemer to the Anaheim Water Company for reservoir purposes" (italics ours). The defendants urge that the term

"tract" means "tract of land". The boundaries of that tract are shown on the map to which reference is made in the deed. Thus, this deed, in substance, refers to two other instruments, i. e., a conveyance and a map. When a deed refers to other instruments the latter become a part of the former, and all of them must be considered as a whole to determine the intention of the parties. Anderson v. Trotter, 213 Cal. 414, 420, 2 P.2d 373; Biescar v. Czechoslovak-Patrohat, 145 Cal.App.2d 133, 142, 302 P.2d 104; Holbrook v. Fazio, 84 Cal.App.2d 700, 191 P.2d 123; Hamilton v. Ferguson, 26 Cal. App.2d 390, 394–395, 79 P.2d 427; Edwards v. Lewis, 25 Cal.App.2d 168, 172, 76 P.2d 720; Drake v. Russian River Land Co., 10 Cal.App. 654, 103 P. 167.

Daniel Kraemer did not *convey* to the Anaheim Water Company the *tract of land* which the defendants contend is excepted from the operation of the partition deed. As noted by the trial judge in his memorandum opinion, the obvious purpose of the exception was to exclude from the operation of this deed property which already had been conveyed and over which the grantor had no legal control, i. e., the easement to Anaheim Water Company. Lewis v. Standard Oil Co. of California, 9 Cir., 88 F.2d 512, 515; Goss v. Congdon, 114 Vt. 155, 40 A.2d 429.

In Boring v. Filby, 151 Cal.App.2d 602, 605, 311 P.2d 869, 871, a conveyance from the defendants to the plaintiffs contained this clause: "Saving, Excepting and Reserving from Parcels 1, 2 and 3 above all oil, gas and minerals, etc., *as contained* in Deed from Bank of America * * * to Edgar O. Filby and Annie M. Filby * *." (Italics ours.) The defendants Filby previously had acquired parcels 1, 2 and 3 from the Bank of America by a deed which reserved to the Bank, as grantor, all oil, gas and minerals but thereafter, by agreement, also received these oil, gas and mineral rights; the plaintiffs claimed these rights under the aforesaid conveyance to them; the defendants contended that these rights were excepted from the operation of that conveyance; a judgment in favor of the plaintiffs was sustained, the court saying: "There is no language in the deed (from the Bank to the defendants) that could possibly be construed as conveying any of the mineral rights to the Filbys. The clause in question contained in the deed from the defendants to the plaintiffs is no more than a reference to an outstanding interest." As no mineral rights were "contained" in the deed from Bank of America to defendants, the questioned clause excepting and reserving the mineral rights "contained" in that deed, in effect, excepted and reserved nothing. The situation in the instant matter is analogous.

In the case at bar, although Daniel Kraemer did not convey to the Anaheim Water Company a tract of land, he did convey an easement, i. e., a "tract conveyed * * *for Reservoir purposes.*" (Italics ours.) In a number of instances the language of a deed granting a tract or a specifically described parcel of property *for a particular purpose* has been held to convey only an easement for that purpose. Parks v. Gates, 186 Cal. 151, 152–154, 199 P. 40; Pellissier v. Corker, 103 Cal. 516, 37 P. 465; City of Glendora v. Faus, 148 Cal.App.2d 920, 922, 307 P.2d 976; Hamilton v. Ferguson, supra, 26 Cal.App.2d 390, 392, 396, 79 P.2d 427; Marlin v. Robinson, 123 Cal.App. 373, 376, 11 P.2d 70. In these cases the courts determined that the recital of the purpose was a part of the granting clause. No valid distinction exists between the meaning of particular language used to describe the extent of the interest in property conveyed and similar language used to describe the extent of the interest in property excepted from a conveyance. In Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 P. 271, the court held that an easement only was excepted from the operation of a deed by the following phraseology: "Saving and excepting therefrom a strip of land forty feet wide * * * for a road to be built at some future time." In Moakley v. Los Angeles Pacific Ry. Co., 139 Cal.App. 421, 425, 34 P.2d 218, 219, supra, a finding of the trial court that an exception from a described parcel of "so much as

has been taken for the county road known as Vermont Avenue, for the street known as Benefit Street and for electric car lines across said land," excepted only an easement, was sustained on appeal. In Penn v. Holland, Tex.Civ.App., 105 S.W.2d 351, 353, 354, the following language in a deed was held to except only a previously conveyed easement, to wit: "Save and except three (3) acres of land out of said tract, the same having been conveyed by me to the Houston Galveston Electric Railway Company", and the court said that the deed in question "does not rise higher than its source, in the sense that it merely meant—by its express reference back to the conveyance of April 26th—to confirm the right of way and easement over the same land that had been previously granted to the railway company." In Pitcairn v. Harkness, 10 Cal.App. 295, 297, 101 P. 809, it was held that the reservation of "a strip of land 25 feet wide * * * for street purposes" reserved an easement only, and that a subsequent grant reciting that "said purchase includes 25 feet * * * to be used for streets" transferred this easement. In Boothe v. McLean, Tex.Civ.App., 267 S.W.2d 158, 165, the court considered a description containing the following language: "* * * save and except 36.54 acres of land heretofore conveyed to the * * * railway company, and that *occupied by the public road* passing along the east and north side of the * * * right of way"; the 36.54 acres was the land over which the railroads and the public had easements only, which had been acquired by eminent domain proceedings and not by conveyance; and it was held, as a matter of law, that the phraseology under consideration excepted only the easements from the property described.

In support of their contentions, the defendants cite Seligman v. Carr, 8 Cal.App. 572, 97 P. 324 and Hartwig v. Central-Gaither Union School Dist., 200 Cal. 425, 253 P. 733, as involving a basic question identical with that presented in the case at bar. However, these cases are clearly distinguishable from the one before us. In each of them, an original deed conveyed property to a school district upon condition that it should be used for school purposes and provided for a reversion in the event the property was not so used; a subsequent deed excepted from its operation the property theretofore conveyed to the school district and, consequently, retained the reversionary interest in the grantors. There was no question in the cited cases as to whether the subsequent deeds excepted a fee or an easement, as the original deeds did not convey an easement.

[4] It is our conclusion that the deed in question, including the conveyance and map referred to therein, clearly indicate an intention to except from its operation that interest in the subject property previously *conveyed* by Daniel to the Water Company, which was an easement, and did not indicate an intention to except therefrom the fee to the tract of land subject to that easement which *had not been conveyed.*

[5] Where the language of a deed is uncertain, i. e., "fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import" (Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 525, 297 P.2d 428, 432), circumstances surrounding its execution and the subsequent conduct of the parties with respect thereto may be considered in order to determine their intention in consonance with the language used; to determine "what they meant *by* what they said." Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19, 23, 297 P. 20, 21; Civil Code, sec. 1647; Universal Sales Corp. v. Cal. Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665; Van Slyke v. Arrowhead, etc. Power Co., supra, 155 Cal. 675, 681, 102 P. 816; Poles v. Glass, 136 Cal.App.2d 508, 510, 288 P.2d 986; Paddock v. Vasquez, 122 Cal.App.2d 396, 265 P.2d 121.

[6] If it be assumed that the deed in question did not clearly express an intention to except from its operation only the water company's easement, neither did it clearly express an intention to except the entire fee of the tract subject to that ease-

ment, and the action of the trial court in permitting the introduction of extrinsic evidence, together with its finding that the parties actually intended to except only the easement, which is adequately supported by the record, were proper and its conclusion was sound. In this regard, it is noteworthy that the phraseology used in the partition deed to describe the excepted interest in the "Reservoir Site", and that used in the decree of distribution in the estate of Daniel Kraemer, for the same purpose is substantially identical; the former excepted "the forty-seven and 61/100 (47 61/100) acre tract conveyed by Daniel Kraemer to the Anaheim Water Company for Reservoir purposes", while the latter excepted "* * * such portions * * * as were conveyed by said Daniel Kraemer in his lifetime to various parties, to wit: * * * a tract containing 47 61/100 acres conveyed by said Daniel to the Anaheim Water Company for a reservoir site * *" In partitioning the property awarded to them by the decree of distribution, it is reasonable to assume that Samuel and Jonathan referred to that decree for the description of that property. The decree clearly excepts from its operation only that property which Daniel had conveyed in his lifetime. The findings of the trial court that the partition deed did likewise is supported by the foregoing circumstances. In addition, there is substantial evidence to support the conclusion that the subsequent conduct of the parties confirmed the fact that they intended the partition deed to dispose of all of the property they owned and to except therefrom only that property over which they had no control.

[7] The defendants' claim of error in the admission of extrinsic evidence to assist in the interpretation of the 1886 deed is of no avail in any event; if the deed clearly excepted only an easement, the admission of such evidence was not prejudicial. Hamilton v. Ferguson, supra, 26 Cal. App.2d 390, 393, 79 P.2d 427; Marlin v. Robinson, supra, 123 Cal.App. 373, 378, 11 P.2d 70. If the deed was not clear such admission was proper.

[8] Even though it be assumed that the deed executed by Jonathan in 1886 did not effectively convey to Samuel all of Jonathan's interest in the "Reservoir Site", the evidence adequately supports the conclusion that whatever interest Jonathan or his successors may have had in this property was terminated by the adverse possession of the plaintiffs. The trial court found that the plaintiffs on the dates of their respective deeds from Samuel and his wife, as the grantees therein named, entered into exclusive possession of the property therein described, including the oil rights conveyed thereby, and, upon the dates of the aforementioned decrees of distribution entered into the exclusive possession of the remaining two-tenths interest in those oil rights; that "from and after the respective dates of said deeds and decrees of distribution to the time of the commencement of this action said respective grantees remained in the continuous, open, notorious, exclusive, adverse, actual, uninterrupted, hostile and peaceable occupancy and possession of the property described in said deeds and decrees of distribution * * *" and during that time "exercised overt, open, notorious, adverse and hostile acts of ownership of said property of such unequivocal character as to clearly manifest and impart notice and knowledge to D. Jonathan Kraemer, and to the defendants, of the hostile intent of the plaintiffs * * * to hold said property adversely and in their own exclusive right for themselves alone"; that during all of this time none of the plaintiffs knew of the existence of any cotenant or cotenancy respecting any of said property, and, until May 19, 1953, no one made any claim to any interest therein; and that the taxes assessed against said property during that time were paid by the plaintiffs, with the exception of those assessed against the mineral rights which, pursuant to the lease in question, were paid by the lessee oil company on behalf of the plaintiffs.

[9, 10] To establish title by adverse possession there must be an actual, open, notorious occupancy of the subject prop-

erty, which is hostile and adverse to the owner's title, under such circumstances as to give reasonable notice thereof, either actual or constructive, to the true owner, by an occupant claiming the property exclusively as his own, under a claim of right or color of title, which is continuous and uninterrupted for five years, and is accompanied by the occupant's payment of all taxes levied or assessed against the property during that period of time. West v. Evans, 29 Cal.2d 414, 417, 175 P.2d 219; Meier v. Meier, 71 Cal.App.2d 502, 505–506, 162 P.2d 950. "The requirement of 'hostility' * * * means not that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner, 'unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter.'" Sorensen v. Costa, 32 Cal.2d 453, 459, 196 P.2d 900, 904.

[11–16] The defendants contend that plaintiffs' occupancy was not under such circumstances as constituted reasonable notice of the hostile character of their claim; that there was no ouster of the tenants out of possession. This contention is based on the well settled principle that the exclusive occupancy of a cotenant is deemed permissive and does not become adverse until the tenant out of possession has had notice, either actual or constructive, that the possession of the cotenant is hostile to him. West v. Evans, supra, 29 Cal.2d 414, 418, 175 P.2d 219; Johns v. Scobie, 12 Cal.2d 618, 623, 86 P.2d 820, 121 A.L.R. 1404. When the entry into occupancy is avowedly as a tenant in common with others, the possession thus gained is the possession of the others and continues as such until the tenancy in common is disclaimed. Akley v. Bassett, 189 Cal. 625, 641–642, 209 P. 576. Under such circumstances, in order to constitute evidence of a disclaimer, the conduct of the tenant in possession must be such as amounts to an ouster of the other cotenants and consist of "acts of the most open and notorious character, clearly giving notice to the world, and to all having occasion to observe the condition and occupancy of the property, that the intention is to exclude, and does exclude the cotenants." Akley v. Bassett, supra, 189 Cal. 625, 642, 209 P. 576, 583. Defendants urge that the evidence in this case does not meet these requirements. However, the foregoing rules have "no application to a case where the possession of the person in question was neither avowedly begun as a tenant in common, nor instituted under a deed or instrument which defined his title as such." Akley v. Bassett, supra, 189 Cal. 625, 642, 209 P. 576, 583; Johns v. Scobie, supra, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404. An entry by a grantee under a deed from a cotenant in exclusive possession, which purports to convey the whole of the property, without notice of the cotenancy, is presumed to be the assertion of an exclusive right in severalty; is equivalent to an express declaration on the part of the grantee that he claims the whole interest; constitutes an ouster of the cotenants out of possession; and is such a disseisin as sets the statute of prescription in motion in his favor and against them. Johns v. Scobie, supra, 12 Cal.2d 618, 624, 86 P.2d 820, 121 A.L.R. 1404; Akley v. Bassett, supra, 189 Cal. 625, 642, 209 P. 576; Frick v. Sinon, 75 Cal. 337, 339, 17 P. 439; Bath v. Valdez, 70 Cal. 350, 358, 11 P. 724; Packard v. Moss, 68 Cal. 123, 129, 8 P. 818; Zolezzi v. Michelis, 86 Cal.App.2d 827, 831, 195 P.2d 835. Such is the case at bar. The entry and claim of the plaintiffs rest on color of title, being made under deeds which implied full ownership (Akley v. Bassett, supra, 189 Cal. 625, 640, 209 P. 576); the estate purporting to be conveyed, not the estate actually conveyed, characterized their entry. Akley v. Bassett, supra, 189 Cal. 625, 642, 209 P. 576. Although each deed reserved to the grantors the oil and gas rights appurtenant to the particular lot described therein, the combined deeds, together with the decrees of distribution in the estates of the grantors, in turn conveyed to the grantees all such rights in all of these lots. None of the grantees had any knowledge

of an outstanding interest in Jonathan or his successors. There was no indication in any of the deeds that Samuel or his wife intended to convey only a one-half interest in any of the property transferred. To the contrary, the map therein referred to represented that Samuel and his wife were the sole owners of the tract therein described. After entering into possession, the plaintiffs exercised acts of ownership which were in total disregard of and adverse to the rights of any other person in any part of their land. The recorded map of Tract No. 56 had obliterated the preexisting concept of a defined and described "Reservoir Site". The evidence supports the conclusion that each plaintiff occupied the whole of his or her lot exclusively, as a unit, under color of title established by deed. In like manner, the plaintiffs claim all of the oil and gas rights appurtenant to the 212 acre parcel—Block F of Tract No. 56—composed of their respective lots and including the 47.61 acre "Reservoir Site". Acceptance of the deeds which conveyed to them the oil and gas rights and the subsequent exercise of acts of ownership by the plaintiffs were the equivalent of an entry into possession of these rights under color of title to the whole interest in severalty. The possession of the Standard Oil Company was the possession of the plaintiffs. Palin v. Sweitzer, 8 Cal.2d 329, 331, 65 P.2d 351; Weyse v. Biedebach, 86 Cal.App. 712, 722, 261 P. 1086. Both were acting under instruments of title implying the transfer of an interest unimpaired by any cotenancy. The execution and recordation of agreements extending and modifying the original lease, which occurred in 1942 and 1943, the receipt of royalties over a period of time encompassing nineteen to thirty-three years —thirty-three years as to five plaintiffs, twenty-six as to one, and nineteen years as to two—without an accounting, the lack of any claim by the defendants to any part of the property, to the royalties or to the oil and gas rights (Palin v. Sweitzer, supra, 8 Cal.2d 329, 330, 65 P.2d 351), the fact that the plaintiffs "knew nothing of the existence of the cotenants" (West v. Evans, supra, 29 Cal.2d 414, 418, 175 P.2d 219, 221; Johns v. Scobie, supra, 12 Cal.2d 618, 624, 86 P.2d 820, 121 A.L.R. 1404), and the possessory acts of the lessee in the discovery, development, operation and maintenance of oil wells on the leased property, justify the conclusion that the plaintiffs were holding these interests adversely to any outstanding claim, that this holding was notorious, that they were acting under the color of title conferred on them by the deeds from Samuel and his wife, and that the defendants had constructive knowledge of these facts. West v. Evans, supra, 29 Cal.2d 414, 419, 175 P.2d 219; Palin v. Sweitzer, supra, 8 Cal.2d 329, 330, 65 P.2d 351. The following statement by the court in Akley v. Bassett, supra, 189 Cal. 625, 642, 209 P. 576, 583, is apropos to this case: "The extent of the estate purporting to be conveyed characterized the entry and subsequent possession, and showed beyond doubt that they were made under a claim to the whole, and were with the intent to oust all others asserting an interest."

[17, 18] Moreover, the recordation of the plaintiffs' deeds, under the circumstances of this case, constituted constructive notice that their claims were hostile and adverse to any interest of Jonathan or the defendants. It is now the settled law of this state "that where a tenant in common enters into possession and claims under an invalid deed purporting to convey the property to him, the recordation of the deed is notice to his cotenants of its existence and therefore of the adverse character of his claim, so as to start the statute of limitations running, at least where, as here, he knew nothing of the existence of the other cotenants." Johns v. Scobie, supra, 12 Cal.2d 618, 624, 86 P.2d 820, 823. In support of their position to the contrary the defendants cite West v. Evans, 29 Cal. 2d 414, 175 P.2d 219, in which recordation alone, independent of other facts, was relied upon to establish notice and, for this reason, is clearly distinguishable from and not controlling in the matter at hand.

[19] The defendants further contend that the possessory acts relied upon to establish a title by adverse possession could not constitute notice to them, as the true owners, that the plaintiffs claimed adversely to their interest in the property, because they had no knowledge of such interest. This contention is without merit. A person claiming title by adverse possession is not required to "establish that the record owner knew of his own rights in the land in question. All that the claimant must show, however, is that his occupation was such as to constitute reasonable notice to the true owner that he claimed the land as his own. The fact that the record owner was unaware of his own rights in the land is immaterial." Sorensen v. Costa, supra, 32 Cal.2d 453, 461, 196 P.2d 900, 905.

[20] The trial court's finding with respect to the payment of taxes is supported by the evidence. From the time of acquisition, each plaintiff paid the taxes assessed against the lot conveyed to him or her, resulting in the payment by plaintiffs annually of all taxes on all of said lots since 1934. The mineral rights appurtenant to this property were assessed separately. Under the "Standard Oil" lease the lessors and the lessee agreed to share payment of these taxes on these rights in accord with an agreed formula. Pursuant to this lease "Standard" as lessee paid all of these taxes and the plaintiffs, as lessors, reimbursed it for their agreed share. In reality, the payment made by "Standard" was made on behalf of the plaintiffs and constituted payment by them. Williams v. Stillwell, 217 Cal. 487, 492, 19 P.2d 773; Gray v. Walker, 157 Cal. 381, 386, 108 P. 278. The lease in question, by providing that the lessee should pay a share of the taxes levied and assessed against the leased premises, in effect, required it to pay an amount of money equal to that share of the taxes, and its payment of this money was made to discharge that obligation and not as a payment on its behalf of taxes, as such, "levied and assessed upon such land". (Code Civ.Proc. sec. 325.)

The defendants contend that "Standard" was in possession for all the cotenants, and that any payment of taxes made by it was made on behalf of all. This contention is based on a false premise. As heretofore noted, the occupancy of the plaintiffs and their lessee, under the circumstances of this case, was not presumed to be the occupancy of a cotenant.

[21] The defendants further contend that the taxes were paid "with what the property yielded" and, for this reason, were not paid by the plaintiffs. Section 325 of the Code of Civil Procedure which prescribes payment by the occupant of all taxes levied and assessed upon the subject property during the possessory period, as an element of adverse possession, does not require that such taxes be paid with money obtained from sources other than the property claimed.

The determination by the trial court that the plaintiffs have a good record title under the 1886 deed and good title by adverse possession under the entry and occupancy by the plaintiffs was correct and should be affirmed. Our conclusions in this regard render unnecessary a consideration of the effect of the 1888 correction deed or the sufficiency of the evidence to establish adverse possession by Samuel. For like reasons, the contentions of plaintiffs respecting the finding of the trial court in their favor, under the doctrines of estoppel and laches, need not be considered. These conclusions also dispose of the issues on appeal which involve the cross-defendant Standard Oil Company of California.

After filing a notice of appeal from the judgment herein, and during the course of proceedings to prepare a transcript on appeal, the defendants-cross-complainants and the cross-defendant, Standard Oil Company of California, filed written requests for a correction of proposed transcripts on appeal. Alleged errors in these transcripts concerned a minute order and other entries in the clerk's transcript, and inaccuracies in the reporter's transcript with respect to a hearing on August 30, 1956, which dealt with issues between the cross-com-

plainants and the cross-defendant, Standard Oil Company. A hearing was held upon these requests at which the court reporter was present and testified. Subsequently the court proposed certain corrections in the reporter's transcript. Thereupon the defendants-cross-complainants filed objections to the proposed corrections and moved for a new trial under the provisions of section 953e of the Code of Civil Procedure upon the ground that the transcript was incomplete and contained guesses, surmise, uncertainty and substitution. The motion for a new trial stated that the issue involved "pertains to cross-complainants' rights and contentions against cross-defendant, Standard Oil Company * * *" After a further hearing, at which no evidence was introduced, the court made its order correcting parts of the clerk's transcript, overruling objections to the controversial minute order, as well as to the proposed corrections of the reporter's transcript, settling both transcripts as corrected and denying the motion for a new trial. Thereupon the defendants-cross-complainants appealed from this order to the Supreme Court, which, in turn, denied a motion to dismiss and transferred the appeal to this court.

[22] There is a presumption that the clerk's minutes correctly related the order to which objection was made, which supports the finding of the trial court to this effect. Wutchumna Water Co. v. Superior Court, 215 Cal. 734, 737, 12 P.2d 1033; People v. Palmer, 49 Cal.App.2d 567, 122 P.2d 109. Moreover, this order referred to matters concerning the accounting phase of this case, and its effect has been rendered inconsequential by the decision on the issue of title. No prejudicial error in settling the clerk's transcript appears.

[23] Any inaccuracies in the reporter's transcript did not relate to matters involving the title dispute between plaintiffs and defendants; they related to proceedings under the cross-complaint and concerned solely the issues therein raised respecting the relationship between cross-complainants and the cross-defendant, Standard Oil Company, based upon the premise that the cross-complainants are owners of a cotenancy interest in the Reservoir Site". The judgment that plaintiffs are the sole owners of that property renders these issues moot. Under these circumstances no prejudice to appellants resulted from the order settling the reporter's transcript as corrected, and it is unnecessary to determine whether the trial court abused its discretion under the circumstances. The order should be affirmed.

[24–26] Assuming without deciding that cross-complainants' motion for a new trial came within the purview of section 953e of the Code of Civil Procedure, the trial court's denial thereof did not constitute prejudicial error. It has been held uniformly "that the exercise of the power by the court under that section is discretionary, and that an order denying a motion made pursuant thereto should not be reversed except for an abuse of discretion." Fickett v. Rauch, 31 Cal.2d 110, 112, 187 P.2d 402, 404. The moving party in such a matter must "indicate substantial controversial issues concerning which a judgment on the merits would depend." Fickett v. Rauch, supra, 31 Cal.2d 110, 115, 187 P.2d 402, 406. The motion in question stated that the issue involved pertained to "cross-complainants' rights and contentions against cross-defendant, Standard Oil Company." The judgment herein did not depend upon this issue. In any event, as heretofore noted, the issue referred to in this motion now is moot. No prejudice to cross-complainants has resulted from the order of denial.

We have considered other objections made by the defendants with respect to rulings upon the evidence and the sufficiency of the pleadings, but find them without merit.

The judgment and orders appealed from are affirmed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.

167 Cal.App.2d 448

PEOPLE of the State of California, Plaintiff and Respondent

v.

Henry WOZNIAK, Defendant and Appellant.

Cr. 1399.

District Court of Appeal, Fourth District, California.

Jan. 29, 1959.

Prosecution for first-degree burglary. The Superior Court, San Diego County, William A. Glen, J., after jury's verdict, entered judgment of conviction and defendant appealed. The District Court of Appeal, Stone, J. pro tem., held that where there was no proof beyond a reasonable doubt of the commission of the crime prior to sunrise and jurors could have reasonably concluded that burglary occurred after sunrise, judgment would be modified to second-degree burglary.

Modified and affirmed.

1. Criminal Law ⇐1159(2)

Test on appeal is whether there is substantial evidence to support conclusion of trier of fact.

2. Criminal Law ⇐304(1)

Courts will take judicial notice of natural phenomena of various sorts including the seasons of the year and differences in solar time.

3. Criminal Law ⇐1184

Where defendant was convicted of first-degree burglary but there was no proof beyond a reasonable doubt of the commission of the crime prior to sunrise and jurors could have reasonably concluded that burglary occurred after sunrise, judgment would be modified to second-degree burglary. West's Ann.Pen.Code, §§ 459, 460, 463, 484, 487, subd. 1, 1260.

4. Burglary ⇐41(1)

In prosecution for first-degree burglary, evidence failed to support conviction of first-degree burglary but impelled modification thereof to second-degree burglary. West's Ann.Pen.Code, §§ 459, 460, 463, 484, 487, subd. 1, 1260.

5. Criminal Law ⇐1023(10)

An appeal does not lie from a verdict and sentence.

Robert C. Thaxton, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Arthur C. deGoede, Deputy Atty. Gen., for respondent.

STONE, Justice pro tem.

A jury found the defendant guilty of burglary in the first degree. By this appeal defendant asks the court to modify the judgment to burglary in the second degree.

Kent Parker was a permanent resident of a hotel in San Diego on March 19, 1958. A few days prior to that date he had been released from the hospital, he was not well, and was suffering some pain. At about 6:30 P.M. he took two sleeping pills prescribed by a doctor and went to sleep. When he awoke on the morning of March 20th he discovered that some of his property had been stolen. This was about 7 or 7:15 A.M. He then dressed, went downstairs to the hotel office, and reported the theft. He was advised by a girl in the cashier's office that his credit cards had been turned in by a cook in whose room they had been found. The defendant registered at the hotel at 10 P.M. March 19th and checked out sometime during the day of March 20th. There is nothing else in the record to indicate the time at which the burglary was committed.

Penal Code, section 460 defines the degrees of burglary as follows:

"1. Every burglary of an inhabited dwelling house, trailer coach as defined by the Vehicle Code, or building committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person armed

with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree."

"2. All other kinds of burglary are of the second degree."

As there is no contention that the defendant was armed or that he committed an assault in the commission of the burglary his conviction in the first degree can be sustained only if the record reflects that the burglary was committed in the nighttime. Section 463 of the Penal Code defines nighttime as follows: "The phrase 'night-time,' as used in this Chapter, means the period between sunset and sunrise."

The hour of sunset on March 19th is unimportant as the defendant did not arrive at the hotel until 10 P.M. The hour of sunrise the following morning, March 20th, was 6:52 A.M. Defendant contends that the failure of the court to instruct the jury of the time of sunset and sunrise made it impossible for the jury to determine whether the burglary took place in the nighttime, before 5:52 A.M. March 20th, or after that hour and during the daytime.

[1] Appellant argues that from the evidence adduced it would be just as reasonable to conclude that the burglary was committed after sunrise as during the nighttime. One inference points to burglary first degree and the other to burglary second degree. The appellant contends that both inferences are reasonable and therefore he is entitled to have the doubt resolved in his favor and the crime determined to be of the lesser degree. Appellant also infers that there was no proof beyond a reasonable doubt of the commission of the crime prior to sunrise and for this additional reason the judgment should be modified to burglary second degree. He cites People v. Golembiewski, 25 Cal.App. 2d 115, 118, 76 P.2d 717, which appears to support his position. However, the Golembiewski case has been distinguished by the Supreme Court which points out in People v. Daugherty, 40 Cal.2d 876, 884, 256 P.2d 911, that in the Golembiewski case there was no evidence of the higher offense and the judgment had to be modified to second degree. The Daugherty case also holds that the rule that a defendant's guilt must be proved beyond a reasonable doubt and the rule that when the evidence is open to two equally reasonable constructions, one of which points to the guilt of the defendant of a higher degree of crime and the other to his guilt of a lesser degree, the court must adopt the theory pointing to the lesser degree, are rules applicable only to the trier of fact. The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. People v. Daugherty, supra, 40 Cal.2d 884, 885, 256 P.2d 915.

The question presented by this appeal is whether or not the record reflects substantial evidence to support the conviction of burglary first degree.

The respondent argues that the fact that the cook discovered Mr. Parker's credit cards in his room and delivered them to the management sometime before Mr. Parker reported the theft at approximately 7:15 A.M. constitutes evidence from which the jury could conclude that the burglary occurred before sunrise. However, the cook was not called to testify as to the time that he discovered the credit cards in his room nor the time he delivered them to the cashier's office, nor was anyone from the cashier's office called to testify as to the time Mr. Parker's credit cards were delivered at that office. Respondent also contends that the jurors could have concluded that the burglary occurred prior to 5:52 because there are fewer people moving about in a hotel prior to sunrise than after and there would be less likelihood of the burglar being detected. Respondent also contends that the victim would be more likely to sleep soundly during the night and less likely to hear a person entering the room than would be the case after sunrise.

[2-4] Of course, the jurors could not have indulged in the speculation suggested by respondent unless they knew the hour of sunrise. Respondent argues that the burglary occurred within a few days of the vernal equinox and that some of the jurors could well have been aware of this and also that at this period of the year the sun sets and rises at approximately 6 P.M. and 6 A.M. It is recognized that courts will take judicial notice of natural phenomena of various sorts including the seasons of the year and differences in solar time. It is reasonable to assume that people living in a given community have general knowledge of the approximate time of sunrise in that vicinity although such knowledge is not exact. This general knowledge was not made certain by an instruction advising the jury of the hour of sunrise, and although the omission standing alone would not be fatal, when viewed in the light of the dearth of evidence concerning the time when the burglary was committed impels a modification of the judgment to burglary second degree.

Pursuant to Penal Code, section 1260, which empowers an appellate court to reduce the degree of an offense, the judgment is modified to read: "Whereas, said Henry Wozniak having been duly found guilty in this court of the crime of burglary of the second degree (Penal Code, sec. 459) and grand theft (Penal Code, secs. 484 and 487, subd. 1) with one prior felony conviction; and defendant's application for probation being denied, it is therefore ordered, adjudged and decreed that the said Henry Wozniak be punished by imprisonment in the state prison of the State of California. It is further ordered, adjudged and directed that the said defendant be taken by the sheriff of the county of San Diego to the Director of Correction and Warden of the state prison of the state of California at California Institution for Men at Chino, forthwith."

[5] As so modified the judgment is affirmed. The attempted appeal from the nonexistent order denying a motion for new trial is dismissed. The attempted appeal from the verdict and sentence from which no appeal lies are hereby dismissed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas E. MANLEY, Defendant and Appellant.

Cr. 2890.

District Court of Appeal, Third District, California.

Jan. 30, 1959.

Hearing Granted March 25, 1959.*

Defendant was convicted in the Superior Court, Mendocino County, Hale McCowen, J., for forgery, and he appealed. The Third District Court of Appeal, Schottky, J., held that since defendant had not personally consented to proceed with only 11 jurors after one juror had been excused because of illness, conviction could not be upheld, notwithstanding fact that his counsel had stated in open court that he had reviewed matter with defendant and that defendant was willing to waive right to trial by 12 jurors and that they stipulated that matter might be decided by jury of 11 people.

Reversed.

1. Forgery ⊜35

The fact that defendant may be civilly liable will not prevent drawing of inference of intent to defraud; and, in forgery prosecution, endorser can be found to have had required intent to defraud, notwithstanding civil code provision that

* Appeal dismissed June 22, 1959.

endorser warrants that he will pay instrument if dishonored. West's Ann.Civ.Code § 3147.

2. Criminal Law ⇐872½

Where defendant did not personally consent to proceed with 11 jurors after one juror was excused because of illness, conviction could not be upheld, notwithstanding fact that his counsel stated in open court that he had reviewed matter with defendant and that defendant was willing to waive right to trial by 12 jurors and that they stipulated that matter might be decided by jury of 11 people. West's Ann.Const. art. 1, § 7; West's Ann.Pen.Code, § 1123.

Timothy W. O'Brien, Public Defender, Ukiah, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

This is an appeal from the judgment entered after a jury found the defendant Thomas E. Manley guilty of a violation of section 470 of the Penal Code (forgery) and from an order of the court denying a motion for a new trial.

The appellant Thomas E. Manley was employed as a reporter for the "Ukiah News" in Ukiah from mid-November, 1957, until about the 27th day of December, 1957. During this period the appellant received five or six weekly paychecks. These checks were made on a check-writing machine and a typewriter and signed by the publisher of the newspaper, Mr. Robert F. Gerber.

On December 29, 1957, the appellant cashed a check payable to himself and purportedly signed by Robert F. Gerber. Mr. Gerber testified that the signature was a forgery and that he had not authorized any person to sign his name to the check. A genuine paycheck issued to the appellant and signed by Mr. Gerber was introduced in evidence for comparison.

The forged check was cashed by a Mr. Virgil Alsup, the owner of a bar or tavern in Ukiah known as the Forest Club. On the evening of December 29, 1957, the appellant entered the bar and after ordering and paying for a drink asked Mr. Alsup if he would cash the check which was payable to himself and showed some identification. In explanation of his request that Mr. Alsup cash the check, the appellant stated that he worked for the newspaper and that he had picked up his check late and there was no place where he could cash it during the holiday weekend. The appellant endorsed the check in Mr. Alsup's presence and received cash in the sum of $94; the check was made out for $94.43. The check was later returned to the bank by Mr. Gerber as a forgery.

The defense was an alibi. Appellant claimed that he was in Santa Rosa during the evening of the 28th and 29th. A bartender testified that he saw appellant in his bar about 9:30 a. m. on December 29, and one Oscar Leezy saw him about 4:30 a. m. the same morning. A third witness, who it was shown had been convicted of a felony, testified he was with the appellant in Santa Rosa from 10:00 a. m., December 29, until sometime the following morning.

Appellant also claimed that he sent a telegram to Gerber from Santa Rosa on December 29, 1957. The Ukiah manager of Western Union testified that the code numbers on the telegram indicated that it was phoned to the Oakland office from Ukiah at 12:20 a. m., December 30, 1957.

A report of the Bureau of Criminal Identification and Investigation was introduced in evidence by the defense. This report recited that Gerber did not write the check appellant was accused of uttering. It also stated that the examiner could not conclude that appellant had written the face of the check.

During the course of the trial a juror was excused because of illness. The court instead of dismissing the jury accepted a stipulation and continued the trial with 11 jurors. The record discloses that the following occurred: "Mr. O'Brien: Your Honor, I have reviewed this matter with

my client. He is aware of his rights. He is willing to waive the right to a trial by twelve jurors and at this time, we stipulate the matter may be continued and be decided by the jury of eleven people. Mr. Irish: I will join in that stipulation, your Honor. The Court: All right. Let the record so show. You may proceed."

[1] Appellant's first contention is that the evidence is insufficient to support the judgment of conviction. He argues that an endorser can not have the required intent to defraud since under the provisions of section 3147 of the Civil Code an endorser warrants that he will pay the instrument if dishonored. Appellant argues further that in a case where there is no evidence that the accused wrote the check himself he can not have the required intent to defraud since the obligation to repay is inconsistent with such intent.

There is no merit in this contention. The fact the appellant may be civilly liable would not prevent the drawing of an inference of intent to defraud. Every thief is civilly liable. If appellant knew the check was not a valid instrument and if he did not inform Mr. Alsup of that fact when he negotiated it, the required intent existed. By negotiating it appellant impliedly warranted that it was valid. Mr. Alsup in cashing the check would expect that he could go to the bank and recover the money he disbursed for the check. Once this expectation proved to be false, he was defrauded. The fact that appellant may have had an undisclosed intent to repay Mr. Alsup at some future date does not change the result since the required intent to defraud would exist when he induced Mr. Alsup to cash a check which was worthless.

Appellant was charged with forging the check and with uttering it, knowing that it was forged, with intent to defraud. The evidence is ample to sustain the conviction. Whether or not appellant wrote the face of the check the record shows that it was not signed by Mr. Gerber so when appellant presented the check to Mr. Alsup, falsely representing that he had received it from the Ukiah News, and then by endorsing the check received the amount thereof, he was guilty of the offense charged.

Upon the oral argument this court expressed doubt as to whether the judgment entered upon a verdict by a jury of only 11 jurors could be sustained and requested respective counsel to file briefs upon that issue.

[2] Appellant contends that the judgment must be reversed because the appellant did not personally and expressly consent to the trial proceeding with 11 jurors. In view of the authorities hereinafter cited, we agree with this contention.

Article I, Sec. 7, of the Constitution of the State of California provides:

> "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve or of any number less than twelve upon which the parties may agree in open court."

In the event a juror becomes ill, Section 1123 of the Penal Code provides:

> "If before the jury has returned its verdict into court, a juror becomes sick or upon other good cause shown to the court is found to be unable to perform his duty, the court may order him to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors or if there be no alternate juror, a juror becomes sick

> or otherwise unable to perform his duty and has been discharged by the court as provided herein, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may be again tried."

It has been held that a defendant in a criminal case may agree to proceed with less than 12 jurors. People v. Clark, 24 Cal.App.2d 302, 74 P.2d 1070; People v. Williams, 128 Cal.App.2d 458, 275 P.2d 513. However, the cited cases involved situations in which during the course of the trial one juror became ill and the trial was continued with the remaining 11 jurors, but in each case the defendant personally waived the requirement of 12 jurors in open court.

Respondent argues that the cited cases did not involve the issue of whether or not such personal waiver by the defendant is required under the provisions of the California Constitution, Article I, Sec. 7. Respondent states: "The constitutional provision above cited provides that the right of trial by jury shall be secured to all and remain inviolate. The constitutional provision further provides that '[a] trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel * * *' It is the respondent's contention that the defendant was accorded a trial by jury in the present case, although the number of jurors was less than the usual number of 12. Therefore, respondent further contends that the requirement of the Constitution with respect to personal waiver by the defendant expressed in open court does not apply and that the excusing of one juror during the course of the trial was merely a matter of procedure upon which counsel for the defendant was authorized to stipulate."

Respondent concedes, as indeed it must, that appellant did not personally "by the use of language" consent that his trial proceed with 11 jurors, but respondent argues that this was merely an irregularity of procedure. We cannot agree. In the recent case of People v. Barnum, 147 Cal.App. 2d 803 at page 808, 305 P.2d 986, at page 989 (hearing denied), the court said:

> "Article I, Section 7 of the state constitution provides, in part, that: 'A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel'. It has been held repeatedly that the consent of the defendant must be expressed by him personally and may not be implied. People v. Garcia, 98 Cal.App. 702, 277 P. 747; People v. Wilkerson, 99 Cal. App. 123, 278 P. 466; People v. Barba, 100 Cal.App. 557, 280 P. 549; People v. Spinato, 100 Cal.App. 600, 280 P. 691; People v. Wyatt, 101 Cal.App. 396, 281 P. 629; People v. Woods, 126 Cal.App. 158, 14 P.2d 313; People v. Washington, 95 Cal.App.2d 454, 213 P.2d 70; People v. Shannon, 110 Cal. App.2d 153, 241 P.2d 1007; People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570; People v. Benjamin, 140 Cal.App. 2d 703, 295 P.2d 477. In each of these cases in which a petition for hearing before the Supreme Court has been filed such petition has been denied. In People v. Pechar, 130 Cal.App.2d 616, 619, 279 P.2d 570, 572, the court held that the consent of a defendant waiving a trial by jury must be expressed 'by the use of language'. In the case at bar, the attorney general, on behalf of respondent, urges the same contention which he urged in the cited case, i.e., that consent may be 'expressed' by conduct as well as by words, and asks this court to reappraise the rule. In the light of the consistent adherence to this rule, over a period of 27 years, by the appellate courts of this state, and the refusal of the Supreme Court to grant a hearing in any case applying it, we do not feel that such a reappraisal is within our province."

We think it is clear that the jury to which a defendant in a criminal case is entitled under Article I, sec. 7, of our state

Constitution is a jury of 12 members. A jury can only be waived "by the consent of both parties, expressed in open court by the defendant and his counsel." In order for a case to be tried with less than 12 jurors, the consent to such reduced number must be expressed in open court by the defendant. We believe there is no logical basis for a distinction between waiving a trial by jury and consenting to a trial by a jury of less than 12 members. For as was said by the United States Supreme Court in Patton v. United States, 281 U.S. 276, at page 290, 50 S.Ct. 253, 255, 74 L. Ed. 854: "It follows that we must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing."

As hereinbefore set forth, appellant did not personally "by the use of language" consent that his trial proceed with 11 jurors when a juror became ill. It would have been a simple matter for the court to have asked appellant if he did so consent and have the record show his expressed consent. The discussions hereinbefore cited have reiterated the rule that the defendant's consent must be expressed by him personally in open court. As stated in People v. Pechar, 130 Cal.App.2d 616, at page 619, 279 P.2d 570, at page 572:

> "Having in mind the sanctity of the right to trial by jury in criminal cases and the evident purpose of the constitutional provision that no defendant should be deprived of that right unless he unequivocally and personally expressed his consent to such waiver in open court, we have concluded that such waiver must be expressed by the defendant in the manner which can involve no question of misinterpretation, doubt or uncertainty at the time or afterwards, i.e., that such waiver must be by the use of language."

We conclude that because appellant did not personally consent to proceeding with 11 jurors the judgment and order must be reversed.

No other points raised require discussion.

The judgment and order are reversed.

VAN DYKE, P. J., and PEEK, J., concur.

167 Cal.App.2d 546

Louis W. MILLER, Jr., Plaintiff and Appellant,

v.

LONG BEACH OIL DEVELOPMENT COMPANY, Service Pipe Line Company, L. J. Smith, Harvey Bird, Doe I, Doe II, and Roe Corporation, Defendants.

Long Beach Oil Development Company, Respondent.

Civ. 23181.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1959.

Rehearing Denied Feb. 27, 1959.

Hearing Denied April 1, 1959.

Action to recover for personal injuries sustained by plaintiff in cave-in of trench in which he was working on premises of defendant. The Superior Court of Los Angeles County, Fred Miller, J., rendered judgment for defendant notwithstanding verdict for plaintiff, and plaintiff appealed. The District Court of Appeal, Herndon, J., held that evidence had not required finding as a matter of law such special employment relationship between plaintiff and defendant as would make recovery of workmen's compensation plaintiff's exclusive remedy.

Reversed.

1. Workmen's Compensation ⇐208

Where an employer sends an employee to do work for another person, and

both have right to exercise certain powers of control over employee, employee may be held to have two employers—his original, or "general" employer, and his second, or "special" employer.

See publication Words and Phrases, for other judicial constructions and definitions of "General Employer" and "Special Employer".

2. Workmen's Compensation ⇐206

In case of dual employment relationship, workman who was injured in course of employment may be entitled to compensation from both his "general" and his "special" employer. West's Ann.Labor Code, §§ 3600 et seq., 3601.

3. Workmen's Compensation ⇐2084

Where dual employment relationship exists, Industrial Accident Commission has exclusive jurisdiction to award compensation for injuries received in course of employment, and injured workman cannot maintain a common-law action for negligence against his special employer. West's Ann.Labor Code, § 3601.

4. Workmen's Compensation ⇐208

For dual employment relationship to exist, special employer must have some control over details of work to be done and not merely in results to be accomplished. West's Ann.Labor Code, § 3601.

5. Workmen's Compensation ⇐2138

Whether such right to control as would create relationship of special employer and employee existed or was exercised is generally a question of fact to be resolved from reasonable inferences to be drawn from circumstances shown; and existence or nonexistence of special employment relationship barring injured workman's action at law is generally a question reserved for trier of facts. West's Ann. Labor Code, § 3601.

6. Appeal and Error ⇐934(1)

On appeal from judgment notwithstanding verdict, reviewing court must examine evidence in light most favorable to appellant.

7. Workmen's Compensation ⇐2138

In action to recover for personal injuries sustained by plaintiff in cave-in of trench in which he was working on premises of defendant, evidence did not require finding as a matter of law such special employment relationship between plaintiff and defendant as would make recovery of workmen's compensation plaintiff's exclusive remedy. West's Ann.Labor Code, § 3601.

Earl A. Barnes, Long Beach, for appellant.

Moss, Lyon & Dunn, Fulton W. Haight and Henry F. Walker, Los Angeles, for respondent.

HERNDON, Justice.

Appellant (plaintiff below) sued to recover damages for personal injuries sustained by him in the cave-in of a trench in which he was working on premises of defendant Long Beach Oil Development Company (hereinafter referred to as respondent). At the time of the accident, appellant was the foreman of a four-man maintenance crew employed by Industrial Suppliers Company and supplied to respondent under a contract which described Industrial Suppliers "as an independent contractor and not as an employee" of respondent. In this common law action for negligence, appellant proceeded against Service Pipe Line Construction Company, the excavator of the trench or ditch which caved in, and respondent on whose premises and for whose benefit the trench had been constructed. Appellant's theory was that the two corporate defendants and certain of their employees had been negligent in failing to shore up the trench in which he sustained his injuries.

By way of affirmative defense, respondent alleged in its answer that appellant was the special employee of both defendants and that the action was accordingly barred by sections 3600 and 3601 of the Labor Code. The action came on for trial

before a jury. Motions for a directed verdict having been denied, a verdict was returned in favor of appellant and against both defendants. Thereafter, respondent's motion for judgment notwithstanding the verdict was granted on the ground that at the time of the accident appellant was respondent's special employee, and that his exclusive remedy was to apply to the Industrial Accident Commission for compensation under the provisions of the Workmen's Compensation Act (Lab.Code, § 3600 et seq.)

Thus, the sole question here presented is this: did the trial court err in deciding *as a matter of law* (contrary to the jury's implied finding) that appellant was the special employee of respondent at the time of the accident?

[1–3] Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers—his original or "general" employer and a second, the "special" employer. Industrial Indemnity Exchange v. Industrial Acc. Comm., 26 Cal.2d 130, 134, 156 P.2d 926; see generally 1 Campbell, Workmen's Compensation, 408, § 453. This doctrine has special significance in the situation in which one party engages an independent contractor to perform certain work, and by the terms of the contract or during the course of its performance the employee of the independent contractor comes under the control and direction of the other party to the contract. If relationships of both general and special employer are found to exist, an employee who is injured during the course of the employment may be entitled to compensation from both employers under the Workmen's Compensation Act. See 27 Cal.Jur. 334, § 56; 1 Campbell, Workmen's Compensation, 412, § 457. Where the special employment relationship is found to exist, the Industrial Accident Commission has exclusive jurisdiction to award compensation for injuries received during the course of such employment and the injured employee cannot maintain a common-law action for negligence against his special employer. Wessell v. Barrett, 62 Cal.App.2d 374, 144 P.2d 656; see Labor Code, § 3601.

The possibility of the existence of a dual employment relationship is well recognized. As stated in Industrial Indemnity Exchange v. Industrial Acc. Comm., supra, 26 Cal.2d 130, 134, 156 P.2d 926, 928, "* * * an employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relationship is held to exist. [Citations.] The right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship. [Citations.] And, although in distinguishing between an employment and an independent contractor relationship it has been said that 'The test of "control", * * * means "*complete* control"' [citations], it is settled that 'a general and special employer relationship is present if there exists in each some power, not necessarily complete, of direction and control.'"

[4] But, to constitute evidence of the special employment relationship the special employer must have a power of direction and control over the way in which the work is to be done (cf. Ridgeway v. Industrial Acc. Comm., 130 Cal.App.2d 841, 848, 279 P.2d 1005; Wessell v. Barrett, supra, 62 Cal.App.2d 374, 376, 144 P.2d 656; see 1 Campbell, Workmen's Compensation 410, § 454.) As stated in Ridgeway v. Industrial Acc. Comm., supra, 130 Cal.App.2d at page 848, 279 P.2d at page 1009: "[it is] * * * the fundamental rule that in order to establish the relationship of special employer and employee it is necessary that the special employer have some control over the details of the work to be done and not merely in the results

accomplished, * * *." See also Doty v. Lacey, 114 Cal.App.2d 73, 249 P.2d 550.

[5] Whether the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown. Industrial Indemnity Exchange v. Industrial Acc. Comm., supra, 26 Cal.2d 130, 135, 156 P.2d 926; Guarantee Ins. Co. Limited Mutual v. Industrial Acc. Comm., 22 Cal.2d 516, 520, 139 P.2d 905. And the existence or non-existence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact. Doty v. Lacey, supra, 114 Cal.App.2d 73, 80, 249 P.2d 550; cf. Wessell v. Barrett, supra, 62 Cal.App.2d 374, 377, 144 P.2d 656; Madsen v. LeClair, 125 Cal.App. 393, 13 P.2d 939; Peters v. United Studios, Inc., 98 Cal.App. 373, 277 P. 156.

In Deorosan v. Haslett Warehouse Co., 165 Cal.App.2d 599, 332 P.2d 422, a common law action for negligence, the trial court granted a nonsuit as to one corporate defendant, the Beagle Products Company, on the theory that as a matter of law the plaintiff was a special employee of Beagle. There was testimony in the record that plaintiff was not an employee of Beagle; that plaintiff was employed and paid by another employer; and that plaintiff was not subject to dismissal by Beagle. The appellate court reversed the judgment of nonsuit with the observation that "* * * the issue of appellant's status [as a special employee] should have been left to the jury * * *."

[6] On this appeal from a judgment n. o. v. we must examine the evidence in the light most favorable to appellant. As stated in Neel v. Mannings, Inc., 19 Cal.2d 647, 649–650, 122 P.2d 576, 577: "It appears to be the well-established law of this state that the power of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its power to grant a nonsuit, Sec. 629 Code Civ.Proc.; Card v. Boms, 210 Cal. 200, 291 P. 190; Hunt v. United Bank & Trust Co. of California, 210 Cal. 108, 291 P. 184; 7 Cal.Jur. 10-Yr. Supp. 268, sec. 65c. Therefore, a motion for judgment *non obstante veredicto* may properly be granted 'when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plainiff.'" And as stated in Hargrave v. Acme Tool & Tester Co., 145 Cal.App.2d 469, 472, 302 P.2d 592, 594: "The trial court is authorized to grant a motion for a judgment notwithstanding the verdict only where, viewing all the evidence in the light most favorable to plaintiff, with every legitimate inference drawn in his favor, and disregarding all conflicting evidence, the record is insufficient to support the verdict for plaintiff."

[7] Thus, if the trier of fact could reasonably conclude that the special employment relationship did not exist between appellant and respondent at the time of the accident the judgment n. o. v. must be reversed. See Umsted v. Scofield Engineering Const. Co., 203 Cal. 224, 227–228, 263 P. 799.

The evidence in the record bearing on the existence of a special employment relationship may be briefly summarized. Appellant had been employed by Industrial Suppliers Company for about four and one-half years prior to the accident. During almost all of that time his work consisted of the supervision of his four-man crew which did small jobs of construction work and maintenance on respondent's oil properties in the Long Beach Harbor area. His services and that of his crew were supplied under a contract between Industrial Suppliers and respondent which was evidenced by a "Service Order" the material portions of which are set out in the margin.[1]

1. "(1) Contractor [Industrial Suppliers] shall furnish all labor, tools, equipment and material necessary for the complete performance of this order unless other-

Appellant was instructed by his employers, the owners of Industrial Suppliers, to follow the instructions of respondent's field superintendent. Appellant and his crew reported for work every morning at the Industrial Suppliers yard from which they drove about five miles to respondent's premises where respondent's construction foreman, L. J. Smith, would give the crew its daily work assignments. The work generally assigned this crew involved relatively unskilled manual labor such as cleaning the concrete foundations of oil-well pumping units, digging ditches and small construction jobs. Their work was performed with tools owned by Industrial Suppliers and appellant was paid a higher wage than the other members of his crew.

Mr. Smith, respondent's construction foreman, testified that he would call the attention of the crew foreman to any work which he didn't think was right, but he did not supervise the operations or concern himself with the details of the work. On cross examination he described his relationship with the foreman of various crews of independent contractors employed by respondent as follows:

"Q. Does your relationship or duty with respect to these contractors vary in any degree? A. They are primarily the same as with Industrial Suppliers.

"Q. What is that relationship? A. To outline their work, the construction work we want performed.

"Q. Then you outline the work for the contractor or the foreman of the contractor, and he is in charge of the actual supervision of the work itself, is that correct? A. Substantially, yes. By outline the job, we don't have blueprints drawn for most of it. * * *

"Q. If you decided clean up work needed to be done would you simply contact the foreman of one of these two Industrial Suppliers crews and tell them where to do the work, is that right? A. That is right.

"Q. I believe you said Mr. Miller was the foreman or pusher of one of those labor crews for Industrial Suppliers? A. He is the foreman for one of the crews, yes.

"Q. Then if you were to contact Mr. Miller and tell him some clean up work was needed in a particular location, you would simply tell him where the work was to be done, is that right? A. That is right.

"Q. You would leave it up to his discretion to determine how the work was to be done and what tools were to be used? A. Yes. If I were to go by and see something that I didn't think was right, I would call it to his attention, but I wouldn't go to the job and tell each individual thing to do."

Appellant testified in substance that he would follow the directions of Mr. Smith as to what he should have his crew do. At one point he testified as follows:

wise provided for herein and shall secure all necessary permits in connection with the performance of the service or acts herein provided for.

"(a) Contractor agrees that work provided for herein will be done by him, and as an independent contractor and not as an employee of company, and that in doing it he shall comply with all apicable labor laws.

"(3) Contractor will obtain and maintain in effect Workmen's Compensation Insurance as provided by law.

"(4) Where work is done on Company's premises, Contractor agrees to observe such safety rules that Company shall prescribe as necessary for the protection of Company's personnel and property. Contractor agrees to limit smoking and the use of fire, including welding and torch cutting to such locations and occasions as are specifically authorized in writing by Company.

"(5) Contractor agrees to pay any taxes assessed on wages for labor hereunder, and agrees to indemnify and hold harmless the Company from all liability and claims therefor and to make any reports required.

"(6) Contractor shall segregate invoice to show taxable and non-taxable items."

"Q. Who was your boss? A. Mr. Tighe and Mr. Foudray [the owners of Industrial Suppliers] were my boss.

"Q. How about Mr. Smith? [Construction foreman for Long Beach Oil Development Co.] A. Mr. Smith told us what to do during the day, gave us locations to do. He didn't tell us how to do the work."

Respondent has directed our attention to certain evidence which undoubtedly would have supported a finding that appellant was the special employee of respondent. Compare Ridgeway v. Industrial Acc. Comm., supra, 130 Cal.App.2d 841, 279 P.2d 1005. For example, the trier of fact could reasonably interpret appellant's testimony that he was told to follow the instructions of respondent's field superintendent as evidence of respondent's right to dictate as to the details of the work. However, in the light of the entire record such testimony could resasonably be interpreted as indicating appellant's duty to follow respondent's directions, not as to detail, but with respect to the assignments to be undertaken and completed. It is not enough for respondent to point to evidence which would support a finding of special employment.

From the record there can be no question but that Industrial Suppliers Company was an independent contractor (Doty v. Lacey, supra, 114 Cal.App.2d 73, 77, 249 P.2d 550) and that Industrial Suppliers was appellant's original or general employer. The real question is whether the evidence *compels* the conclusion that as between appellant and respondent the special employment relationship was created, or whether the trier of fact could reasonably conclude that respondent did not exercise, or have the right to exercise, sufficient control over the details of appellant's work to become his special employer. There is abundant evidence in the record from which the trier of fact reasonably could conclude that respondent did not become appellant's special employer. Appellant's wages were paid by Industrial Suppliers, not by respondent (cf. Ridgeway v. Industrial Acc. Comm., supra, 130 Cal. App.2d at page 843, 279 P.2d at page 1006). Respondent did not have the power to discharge appellant; if dissatisfied respondent might have asked for another foreman, but it had no power to terminate appellant's employment. Cf. Doty v. Lacey, supra, 114 Cal.App.2d at page 77, 249 P.2d at page 553. At the time of the cave-in Mr. Smith, respondent's construction foreman was not present overseeing the trench cleaning operation, nor was appellant under his direct supervision and control. Cf. Wessell v. Barrett, supra, 62 Cal.App.2d at page 375, 144 P.2d at page 657.

As the foreman of the crew performing services for respondent, appellant presumably would direct and supervise the activities of his subordinates. The jury might reasonably conclude that Mr. Smith's directions dealt with the results to be accomplished by the group labor of the crew and not with appellant's activities in supervising their performance. The contract between respondent and Industrial Suppliers describes the latter as an independent contractor and not an employee. Although the writing is by no means conclusive as to respondent's right to exercise control over the details of appellant's work, with other evidence it is a sufficient basis for the inferences as to the absence of the special employment relationship which the jury evidently drew.

Conceding that respondent had the power to direct the time and place of appellant's performance of his labors and the result to be obtained, such general supervisory power over the employee of an independent contractor does not constitute conclusive evidence of the special employment relationship. Ridgeway v. Industrial Acc. Comm., supra, 130 Cal.App.2d at pages 848–849, 279 P.2d at page 1009. Thus the jury might reasonably have inferred that the directions given plaintiff by respondent's construction foreman "* * * were merely directions as to the result to be accomplished, such as are required in the nature of things to be given to independent contractors in any case." Umsted v. Scofield Engineering Const. Co., supra, 203 Cal. 224, 230, 263 P. 799, 801.

Examining the record in the light of the above cited cases, we conclude that there is substantial evidence upon which the trier of fact could find that the special employment relationship did not exist between appellant and respondent. It follows that the trial court erred in granting the judgment n. o. v.

Reversed.

FOX, P. J., and ASHBURN, J., concur.

167 Cal.App.2d Supp. 828

Carl D. LINDBERG, Respondent,
v.
Michael COUTCHES, Appellant.
Civ. 262.

Appellate Department, Superior Court, Alameda County, California.
Feb. 2, 1959.

Action by buyer of used aircraft against seller for breach of implied warranty of fitness. The Municipal Court, San Leandro-Hayward Judicial District, T. L. Foley, J., entered judgment for buyer and seller appealed. The Appellate Department of Superior Court, Alameda County, Quayle, J. pro tem., held that seller, by advertising and offering used "Cessna 195" aircraft for sale without indicating any inability of aircraft to sustain flight, impliedly represented that aircraft was reasonably fit to sustain flight.

Judgment affirmed.

1. Sales ⇐273(1)

Seller, by advertising and offering a used "Cessna 195" aircraft for sale, without indicating any inability of aircraft to sustain flight, impliedly represented that aircraft was reasonably fit to sustain flight. West's Ann.Civ.Code, § 1735.

2. Sales ⇐272, 273(1)

The seller by the very act of offering his goods for sale, asserts or represents that they are merchantable articles of their kind or are fit for some special purpose and that the buyer relies upon this implied assertion or representation. West's Ann. Civ.Code, § 1735.

3. Sales ⇐273(1)

Warranty of fitness for its intended use extends to used articles as well as new articles. West's Ann.Civ.Code, § 1735.

4. Sales ⇐441(1)

In action by buyer of used aircraft against seller for breach of implied warranty of fitness, evidence established that use of trade name "Cessna 195" in contract was merely manner of designating article sold and that buyer did not order aircraft by its trade name or that buyer sought a "Cessna 195". West's Ann.Civ. Code, § 1735, subd. 4.

5. Sales ⇐273(5)

Mere description of an article by its trade name is not conclusive, if other conditions justify a finding of the existence of an implied warranty of fitness. West's Ann.Civ.Code, § 1735, subd. 4.

6. Sales ⇐441(2)

In action by buyer of used aircraft against seller for breach of implied warranty of fitness, evidence that buyer made known to seller that he proposed to use aircraft immediately in aerial photograph business and that seller made no statement of any kind to indicate that aircraft was in any way unfit for buyer's proposed use, established that buyer relied upon implied representation that aircraft was airworthy. West's Ann.Civ.Code, § 1735.

7. Evidence ⇐34

Court may take judicial notice of Federal Civil Aeronautics Act providing that it shall be unlawful for any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate. West's Ann.Civ.

Code, § 1735; Civil Aeronautics Act of 1938, § 610(a), 49 U.S.C.A. § 560(a).

8. Sales ⇐120, 267

Printed disclaimer of contract providing for sale of used aircraft "as is, where is, unless otherwise specified", followed by handwritten statement "Deposit subject to financial approval and mechanical approval", did not affect warranty of mechanical fitness and was modified by handwritten statement and therefore aircraft was required to be mechanically fit for its intended purpose and buyer had right to withdraw from sale if aircraft was not fit. West's Ann.Civ.Code, § 1735; Civil Aeronautics Act of 1938, § 610(a), 49 U.S.C.A. § 560(a).

9. Sales ⇐267

Only an express disclaimer will eliminate an implied warranty of fitness. West's Ann.Civ.Code, § 1735.

10. Sales ⇐267

Disclaimer of seller's implied warranty is strictly construed against the seller. West's Ann.Civ.Code, § 1735.

11. Sales ⇐270

Under contract for sale of used aircraft providing for sale thereof "as is, where is, unless otherwise specified", followed by handwritten statement "Deposit subject to financial approval and mechanical approval", buyer had duty to inspect and withdraw from sale if reasonable inspection revealed mechanical defects but seller remained responsible for mechanical defects which reasonable inspection could not reveal. West's Ann.Civ.Code, § 1735.

12. Sales ⇐270

Statute providing that if buyer has examined goods, there is no implied warranty as regards defect which such examination ought to have revealed, negates warranty only as to defects that could be discovered by reasonable inspection. West's Ann.Civ.Code, § 1735, subd. 3.

13. Sales ⇐267

In action by buyer of used aircraft against seller for breach of implied warranty of fitness, wherein licensed CAA mechanic and inspector testified that reasonable inspection did not and would not reveal wilfully concealed oil leakage problem, printed disclaimer of contract providing for sale "as is, where is, unless otherwise specified" created only conditional disclaimer of warranty and did not affect latent defect that rendered aircraft not airworthy. West's Ann.Civ.Code, § 1735, subd. 3.

14. Sales ⇐284(1)

Seller of used aircraft was liable for latent mechanical defects therein which could not be discovered by reasonable inspection even though seller was unaware of defect. West's Ann.Civ.Code, § 1735, subd. 3.

15. Fraud ⇐30

Seller of used aircraft with wilfully concealed latent mechanical defect may seek redress from seller's predecessors in interest. West's Ann.Civ.Code, § 1735.

Purchio & Fairwell, Hayward, J. W. Morony, Chico, for appellant.

Paul N. McCloskey, Jr., Palo Alto, for respondent.

QUAYLE, Justice pro tem.

This appeal comes before the court on an agreed statement of facts after judgment in favor of plaintiff in an action for breach of warranty arising out of the sale of a used "Cessna 195" aircraft in which damages in the sum of $1,200.73 were awarded against defendant. The amount of damages is not an issue here. The defendant appeals, contending that the sale was made without warranty, express or implied.

On April 20, 1957, while engaged in the business of selling aircraft, appellant agreed in writing to sell to respondent a certain "Cessna 195" aircraft for $7,150. A printed clause in the contract provided—

> "It is agreed that the aircraft herein sold is sold as is, where is, unless otherwise specified."

A handwritten insertion in the contract, under the term "Remarks" provided:

"Deposit subject to financial approval and mechanical approval."

Prior to the execution of the contract, respondent made known to appellant that he proposed to use the aircraft immediately in the aerial photography business. Respondent and appellant made a short test flight in the aircraft before respondent took delivery. Appellant made no statement of any kind to indicate that the aircraft was in any way unfit for respondent's proposed use.

Respondent did not accept delivery of the aircraft until he had employed Mr. Skid Meissner, a duly licensed CAA mechanic and inspector to give the aircraft a 100-hour check and complete mechanical examination. After correcting several minor defects he certified the aircraft to be merchantable and airworthy under CAA regulations. Mr. Meissner, stipulated to be an expert on aircraft mechanics, testified that prior to the time of sale and his examination, a piece of shim stock had been inserted between the crank shaft and oil-retaining enclosing sleeve; that such piece of shim stock concealed a worn area in the crank shaft and further kept a serious oil leakage problem from becoming apparent upon any reasonable investigation; that such shim stock could only be discovered upon a major overhaul of the aircraft; that this condition made the aircraft both unmerchantable and non-airworthy under existing CAA rules.

It was Mr. Meissner's expert opinion that the shim stock had been inserted at some time prior to appellant's acquisition of the aircraft. The appellant testified that he did not know of the presence of the shim stock. He had purchased the aircraft for $6,850 the previous month from Vesta Aircraft, a used aircraft sales organization. Appellant then advertised the aircraft for sale at a price of $8,450, believing it had flown approximately 200 hours since its last major overhaul.

After commencing negotiations with respondent, the arrival of the aircraft's log books from Vesta Aircraft showed that 560 hours flying time had been put on the engine since its last major overhaul. The testimony indicated that major overhaul on an engine of this type was required between 800 and 1,000 hours. Because of this disclosure, appellant reduced the sales price to respondent to $7,150, the figure inserted in the written contract.

After taking delivery of the aircraft, respondent entered into certain commitments for its use in aerial photography. During the month of June, 1957, increased oil leakage caused respondent to submit the aircraft for further examination after flying it only 25 hours. After several attempts, Mr. Meissner discovered the shim stock and immediately grounded the aircraft.

Appellant's first contention is that there was no express warranty connected with this sale. Respondent makes no issue of this. He relies exclusively on an implied warranty arising under subdivision 1 of section 1735 of the Civil Code.

Appellant contends that no such implied warranty arises because there was no representation made by seller and relied upon by buyer, and furthermore, the terms of the agreement of sale disclaimed warranty.

[1, 2] The implied warranty that the goods shall be reasonably fit for buyer's particular purpose exists only "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment." Subdivision 1, Section 1735, Civil Code. By advertising and offering a used "Cessna 195" aircraft for sale without indicating any inability to sustain flight, appellant impliedly represented that it was reasonably fit for the purpose for which it is intended, namely, sustained flight.

The 1948 Edition of Williston on Sales (Section 231, in Vol. 1, at page 591), states:

"* * * the seller by the very act of offering his goods for sale, asserts or represents that they are merchantable articles of their kind or are fit for some special purpose and that the buyer relies upon this implied assertion or representation."

[3] Section 1735 of the Civil Code is a part of the Uniform Sales Act as adopted in California and it extends the warranty of fitness for its intended use to used articles as well as new articles. Drumar Mining Co. v. Morris Ravine Mining Co., 33 Cal. App.2d 492, 92 P.2d 424; 1 Williston on Sales, 575 (Section 232); 43 Cal.Jur. 2nd, 263.

[4, 5] Appellant claims that the use of the trade name "Cessna 195" in the agreement of sale negates warranty under subdivision 4 of section 1735 of the Civil Code. This subdivision provides that

> "in the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

There is nothing in the agreed statement of facts that indicates that this aircraft was ordered by its trade name, or that the buyer was seeking a "Cessna 195". On the other hand it does appear that appellant had this used aircraft and offered it for sale. That after negotiation the parties reduced their bargain to writing and the use of the trade name "Cessna 195" was merely a manner of designating the article sold. Mere description of an article by its trade name is not conclusive, if other conditions justify a finding of the existence of an implied warranty of fitness. Bagley v. International Harvester Co., 91 Cal.App. 2d 922, 206 P.2d 43.

[6, 7] It cannot be successfully contended that respondent did not rely on appellant's implied representation that the aircraft in question was airworthy. He disclosed to appellant during negotiations that he needed the aircraft for immediate use in the aerial photograph business. This required the immediate use of the aircraft in flight. It can be inferred that he would not have bought the aircraft had he known that it could not be so used. The court takes judicial notice of the Federal Civil Aeronautics Act of 1938 which provides:

> "It shall be unlawful * * * for any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate." § 610, Civil Aeronautics Act of 1938 (49 U.S.C.A. § 560(a))

Therefore immediate use of the aircraft in flight, as required by the respondent, was impossible because the aircraft in fact was not airworthy.

[8] Next let us give consideration to appellant's contention that the terms of the written agreement of sale constituted a disclaimer of warranty. In the printed portion of the contract it provided that the aircraft was sold "as is, where is, unless otherwise specified." Elsewhere in the agreement there appeared in handwriting the words "Deposit subject to financial approval and mechanical approval." It seems unnecessary to consider whether one of these provisions supersedes the other because of the manner in which it appeared on the face of the contract. They can most reasonably be reconciled from the context of the agreement. The printed form contemplated a disclaimer of warranty unless the parties expressed a different intent by some other provision in the document. The "unless otherwise specified" provision was used by respondent and appellant here when they inserted the condition that the "Deposit subject to * * * mechanical approval."

Thereby the parties expressed their intention that the aircraft should be mechanically fit for its intended purpose. Buyer was accorded the right to withdraw from the sale if the aircraft was not mechanically fit. The disclaimer originally set forth in the contract was thereby modified so as not to affect the warranty of mechanical fitness, which in essence meant airworthiness.

[9, 10] The law seems clear that only an express disclaimer will eliminate the implied warranty of fitness. Furthermore disclaimer of seller's implied warranty is strictly construed against the seller. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041.

[11] The reasonable effect to be given to the terms of this agreement of sale would

seem to be that responsibility be imposed upon the buyer to inspect and withdraw from the sale if reasonable inspection revealed mechanical defects; but that seller remained responsible for mechanical defects which reasonable inspection could not reveal.

[12, 13] Subdivision 3 of section 1735 of the Civil Code provides;

> "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

This negates warranty only as to defects that could be discovered by reasonable inspection. Webster v. Klassen, 109 Cal.App. 2d 583, 241 P.2d 302; Moore v. Hubbard & Johnson Lumber Co., 149 Cal.App.2d 236, at page 241, 308 P.2d 794, at page 797. Here it is admitted that reasonable inspection did not and would not reveal the mechanical defect wilfully concealed by some one who had access to the aircraft prior to the sale in question. Therefore the agreement of sale created only a conditional disclaimer of warranty which did not effect the particular latent defect that rendered the aircraft in question not airworthy.

[14] Appellant points out that it is inequitable to hold him liable for a latent mechanical defect of which he was not aware; that since he did not discover it and could not discover it unless he undertook major overhaul of the aircraft, that he was also an innocent victim of a wilful act perpetrated by some one else.

However, the Uniform Sales Act extends warranty as to latent defects upon the seller whether they are known to him or not. Tremeroli v. Austin Trailer Equipment Co., 102 Cal.App.2d 464, 227 P.2d 923; 43 Cal.Jur.2nd, 256. The defect was admittedly latent. The expert testimony indicated that it was wilfully concealed by one of appellant's predecessors in interest.

A similar result obtained in Regula v. Gerber, Ohio Com.Pl., 70 N.E.2d 662, where, under the Uniform Sales Act in Ohio (Ohio G.C. 8395), a purchaser acquiring a used automobile for transportation was relieved from his contract because loose connecting rod bearings rendered the vehicle unroadworthy. Seller's contention, that he was unaware of the defect because some person unknown had concealed it by putting heavy oil in the crank case, was of no avail in the face of warranties implied by law upon the seller.

[15] If this is an attempt by appellant to seek the application of equity to the issues here involved it should be recalled first, that warranty is a codification of the legal remedies developed primarily from the common law; furthermore, if appellant is held liable here he may seek redress against Vesta Aircraft, from whom he purchased the aircraft. They not only may be liable on their warranty but it is possible they concealed the defect or at least knew of it. On the other hand, if respondent is denied relief here, he is without remedy.

The judgment appealed from is affirmed.

WAGLER, P. J., and HOYT, J., concur.

51 Cal.2d 541

Harold L. HOTLE et al., as Executors, etc., Appellants,

v.

Evelyn F. MILLER, as Special Administrator, etc., Respondent.

Sac. 6819.

Supreme Court of California,
In Bank.
Feb. 6, 1959.

Action for reformation of spouses' agreement to hold property as community property regardless of way record title might stand at time. The Superior Court, Sonoma County, Hilliard Comstock, J., sustained a general demurrer, and plaintiffs appealed. The Supreme Court, Traynor, J., held that the complaint stated a cause of action for reformation on ground of mutual mistake, and that reformation would be of benefit to plaintiff since, properly construed, agreement evinced intent to abrogate any conflicting provision in prior deposit agreement creating joint tenancy with right of survivorship.

Reversed.

McComb, J., dissented.

Opinion, 327 P.2d 183, vacated.

1. Reformation of Instruments ⇐36(1)

Complaint, for reformation, on ground of mutual mistake, of spouses' agreement with regard to what property should be held as community property, was sufficient. West's Ann.Civ.Code, § 3399.

2. Joint Tenancy ⇐6

1937 statute making joint deposit conclusive evidence of intention to vest title in survivor became part of deposit agreement made while it was in effect. West's Ann.Financial Code, §§ 850–853.

3. Joint Tenancy ⇐6

1937 statute making deposit conclusive evidence of intention of depositors to vest title in survivor in no way deprived depositors of their freedom to make subsequent agreements changing their interests in account; but even if it could be so interpreted, deprivation would not extend past repeal of statute in 1949. West's Ann. Financial Code, §§ 850–853; West's Ann. Civ.Code, § 1698.

4. Contracts ⇐7

Parties to contract could not contract away their powers to contract in future.

5. Contracts ⇐1

The law, not private agreement, determines essential elements of valid contract.

6. Husband and Wife ⇐39

A husband and wife may change character of their property by agreement. West's Ann.Financial Code, §§ 850–853; West's Ann.Civ.Code, § 158.

7. Husband and Wife ⇐14(3)

Properly construed, spouses' subsequent agreement, to hold their property as community property regardless of way record title might stand at time, evinced intent to abrogate any conflicting provision in prior deposit agreement creating joint tenancy with right of survivorship; and bank, which was party to deposit agreement, being in no way prejudiced by such subsequent agreement, abrogation was effective.

8. Contracts ⇐236

Two parties to tripartite agreement cannot change it to prejudice of third party.

Donald M. Scott, Sebastopol, and Lounibos & Lounibos, Petaluma, for appellants.

Frank W. Finn and Leon J. Libeu, Sebastopol, for respondent.

TRAYNOR, Justice.

Plaintiffs, executors of the will of Seymour Frizelle, appeal from a judgment for defendant, special administrator of the estate of Jennie Frizelle, in an action for reformation of a written agreement executed in January, 1953. The judgment was entered upon the sustaining of a general demurrer to the first amended complaint without leave to amend.

The complaint alleged:

On November 6, 1940, Seymour and Jennie opened an account with the Bank of Sonoma. The deposit agreement provided that "We hereby agree with each other and the bank, that all moneys now or hereafter deposited by us or either of us with the bank in this account shall be so deposited and shall be received and held by the bank with the understanding and upon the conditions that said money as deposited, without consideration of its previous ownership, and all interest therein (if any there be) shall be the property of both of us as joint tenants and shall be payable to and collectable by either of us during our joint lives, and after death of one of us shall belong to and be the sole property of the survivor, and shall be payable to and collectable by such survivor."

In January, 1953, Seymour and Jennie orally agreed that regardless of how title was held, all of their property had been acquired as their community property, that "all of said property, and any and all property which they might thereafter acquire, should be held and owned by them as community property regardless of the way the record title might stand at any time," and that they would execute a written agreement so providing. They employed an attorney to draft the written agreement, which they executed in the mistaken belief that it correctly expressed their oral understanding. The attorney's draft, however, set forth a defective description of the existing property and made no reference to property thereafter to be acquired.

On October 20, 1954, Seymour executed a will in which he undertook to dispose of all of the community property, and Jennie executed a waiver of claim to her share of the community property in view of her election to accept the terms of the will.

Seymour died on March 2, 1955. The balance in the bank account was then $42,357.14. Jennie died on July 17, 1955.

Plaintiffs contend that they have stated a cause of action for reformation of the 1953 agreement, that under the agreement as reformed the balance of the account is community property, and that they are therefore entitled to administer it as such pursuant to the terms of the will and Jennie's waiver. Defendant contends, on the other hand, that whether reformed or not the agreement cannot operate to change the rights of the parties in the joint tenancy bank account, that title to it therefore vested in Jennie when she survived Seymour, and that since there is no allegation that any other property is affected by the agreement, its reformation would serve no purpose.

[1] The complaint states a cause of action for reformation of the 1953 agreement on the ground of mutual mistake (Civ.Code, § 3399; Murphy v. Rooney, 45 Cal. 78; Oatman v. Niemeyer, 207 Cal. 424, 425–427, 278 P. 1043; see Bailard v. Marden, 36 Cal.2d 703, 708, 227 P.2d 10) if such reformation would serve any interest of plaintiffs. Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157. It would if the 1953 agreement could affect the rights of the parties in the joint account.

[2] Defendant invokes former section 15a of the California Bank Act (1 Deering's Gen.Laws, 1937, Act 652, pp. 221–222),* in effect at the time the joint account was opened, to establish that the 1953 agreement cannot operate to defeat Jennie's right of survivorship. That section provided in part: "When a deposit shall be made in any bank by any person or persons whether minor or adult in the names of such depositor or depositors and another person or persons, and in form to be paid to any of them or the survivor or survivors of them, such deposit and any additions thereto made by any such persons after the making thereof, shall become the property of such persons as joint tenants, and the deposit together with all dividends or interest thereon, shall be held for the ex-

* Now West's Ann.Financial Code, §§ 850–853.

clusive use of such persons and may be paid to any of them during their lifetime or to the survivor or survivors after the death of one or more of them, and such payment and the receipt or acquittance of the person or persons to whom such payment is made shall be valid and sufficient release and discharge to such bank for all payments made on account of such deposit prior to the receipt by such bank of notice in writing not to pay such deposit in accordance with the terms thereof. *The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.*" (Italics added.) Since this section was in effect at the time the account was opened, it became a part of the contract of the parties. Comastri v. Burke, 137 Cal.App.2d 430, 434, 290 P.2d 663. Defendant accordingly contends that in the absence of fraud or undue influence, plaintiffs cannot now show that the parties did not intend that title should vest in the survivor.

[3] There is no doubt that under the statute the making of the deposit is conclusive evidence of the intention of the depositors at that time to vest title in the survivor. It does not follow, however, that the statute compels depositors thereafter to remain frozen to that intention. It in no way deprives the depositors of their freedom of contract to make subsequent agreements changing their interests in the account. Such freedom is expressly recognized in Civil Code section 1698, which provides that a "contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Section 15a cannot reasonably be interpreted to impair this freedom to alter one contract by another. There is nothing in its language that would justify such interpretation. The intention to which it refers is the intention manifested by the making of the deposit in the specified form and thus necessarily the intention existing at the time that form is used. Its constrained language cannot be enlarged to nullify any subsequent contracts between the depositors and thereby to repeal by implication Civil Code section 1698.

This interpretation of section 15a in no way departs from the parol evidence rule. "Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations." In re Estate of Gaines, 15 Cal.2d 255, 265, 100 P.2d 1055, 1060. Obviously, however, it has no corresponding power to preclude future negotiations. "Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract whether oral or written can be varied, contradicted, or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the 'parol evidence rule.'" 3 Corbin on Contracts, § 574, pp. 222–223; see also, 3 Williston on Contracts (Rev. ed.), § 632, p. 1817; McKeon v. Giusto, 44 Cal.2d 152, 156–157, 280 P.2d 782, and cases cited. Paterson v. Comastri, 39 Cal.2d 66, 244 P.2d 902; Medeiros v. Cotta, 134 Cal.App.2d 452, 286 P.2d 546; Comastri v. Burke, 137 Cal.App.2d 430, 290 P.2d 663, and other cases interpreting section 15a of the Bank Act are not to the contrary, for none of them involved a subsequent agreement changing the rights of the depositors in a joint account.

Even if section 15a were interpreted to deprive the depositors of their freedom to

make subsequent contracts changing their rights in the joint account, there could be no such deprivation following the repeal of that section in 1949. Section 852 of the Financial Code based thereon not only omits the provision making the form of the deposit conclusive evidence of the intent of the parties to vest title in the survivor, but expressly recognizes that the deposit agreement may not accurately reflect the interests of the depositors in the account. It provides that the bank may refuse payment after notice from a depositor "not to permit withdrawals in accordance with the terms of the account * * *. After receipt of such notice, a bank may refuse, without liability, to honor any check, receipt, or withdrawal order on the account pending determination of the rights of the parties."

[4–8] Although the repealed provision of section 15a was a part of the joint deposit agreement entered into while it was in effect, since its repeal, any restriction it might theretofore have imposed on the depositors' power to contract could survive only by virtue of its continued existence as part of the contract of the parties. The parties could not, however, contract away their power to contract in the future, for the law, not private agreement, determines the essential elements of a valid contract. See, 6 Corbin on Contracts, § 1295, pp. 158–161. A husband and wife may change the character of their property by agreement. Civ.Code, § 158; In re Estate of Wieling, 37 Cal.2d 106, 108, 230 P.2d 808. Clearly implict in the 1953 agreement in this case was the mutual abrogation by the parties of any conflicting provision in their joint tenancy agreement. Their abrogation was effective, since they were free to contract in 1953 without regard to any limitations imposed by the repealed provision.

Ehrman v. Rosenthal, 117 Cal. 491, 49 P. 460, and Fitts v. Mission Health & Beauty Shop, 58 Cal.App. 362, 208 P. 691, cited by defendant are not to the contrary. Those cases correctly hold that two parties to a tripartite agreement cannot change it to the prejudice of the third party. In the present case the bank will in no way be prejudiced by recognizing its depositors' subsequent agreement between themselves.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER and SPENCE, JJ., concur.

McCOMB, J., dissents.

51 Cal.2d 548

PEOPLE of the State of California, Respondent,

v.

John DEWBERRY, Appellant.

Cr. 6335.

Supreme Court of California, In Bank.

Feb. 6, 1959.

Prosecution for murder and for unlawful carrying of a weapon. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered orders denying new trial and the defendant appealed from judgment and order pertaining to the murder charge. The Supreme Court, Traynor, J., held that failure to instruct jury that, if they were convinced beyond a reasonable doubt that defendant was guilty of an offense included within charge of indictment but entertained doubt as to whether it was murder or manslaughter, they should convict defendant only of manslaughter, was error.

Judgment and order denying a new trial reversed as to murder count, and affirmed in other respects.

McComb, J., dissented in part.

Opinion, 327 P.2d 616, vacated.

1. Homicide ⇐268

In prosecution for murder allegedly committed by defendant when decedent took some of defendant's money which he had spread out on a bar and refused to return it to defendant when he demanded it, evidence was sufficient to make a submissible case. West's Ann.Pen.Code, §§ 187, 188.

2. Criminal Law ⇐785(8)

In prosecution for murder and for unlawful possession of a pistol because of prior felony convictions, requested instruction that conviction of a felony may be considered only for purpose of judging credibility of witness and conviction does not necessarily destroy or impair witness' credibility and does not raise a presumption that witness has testified falsely, was properly refused. West's Ann.Pen.Code, § 12021.

3. Homicide ⇐307(1)

In prosecution for murder and for unlawful carrying of a weapon, failure to instruct jury that, if they were convinced beyond a reasonable doubt that defendant was guilty of an offense included within the charge of the indictment but entertained doubt as to whether it was murder or manslaughter, they should convict defendant only of manslaughter, was error. West's Ann.Pen.Code, § 1097.

4. Criminal Law ⇐795(4)

When evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, jury must be instructed that if they entertain reasonable doubt as to which offense has been committed, they must find defendant guilty only of lesser offense. West's Ann. Pen.Code, § 1097.

5. Criminal Law ⇐571

Statute providing that where it appears that defendant has committed a public offense and there is reasonable ground of doubt of which of two or more degrees he is guilty, he can be convicted of lowest of such degrees only, presupposes that jury has concluded that defendant is guilty of some public offense embraced within pleadings but is in doubt as to degree of offense proved. West's Ann.Pen.Code, § 1097.

6. Homicide ⇐21

An unlawful killing may involve not only two degrees of murder, but also included offense of manslaughter.

7. Criminal Law ⇐571

Under statute providing that where it appears that defendant has committed a "public offense" and there is reasonable ground of doubt as to which of two or more "degrees" he is guilty, he can be convicted of lowest of such degrees only, the quoted words refer to all degrees of criminality involved in a criminal act. West's Ann.Pen.Code, § 1097.

See publication Words and Phrases, for other judicial constructions and definitions of "Degrees" and "Public Offense".

8. Criminal Law ⇐561(1)

Principle of reasonable doubt requires an acquittal of an offense when prosecution has not met its burden of proof, and when reasonable doubt exists as between degrees of same offense or as between inclusive and included offense, jury can only convict of crime whose elements have been proved beyond a reasonable doubt. West's Ann. Pen.Code, § 1097.

Gladstein, Andersen, Leonard & Sibbett, George R. Andersen and Norman Leonard, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and John S. McInerny, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of second degree murder and of a violation of section 12021 of the Penal Code (possession of a pistol by an ex-convict). He also appeals from the order denying his motion for a new trial. He contends that the evidence is insufficient to support the verdict and that the refusal to give certain requested instructions was prejudicial error.

[1] The circumstances of the homicide were related at the trial by two witnesses, Jesse Mosley and defendant. Mosley testified that about 7:30 A. M. on Sunday, October 14, 1956, he went to a bar in San Francisco. He sat near the door and consumed two bourbon highballs. He had been in the bar about forty-five minutes when defendant entered and sat about 10 feet from him. Mosley did not know defendant, but had seen him before and had heard his name. Defendant went to the telephone several times and complained about not being able to reach his sister.

In the course of a conversation about gambling between defendant and another customer defendant took a large roll of bills from his pocket. The two agreed to gamble and defendant stated that he did not want any foolishness about his money and that he carried his own protection. He then showed the revolver he was carrying. Defendant repocketed the pistol and the two left the bar. A short time later, defendant returned.

The deceased, Rudolf Glover, entered the bar at about 9 A. M. with a woman whom he introduced as his wife to Mosley and the others. Glover and defendant each bought a round of drinks for the six or seven other customers.

About 10:45 A. M. the television set was turned on for a Forty-Niner football game. Mosley moved to a booth in the rear to see better. About this time defendant told the bartender he wished to take care of his bill and spread his roll of money on the bar.

A few minutes later, two people sat in front of Mosley and blocked his view of the screen, so he started back to his original seat. As he was walking toward the front of the bar he heard defendant accuse Glover of taking his money and demand its return. Glover stated that he was not taking defendant's money but merely keeping it for him to protect him. Defendant told Glover that he did not need his protection, that he had his own protection. Both defendant and Glover were standing, about three bar stools or ten feet apart. Defendant again demanded that Glover return the money.

In the course of the argument, Mosley saw Glover put his hand in his pocket and pass something to Mrs. Glover. Defendant then told Mrs. Glover to put his money on the bar and repeated his demand to Glover. Thereupon defendant took out his revolver, cocked it, and fired once. Glover turned and fell. At no time did Mosley hear Glover threaten defendant or see him make a move toward defendant.

Defendant turned Glover over and went through his pockets. Mrs. Glover began to cry as she put her head on Glover's chest. She then started for the door, but defendant asked her for the rest of his money. When she failed to give it to him, he hit her in the face, knocking her down. He pointed the pistol at her and said, "If you don't give me my money I will kill you too." Mosley took the money from Mrs. Glover. Defendant had the bartender count it for him and when he was told the amount he stated that he was still about $100 short.

Meanwhile, someone had called an ambulance and the police. Officer Dobleman testified that when he arrived at the bar, defendant handed him a .38 calibre revolver with five live rounds and one discharged shell in the cylinder. Defendant told the officer, "He tried to take my money and I did it." Shortly thereafter defendant made substantially the same statement to Inspector McDonald of the homicide detail. It appeared to the officers that at the time he was questioned defendant had been drinking but was in full control of his faculties and had no trouble speaking.

Defendant testified that he was a professional gambler and a car salesman and admitted two prior felony convictions. He had spend the previous night drinking and gambling in San Mateo, had met a friend in San Francisco about 5:00 A. M., had a few more drinks, and went to the bar about 8:00 A. M. He was waiting there to get in touch with his sister to give her money for the care of his mother. While he was waiting, he talked to another customer

about gambling, but he denied showing him the pistol. He went upstairs and gambled with him for about forty-five minutes and won $55.

When he returned to the bar, he had a brief conversation with the bartender about his bar bill. He paid it and then spread his money out along the bar so that the could arrange it according to denomination. He knew he had $1,252. While he was sorting and arranging the money, Mrs. Glover told him to take it off the bar. Defendant told her to mind her own business and she walked away. Glover then walked to the bar and picked up the money. Defendant stopped him and asked him to return it. Glover put some money back on the bar, but defendant could see that five $100 bills were missing. At defendant's request, the bartender counted the money and found about $700. After defendant's repeated demands for the return of his money, Glover reached in his pocket and raised his arm toward defendant. Glover had told defendant that if he did not shut up he would lose more than his money. One James McCoy had told him that the deceased had a reputation of being belligerent. Defendant said he tried to fire the pistol to the right of Glover, but with no intention to hit him. He had won the weapon in the game in San Mateo and was not sure it was loaded until he pulled the trigger. He denied threatening Mrs. Glover.

The testimony of the autopsy surgeon tended to corroborate defendant's story about Glover's raising his arm toward defendant. James McCoy, called by the People in rebuttal, denied telling defendant anything about Glover.

There is no merit in defendant's contention that the evidence was insufficient to support the conviction of second-degree murder. Murder is the unlawful killing of a human being, with malice aforethought. Pen.Code, § 187. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Pen.Code, § 188. The jury could reasonably conclude from the testimony of the prosecution's eyewitness that defendant shot the deceased without the provocation necessary to make the homicide manslaughter or the deliberation and premeditation necessary to make it first-degree murder. Defendant's testimony of provocation served only to create a conflict in the evidence. People v. Wein, 50 Cal.2d 383, 326 P.2d 457; People v. Brust, 47 Cal.2d 776, 783, 306 P.2d 480; People v. Pope, 130 Cal.App.2d 321, 325, 279 P.2d 108.

[2] Defendant contends that the court erred in refusing to give the following instruction:

> "The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you for only one purpose, namely, in judging the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such a witness."

The jury was instructed that it was for them alone to judge the credibility of the witnesses and the weight to be given the evidence offered; that every person is presumed to speak the truth; and that a witness may be impeached by inconsistent statements, by contradictory evidence, or by evidence that he has been convicted of a felony. These instructions correctly stated the law. Moreover, under the circumstances of the present case, the requested instruction was incorrect. Defendant's convictions were not in the evidence "for only one purpose, namely, in judging the credibility of that witness." They were an essential element in the charged violation of the Deadly Weapons Act. Pen.Code, § 12021.

[3] Defendant's most serious contention is that the court erred in refusing to give the following instruction:

"You may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, if, in your judgment, the evidence supports such a verdict under my instructions.

"To enable you to apply the foregoing instruction, if your findings of fact require you to do so, I instruct you that the offense of murder, of which the defendant is charged in Count I of the indictment, necessarily includes the crime of manslaughter.

"If you find that defendant was guilty of an offense included within the charge of the indictment, but entertain a reasonable doubt as to the degree of the crime of which he is guilty, it is your duty to convict him only of the lesser offense." (CALJIC [1946 ed.] Instructions Nos. 115–115A.)

The jury was instructed on the elements of the crimes of murder and manslaughter. The court explained that there are two degrees of murder and that if the jurors were convinced beyond a reasonable doubt that defendant had committed the crime of murder but entertained a reasonable doubt as to the degree, they should give defendant the benefit of the doubt and find him guilty of second degree murder. The jury was also instructed that if they were in doubt as to whether the killing was manslaughter or justifiable homicide, defendant was to be acquitted. Finally, the court instructed the jury that defendant was presumed innocent of any crime until the contrary had been proved, and in case of reasonable doubt, was entitled to an acquittal, and that the presumption of innocence attaches at every stage of the case and to every fact essential to a conviction.

Defendant contends that because the instructions on manslaughter were not accompanied with the further instruction that in the case of a reasonable doubt as between second degree murder and manslaughter, defendant was to be found guilty of manslaughter, the jury was given the impression that the rule requiring a finding of guilt of the lesser offense applied only as between degrees of murder.

[4] It has been consistently held in this state since 1880 that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. People v. Iams, 57 Cal. 115, 121, 130; People v. Newcomer, 118 Cal. 263, 270–271, 50 P. 405; People v. Marshall, 120 Cal. 70, 70–71, 52 P. 129; People v. Burns, 88 Cal.App.2d 867, 871–873, 200 P.2d 134; see also, McAffee v. United States, 70 App.D.C. 142, 105 F.2d 21, 31; People v. Marquis, 153 Cal.App.2d 553, 556–558, 315 P.2d 57; People v. Miller, 67 Cal.App. 674, 678–679, 228 P. 68; 20 A.L.R. 1258, 1259; 26 Am.Jur., Homicide, § 541. The People contend, however, that this rule is inconsistent with section 1097 of the Penal Code, which provides that "When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only." They contend that this section is limited on its face to degrees of the same offense and that the proposed instruction is therefore erroneous because murder and manslaughter are distinct offenses.

[5–7] Section 1097 presupposes that the jury has concluded that the defendant is guilty of some public offense embraced within the pleadings but is in doubt as to the degree of the offense proved. The question presented is whether the words "offense" and "degrees" refer only to the specifically defined degrees of a single offense, or refer to all the degrees of criminality that may be involved in a criminal act. Thus, an unlawful killing may involve not only the two degrees of murder, but also the included offense of manslaughter. There is no reason for not applying the general principle of reasonable doubt to both situations. Given the overriding basic

principle of reasonable doubt, the admonition that the Penal Code is to be interpreted "with a view to effect its objects and to promote justice" (Pen.Code, § 4), and the anomaly that would otherwise result, we conclude that the words "offense" and "degrees" in section 1097 refer to all the degrees of criminality involved in a criminal act.

[8] Even if we were to conclude, however, that section 1097 refers only to specifically defined degrees of single offenses divided into degrees, it would not follow that the instruction is erroneous. In every case the principle of reasonable doubt requires an acquittal of an offense when the prosecution has not met its burden of proof. Thus, whether reasonable doubt exists as between degrees of the same offense or as between the inclusive and included offense, the jury can only convict of the crime whose elements have been proved beyond a reasonable doubt. Narrowly construed, section 1097 at most illustrates the application of the rule in the case of crimes divided into degrees. It does not abrogate its application in other situations. See Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289; City of Los Angeles v. City of Glendale, 23 Cal. 2d 68, 77, 142 P.2d 289; Strand Improvement Co. v. City of Long Beach, 173 Cal. 765, 772–773, 161 P. 975. Accordingly, under either interpretation, it affords no basis for departing from the settled law. People v. Iams, supra, 57 Cal. 115, 121, 130; People v. Newcomer, supra, 118 Cal. 263, 270–271, 50 P. 405; People v. Marshall, supra, 120 Cal. 70, 70–71, 52 P. 129; People v. Burns, supra, 88 Cal.App.2d 867, 871–873, 200 P.2d 134; see also, McAffee v. United States, supra, 105 F.2d 21, 31; People v. Marquis, supra, 153 Cal.App.2d 553, 556–558, 315 P.2d 57; People v. Miller, supra, 67 Cal.App. 674, 678–679, 228 P. 68; 20 A.L.R. 1258, 1259; 26 Am.Jur., Homicide, § 541.

The People contend, however, that the proposed instruction is erroneous in its statement of the rule of reasonable doubt between second degree murder and manslaughter. They object to the language that if you "entertain a reasonable doubt as to the degree of the crime of which he is guilty, it is your duty to convict him only of the lesser offense." They point out that it is only murder that is divided into degrees and contend that the jury would relate "degree of the crime" to degrees of murder, "lesser offense" to manslaughter, and conclude that under the proposed instruction doubt as to the degree of murder would require a verdict of manslaughter. The instruction cannot reasonably be construed to reach such an obviously absurd result. When read in context it is obvious that "degree of the crime" refers, not to degrees of murder alone, but to degrees of criminal homicide including manslaughter, and that "lesser offense" refers to the lesser of the two degrees of criminal homicide between which the doubt exists. It thus makes clear that the principle of reasonable doubt applies not only between first and second degree murder but also between second degree murder and manslaughter.

The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder. This case was a close one on its facts. While there was sufficient evidence to support a conviction of second degree murder, a finding that the offense was manslaughter would be equally warranted. Even if the jury disbelieved defendant's testimony that he did not intend to hit Glover and concluded that the crime was not involuntary manslaughter, it was still presented with substantial evidence of provocation, much of which was undisputed, that would support a finding of voluntary manslaughter. See People v. Keel, 91 Cal.App. 599, 604–606, 267 P. 161. Glover had taken defendant's money and only returned part of it, passing the rest to his

wife. Defendant could reasonably conclude that Glover intended to steal his money, and he testified that Glover made a menacing gesture toward him and told him that if he did not shut up he would lose more than his money. Defendant was entitled to have this evidence considered in the light of the rule of reasonable doubt, not only on the issue of self defense, but also on the issue of provocation sufficient to reduce the killing from second degree murder to manslaughter. The record demonstrates that the jury considered the distinction between these offenses crucial and had difficulty with it. Six hours after the case was submitted to them, they returned to the courtroom and requested "once again the legal interpretation of murder in the second degree and voluntary manslaughter," and again the defendant requested that his instruction be given, and again his request was denied.

The proposed instruction should have been given. It went directly to the defense of reasonable doubt of defendant's guilt of second degree murder; it was clearly responsive to an issue raised by the evidence (People v. Carnine, 41 Cal.2d 384, 389–390, 260 P.2d 16; People v. Hudson, 45 Cal.2d 121, 126, 287 P.2d 497), and it was essential to cure the misleading effect of its absence in the light of the other instructions given. Under these circumstances there exists "such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result," and accordingly the error is prejudicial. People v. Watson, 46 Cal.2d 818, 837, 299 P.2d 243, 255. The error did not, however, have any bearing on defendant's conviction of violating Penal Code section 12021.

The judgment and the order denying a new trial are reversed as to count one charging murder. In all other respects they are affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

McCOMB, Justice (concurring and dissenting).

I would affirm the judgment for the reasons stated by Mr. Presiding Justice Kaufman in the opinion prepared by him for the District Court of Appeal in People v. Dewberry, Cal.App., 327 P.2d 616.

51 Cal.2d 523

PEOPLE of the State of California, Respondent,

v.

Vender Lee DUNCAN, Appellant.

Cr. 6287.

Supreme Court of California, In Bank.

Feb. 3, 1959.

Defendant was convicted in the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., for first-degree murder, and he appealed. The Supreme Court, Gibson, C. J., held that the trial court had properly denied defendant's request, made after fixing of death penalty and prior to commencement of sanity proceeding, that he be permitted to conduct further voir dire examination of jurors to determine whether they had become biased as a result of fixing of that penalty.

Affirmed.

1. Homicide ⇐228(1)

Corpus delicti of first-degree murder consists of two elements, namely, death of victim and existence of some criminal agency as cause.

2. Criminal Law ⇐517(4)

Once prima facie proof of corpus delicti is made, extrajudicial statements, admissions and confessions of defendant may be considered in determining whether all of elements of crime have been established.

3. Homicide ⇐253(1)

In homicide prosecution, evidence, exclusive of defendant's confessions, was sufficient to establish commission of first-degree murder. West's Ann.Pen.Code, § 189.

4. Criminal Law ⇐404(4)

In homicide prosecution, 12-inch pipe taken from defendant at time he was arrested as a vagrant was relevant in connection with his statement that he had struck victim with a piece of pipe.

5. Searches and Seizures ⇐3(1)

Under circumstances disclosed, in homicide prosecution, officers, who had observed defendant acting suspiciously after midnight in neighborhood where attacks had occurred, and who had observed table knife protruding from his pocket, were justified in questioning and searching defendant.

6. Criminal Law ⇐384

In homicide prosecution, it was not error to reject defendant's offer to prove that another crime, similar in circumstances to the ones for which he was being prosecuted, had occurred while he was in custody.

7. Criminal Law ⇐625, 1206(1)

Penal Code section, providing for separate trials of issues of guilt, penalty, and sanity, is constitutional. West's Ann. Pen.Code, § 190.1.

8. Jury ⇐131(11)

In homicide prosecution, trial court properly denied defendant's request, made after fixing of death penalty and prior to commencement of sanity proceeding, that he be permitted to conduct further voir dire examination of jurors to determine whether they had become biased as a result of fixing of that penalty. West's Ann.Pen. Code, § 190.1.

9. Criminal Law ⇐854(8)

In homicide prosecution, it was not error to permit jury to separate after it had returned verdict of guilty of murder in first degree but prior to commencement of sanity proceeding. West's Ann.Pen.Code, § 190.1.

10. Criminal Law ⇐871(2)

In homicide prosecution, verdicts relative to penalty and to sanity were not rendered invalid by fact that they were not signed by foreman who had signed verdicts of guilty but, instead, were signed by different foremen. West's Ann.Pen.Code, § 190.1.

Edward T. Mancuso, Public Defender, and Waldo F. Postel, Jr., Asst. Public Defender, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., and Walter H. Giubbini, Asst. Dist. Atty., San Francisco, for respondent.

GIBSON, Chief Justice.

A jury found defendant guilty of two counts of first degree murder. In separate proceedings the penalty was fixed at death for each count, and defendant was found to have been sane when the offenses were committed. Pen.Code, § 190.1. His motions for a new trial and modification of the verdicts were denied, and he was sentenced to death. This appeal comes before us automatically. Pen.Code, § 1239, subd. (b).

Two police officers found the dead body of Elizabeth Manning on September 4, 1955, in her apartment on Webster Street near Fulton Street in San Francisco. About $65 in currency and some silver were missing. Mrs. Manning, who was about 75 years old, had been beaten about the head, face, neck and chest, a number of bones had been fractured, there were injuries to her genitalia, and spermatozoa were present in her vagina. The autopsy surgeon testified that Mrs. Manning's death was due to strangulation.

Mrs. Ada Romig, an elderly woman, was found on April 5, 1957, in a vacant lot which ran from Fulton to Grove Street between Fillmore and Webster Streets in San Francisco. She had been attacked at

the Grove Street end of the lot and dragged through it to where she was found near Fulton. There were extensive injuries about her head, face and neck. A small abrasion was found on the inside of the left thigh, and the opening to the vagina was badly bruised and bleeding. She died on May 9, 1957, as a result of the injuries. Officers searched the lot and found articles of her clothing in several places, but they did not find her purse.

Approximately three weeks after the attack on Mrs. Romig, police officers observed defendant and another man some time after midnight on the corner of Octavia and McAllister Streets, four and a half blocks from the lot where the attack occurred. Defendant and the other man made a number of starts in different directions but each time went back to the corner. When defendant saw the officers he turned around and started to walk in another direction. The officers approached defendant, saw the blade of a table knife protruding from his pocket, and took the knife from him. They questioned him as to his reason for being in the area, and he gave several conflicting stories. He was placed under arrest as a vagrant, and, when he was searched, the officers found a 12-inch pipe with an elbow on it inside the front of his trousers.

In November 1957, while serving a county jail sentence for another offense, defendant asked to speak to members of the homicide department. He told the officers that in the early part of September 1955 he had killed a woman with whom he had been having an "affair" and that he had taken two watches and $35 from her.

The police officers asked defendant to show them where the crime had taken place, and he directed them to 804 Webster Street, the location of Mrs. Manning's apartment. Upon arriving there he said that his earlier statement was false in some respects, that he wanted to correct it, that he had never seen Mrs. Manning before he entered her apartment, that she awoke and started to scream as he was taking about $200 from a drawer, that he hit her numerous times and started to choke her, that he then took about $30 from her purse, and that after she again cried out he raped and choked her. At the time the police officers discovered Mrs. Manning's body the front and rear doors of the apartment were locked, and the only apparent method of entry was through an unlatched window. When asked how he entered the apartment, defendant led the officers to a garbage pail, which was under the steps of the adjoining home and not visible from the street, and showed them how he had placed it under the window and climbed into the room. He also said that he had wrapped his hands in handkerchiefs so that he would leave no fingerprints.

A few days later defendant told police officers he had killed another woman in a lot on Fillmore Street, and he directed them to the place where Mrs. Romig had been attacked. He told the officers that he accosted Mrs. Romig at the corner of Grove and Webster Streets and, after threatening her with a knife, forced her into the lot where he shoved her to the ground, choked her with a piece of wire, struck her repeatedly over the head with a piece of pipe, a cement brick and other things, and then began an act of intercourse. Due to light in the area and the sound of voices he became afraid that someone might see or hear him, and he dragged her to an opening between a wall and a shed. Mrs. Romig began to moan, so he dragged her farther into the lot and again had an act of intercourse but stopped when he was frightened by some noise. He moved her to another portion of the lot and took fifty cents and some codeine from her purse.

Defendant repeated his confessions the next day, and his statements, which were recorded and which the jury heard, were substantially the same as those he had previously given to the police at the scenes of the crimes.

At the trial defendant admitted making the confessions but denied that he had committed either of the crimes and said that he made the confessions because he wanted

to die and that he had attempted suicide three times previously. He explained his knowledge of the crimes by stating that he learned some of the details from newspaper accounts and some from seeing police reports on an occasion when he was arrested in 1956, and that with respect to others he had been prompted by the police when he was taken to the scenes of the crimes. On cross-examination he admitted prior convictions of rape and assault to commit murder.

There is no claim that the evidence is insufficient to support defendant's conviction of the murder of Mrs. Manning.

[1–3] With respect to the Romig homicide, defendant contends that every element of the corpus delicti, including the degree of the crime, must be established without reference to his extrajudicial statements, and he asserts that any question of the homicide occurring during the commission of a robbery or rape was raised by his confession and that the People, as a matter of law, established only a murder in the second degree. It is settled, however, that the corpus delicti in a case involving first degree murder consists of two elements, namely, the death of the victim and the existence of some criminal agency as the cause. People v. Cullen, 37 Cal.2d 614, 624–625, 234 P.2d 1; People v. Ives, 17 Cal.2d 459, 463–464, 110 P.2d 408. Once prima facie proof of the corpus delicti is made, the extrajudicial statements, admissions, and confessions of a defendant may be considered in determining whether all the elements of the crime have been established. People v. McMonigle, 29 Cal.2d 730, 738–740, 177 P.2d 745. It is clear from the evidence other than the confessions that Mrs. Romig met her death through a criminal agency. Moreover, the circumstantial evidence, without the confessions, is sufficient to establish the commission of first degree murder, since it supports an inference that Mrs. Romig was killed in the perpetration of, or attempt to perpetrate, rape. Pen.Code, § 189; cf. People v. Sameniego, 118 Cal.App. 165, 170–171, 4 P.2d 809, 5 P.2d 653.

[4, 5] The 12-inch pipe taken from defendant at the time he was arrested as a vagrant was relevant in connection with his statement that he had struck Mrs. Romig with a piece of pipe. An objection that the pipe was obtained as the result of an unlawful search and seizure was properly overruled. In view of the circumstances related above, the officers were clearly justified in questioning and searching defendant.

[6] Defendant contends that the trial court erroneously rejected his offer to prove that in March 1958, when he was in custody, a third woman was murdered in San Francisco, that she had been strangled, and that she had suffered injuries similar to those inflicted upon Mrs. Manning and Mrs. Romig. He argues that the offered evidence would have tended to show that the same person committed all the crimes and that, since defendant could not have committed the third murder, he was innocent. However, the facts which defendant sought to prove are at best too remotely connected wtih the issues of this case to show that the trial court erred in refusing the offer.

After the jurors had been deliberating the issue of sanity for several hours they returned to the courtroom and asked whether, if defendant was sane at the inception of the crime, they were to infer from this that he was legally sane throughout the crime. In reply the judge repeated instructions previously given on sanity, including directions that the jury must determine whether defendant was sane or insane at the time of the commission of the offenses and ascertain the condition of his mind at the "precise times" of the criminal conduct of which he "has been found guilty." The judge remarked that he realized it would be difficult for the jurors to determine the mental condition of a person at any definite period during the commission of a crime, and defendant asserts that this remark took from the jury the right to find that he became legally insane before committing murder or rape if the jury found that he was sane when

he commenced the crime of burglary or assault and battery in Mrs. Manning's apartment or when he forced Mrs. Romig into the lot. The instructions informed the jury that its duty was to determine defendant's mental condition at the time of the consummation of the crimes of which he was convicted, namely, the murders, and there is no sound basis for concluding that the remark in question was understood as anything more than a recognition that the performance of that duty would be difficult.

[7] There is no merit in defendant's contentions that section 190.1 of the Penal Code, adopted in 1957, which provides for separate trials of the issues of guilt, penalty, and sanity, is unconstitutional. People v. Feldkamp, 51 Cal.2d 237, 331 P.2d 632; People v. Ward, 50 Cal.2d 702, 328 P. 2d 777; cf. People v. Cordova, 14 Cal.2d 308, 309 et seq., 94 P.2d 40.

[8] The trial court properly denied defendant's request, made after the fixing of the death penalty and prior to the commencement of the sanity proceeding, that he be permitted to conduct further voir dire examination of the jurors to determine whether they had become biased as a result of the fixing of that penalty. Section 190.1 of the Penal Code provides that, where the defendant is convicted by a jury of an offense which may involve the death penalty, the same jury shall determine the issues of penalty and insanity "unless, for good cause shown, the court discharges that jury * * *." The section clearly contemplates that a jury, after fixing the penalty at death, may be called upon to determine the question of insanity and that the imposition of the death penalty, without more, does not constitute bias on the part of the jurors or good cause for discharge. Defendant conceded to the trial court that he had no information in his possession indicating disqualification of any of the jurors, and he admitted that he had been given opportunity before the jurors were sworn to examine them as to whether or not their judgment on the issue of sanity would be affected by the fixing of the death penalty. In an analogous situation involving the death penalty prior to the enactment of section 190.1, it was held that the trial court was not required to let the defendant re-examine the jurors for cause after trial of the general issue and before the proceeding to determine sanity. People v. Goodwin, 9 Cal.2d 711, 715, 72 P.2d 551; see People v. Wein, 50 Cal.2d 383, 408, 326 P.2d 457; cf. People v. Woods, 19 Cal.App.2d 556, 558, 65 P.2d 940; People v. Foster, 3 Cal.App.2d 35, 39–40, 39 P.2d 271; People v. Davis, 94 Cal.App. 192, 197, 270 P. 715.

[9] There was no error in permitting the jury to separate after it returned the verdicts of guilty of murder of the first degree. Section 190.1 of the Penal Code, as we have seen, provides for separate proceedings on the issues of guilt, penalty, and sanity, and, under certain circumstances, it permits the hearing of these issues by different juries. The trial of the issues of penalty and sanity may take several days, and there does not seem to be any greater reason to prevent the jury from separating prior to or during these proceedings than during the trial of the issue of guilt.

[10] The verdicts relative to penalty and to sanity were not rendered invalid by the fact that they were not signed by the foreman who signed the verdicts of guilty but, instead, were signed by different foremen. No reason appears why the jury should not be permitted to choose different foremen for the separate proceedings upon the issues of guilt, penalty, and sanity.

The judgment and the order denying a new trial are affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

51 Cal.2d 510

Nick VANGEL et al., Respondents,

v.

Charles VANGEL, Appellant.

L. A. 24725.

Supreme Court of California,

In Bank.

Feb. 3, 1959.

Action for dissolution of partnership and for accounting. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment, and the defendant appealed. The Supreme Court, Carter, J., held that where amounts due partner causing dissolution of partnership, as his original share of partnership assets, had been deposited to his order, no profits were thereafter due him from the use of such assets.

Affirmed.

Opinion, 327 P.2d 136, vacated.

1. Partnership ⇐328(3)

In action for dissolution of partnership, evidence warranted finding that partner who was expelled from partnership for cause and by judicial decree and who continued to participate with former partners in operation and management of business without protest and with acquiescence of former partners was entitled to compensation for such services at rate of $200 per month.

2. Appeal and Error ⇐1097(1), 1195(1)

In action for dissolution of partnership, where it was decided on former appeal that certain amounts were properly disposed of in determining net worth of partnership on date of dissolution, the matter was res judicata and could not be relitigated in subsequent proceedings in the trial or appellate courts.

3. Appeal and Error ⇐1097(1), 1195(1)

In action for dissolution of partnership, where it was determined on prior appeal that trial court properly applied the statute relating to continuation of partnership business by partners not causing the dissolution, the party causing the dissolution could not assert in subsequent proceedings that statute was not properly applied. West's Ann.Corp.Code, § 15038(2)(b).

4. Appeal and Error ⇐1195(1)

Where value of partnership's ranch on date of dissolution had been fixed and on review such valuation was declared to be "definitive of that question", the partner causing dissolution could not thereafter assert right to share on a different valuation based on what the ranch, because of its location, would be worth for subdivision purposes.

5. Partnership ⇐306

Where amounts due partner causing dissolution of partnership, as his original share of partnership assets, had been deposited to his order, no profits were thereafter due him from the use of such assets.

Pacht, Ross, Warne & Bernhard, Isaac Pacht and Harvey M. Grossman, Los Angeles, for appellant.

Harold M. Heimbaugh, Los Angeles, and George W. Rochester, La Habra, for respondents.

CARTER, Justice.

Defendant, Charles Vangel, appeals from a judgment entered in an action instituted in April, 1946, by plaintiffs, Nick and Ernest Vangel, for dissolution of a partnership. The case has now been tried four times and this appeal is from the judgment entered after the fourth trial. Vangel v. Vangel, 116 Cal.App.2d 615, 254 P.2d 919; Vangel v. Vangel, 45 Cal.2d 804, 291 P.2d 25, 55 A.L.R.2d 138.

In May, 1944, Nick, Ernest and Charles Vangel, brothers, entered into an agreement for the purchase and operation of a 360-acre citrus ranch. The agreement provided that title was to be taken in the individual names of the three brothers, each of whom

was to contribute his pro rata share of the purchase price and each to own a one-third interest in the ranch. The purchase of the ranch was consummated for $340,000, with a down payment of $120,000. Charles was unable to pay his full share of the down payment and borrowed $25,000 from Nick and Ernest to make up his share of $40,000.

After operations had commenced a dispute arose among the brothers which culminated in an action by Nick and Ernest to dissolve the partnership. Inasmuch as our decision here must necessarily turn upon a construction of the opinion rendered by the District Court of Appeal in Vangel v. Vangel, 116 Cal.App.2d 615, 254 P.2d 919, and by this court on December 23, 1955, we will set forth in some detail the pertinent portions thereof. Unless otherwise noted, the emphasis is here added. In Vangel v. Vangel, 45 Cal.2d 804, 806, 807, 808, 809, 810, 291 P.2d 25, 26–29, we held: "By the prior judgment, a dissolution was decreed effective as of June 15, 1950. The court found that Charles wrongfully caused the dissolution and concluded that Nick and Ernest were privileged to purchase his interest. The value of the ranch was fixed at $235,000, and a finding was made as to the value of Charles' interest in the partnership. According to another finding, he was entitled to participate in profits accruing between the date of dissolution and January 1, 1951.

"Upon the prior appeal [Vangel v. Vangel, 116 Cal.App.2d 615, 254 P.2d 919], findings as to the value of the ranch property and Charles' fault in causing the dissolution were approved. *It was held that the trial judge properly allowed the plaintiffs to purchase Charles' interest, but that he erred in failing to include certain items in his valuation of it.* Furthermore, said the District Court of Appeal, *the right of Charles to participate in profits accumulated by joint use of the partnership assets should not have been terminated as of January 1, 1951. That period, it was determined, should extend so as to include the proceeds from fruit substantially matured and soon ready for marketing,* the final date to be left to the sound judgment of the chancellor. As to those matters, the judgment was reversed with directions for an accounting.

"The amounts of profits from the operation of the ranch after dissolution of the partnership and of set-offs, claims and advances, as determined upon the retrial, are not now disputed. The value of Charles' interest in the partnership at the time of dissolution based upon those amounts, *was found to be 23.96%* of the partnership net worth. *The court also declared that Charles is entitled to that percentage of the profits from the operation of the ranch accruing between the date of dissolution and the winding up of the partnership affairs.* Another finding is that 'whatever services defendant may have rendered toward the conduct of the partnership affairs, from the date of the dissolution of the partnership * * * was voluntary on his part and against the wishes and directions of the plaintiffs.'

"The judgment gives Nick and Ernest, *inter alia,* the right to purchase Charles' interest in the partnership for its value as determined at the retrial, *plus interest on that amount from September 8, 1953.* Charles is allowed 23.96% of the profits accruing prior to that date and the same percentage of certain proceeds from sales of crops. *He is denied any wages for services performed after the dissolution of the partnership* and must pay 23.96% of the costs of the audit.

"Charles contends that the trial judge erred in his computations of the values at the time of the dissolution, of the respective partnership interests and of the partners' shares of the profits accruing between dissolution and the winding up of the partnership affairs. He also challenges the finding that his post-dissolution services were 'voluntary' and 'against the wishes and directions of the plaintiffs' as being without support in the evidence. Finally, he contends that he should not have been

taxed any of the costs of conducting the audit upon the retrial.

"With regard to the value of the partnership interests, Charles argues that the trial judge erred in including in the partners' capital accounts items which properly are personal obligations of the partners *inter sese*. He objects particularly to the inclusion of an item of $25,000, advanced to him by the other partners upon the purchase of the ranch, and another one of $42,000, which his brothers assertedly withdrew improperly from partnership funds.

"Upon the former appeal, however, it was held that these items were, respectively, an obligation owing to the partnership and a distribution of profits. By including those items in his computations of the values of the partners' interests in the partnership, the trial judge followed the mandate of the District Court of Appeal: 'In ascertaining such interest not only is the value of the ranch to be considered as of that date [June 15, 1950] as well as other capital assets, liabilities and expenses, but also the claims which the partnership had against the brothers *and their set-offs among themselves* should have been computed as of June 15, 1950, with interest to that time.' Emphasis added, 116 Cal.App. 2d 629–630, 254 P.2d 928. The court further said 'in determining the respective financial interests in the partnership business as of that date consideration must be given to the $25,000 which plaintiffs advanced for defendant, and to the $42,000 which plaintiffs improperly withheld and distributed, together with interest on said sums to date of dissolution. All other assets and liabilities of the partnership, together with any claims of the parties *inter se*, must be included in the ascertainment of the respective interests of the plaintiffs and the defendant.' * * *

"In attacking the portion of the judgment limiting him to 23.96% of the post-dissolution profits, Charles has presented several theories as justifying a larger amount. *It is unnecessary to consider all of them, however, because the computation of his share was made upon an erroneous basis.*

"Upon the former appeal it was held that the trial judge was correct in concluding that the partnership had been dissolved by reason of Charles' breach of the partnership agreement and that the remaining partners had exercised their privilege of continuing the partnership business. Corp. Code, § 15038(2) (b). In that situation, Charles was entitled to have computed the value of his interest in the partnership, exclusive of his share of the good will of the business, and less any damages caused to his copartners. Corp. Code, § 15038 (2) (c) par. II. For the use of his partnership assets in the continuing business, pending a settlement of the accounts, he was entitled to receive 'as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option * * * in lieu of interest, the profits *attributable to the use of his right in the property* of the dissolved partnership.' Emphasis added; Corp. Code, § 15042. Said the District Court of Appeal, *'From the position defendant has taken on this appeal it is fair to say that he has elected to take profits rather than interest on the value of his share of the partnership.'* 116 Cal.App.2d 629, 254 P.2d 928.

"The record presents the rather unusual situation of a partner, expelled from the partnership for cause and by judicial decree, continuing to participate with his former partners in the operation and management of the business. Charles contends that he is entitled to receive compensation for services so performed. In reply, his brothers rely upon the finding that his post-dissolution services were voluntary and against their wishes. However, the evidence does not support that finding. It appears that Charles continued to participate in the business in substantially the same manner as before the action for dissolution. There is no evidence of any protest by his brothers. On the contrary, they appear to have acquiesced fully in his continuing services.

"Section 15042 of the Corporations Code fixes the right of one retired from a partnership for cause, or the personal repre-

sentative of a deceased partner, to recover compensation for the use of his assets in the continuing business pending an accounting. In such case, he is entitled to 'the profits attributable to the use of his right in the property.' As a practical matter, his share of the profits usually is computed on the basis of the ratio that his share of the partnership assets bears to the whole of them. [Citations.] However, that division may not be equitable when the contribution to profits from capital is relatively minor in comparison to the contribution from the skills or services of one conducting the business. In such a case, the managing partner may be entitled to a greater share of the profits. [Citations.] Although such a method of dividing profits is usually spoken of in terms of providing extra compensation for the managing ex-partner, in reality it merely reflects the statutory requirement that the retired or deceased partner be allowed the profits attributable to his right in the assets used in the business.

"No California case considers the right to compensation for services in a continuing business of one whose fault has caused the dissolution of the partnership. The authorities in other jurisdictions are in conflict. [Citations.] Those which deny recovery generally proceed upon a theory similar to the unclean hands principle; most of the decisions which allow recovery are based upon the principle that one who seeks equity must do equity.

"In the present case the balance of the equities favors the allowance of compensation based upon services rendered. The type of operation here shown is one which involves a considerable amount of service and skill in the cultivation and harvesting of a citrus crop. Furthermore, it would be inequitable to deny Charles compensation for his services when his brothers acquiesced in them.

"The respondents [plaintiffs] take the position, however, that the requirement that profits be apportioned according to the values of the partnership interests without compensation to Charles for his post-dissolution services is the law of the case as established in Vangel v. Vangel, supra. It is unnecessary to pass upon this contention. 'The doctrine of the law of the case is recognized as a harsh one * * * and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision.' England v. Hospital of Good Samaritan, 14 Cal.2d 791, 795, 97 P.2d 813, 814. Even if the decision upon the former appeal be construed as limiting the apportionment of profits in the manner suggested, it would be unjust to do so, and the decision should not be followed to that extent.

"The judgment, insofar as it determines the value of the partnership interests and the total amount of post-dissolution profits to be distributed among the ex-partners, is based upon findings which are supported by substantial evidence. However, those profits are divided solely upon the basis of the relative values of the partners' interests in the partnership property. The amount of profits attributable to the use of Charles' share of the assets and also those allocable to his services in the continuing business should have been considered in the apportionment.

"No error is shown in the award of costs. A proceeding to dissolve and liquidate a partnership is controlled by equitable principles [citations] and the trial judge has a broad discretion in fixing costs [citations].

"The judgment is reversed with directions to the trial court to determine, in accordance with this opinion, the respective share of the profits to which each partner is entitled. In all other respects the judgment is affirmed. The costs upon this appeal shall be divided equally between the appellant and the respondents."

Summary of Directions:

We held (in addition to what had theretofore been adjudicated):

1. That Charles was entitled to a share of the post-dissolution profits attributable to

the use of his share of the partnership assets.

2. That Charles was entitled to compensation for his services in the continuing business.

3. That Charles was not limited to 23.96% of the post-dissolution profits because the contribution of his services in managing the ranch had not been taken into consideration.

The 23.96 percentage was achieved in this way:

Partners' Capital: Gross assets of partnership (with value of partnership real estate, improvements and supplies fixed at $235,000) less gross liabilities.

	Nick Vangel	Ernest Vangel	Charles Vangel	Total
Balance, at 33⅓ per cent each	$67,611.98	$67,611.99	$67,611.99	$202,835.96
Adjustments—Liability of Charles Vangel to Nick and Ernest Vangel in the amount of $25,000, plus interest at 7 per cent from April 16, 1945 to June 15, 1950	17,021.23	17,021.23	(34,042.46)	
Liability of Nick and Ernest Vangel to Charles Vangel in amount of $14,000 (⅓ of $42,000), plus interest at 7 per cent from May 27, 1949 to June 15, 1950	(7,515.51)	(7,515.51)	15,031.02	
Financial interests	$77,117.70	$77,117.71	$48,600.55	
Interest in percentages	38.02%	32.02%	23.96%	

After our decision, upon the retrial, the court found:

1. That this court affirmed the 23.96 per cent figure, both as to the former partnership interests and the post-dissolution profits from June 15, 1950, the adjudged dissolution date, "to and including the 1953 crops harvested and unharvested, *the cut-off date being May 12, 1953.*" (Finding III.)

2. That defendant's interest in the value of the ranch, at the time of dissolution, on the basis of 23.96 per cent was found by Judge Vickers to be $37,440.45; that this figure was affirmed by this court. (Finding IV.)

3. That defendant's interest "in capital assets (profits) at the date of dissolution of the partnership was $48,600.55. (Finding IV.)

4. That defendant's interest in *post-dissolution* profits from June 15, 1950, to May 12, 1953 "the terminal date found by Judge Vickers and affirmed by the Supreme Court" amounted to $45,849.39. (Finding IV.)

5. That certain monies had been paid to plaintiffs subsequent to May 12, 1953, and up to October 13, 1953, and that defendant's interest therein was $9,024.74. (Finding IV.)

6. That the "total of Defendant's interest 'attributable to the use of Charles' (Defendant) share of assets' in the former partnership is $140,915.13." (Finding IV.)

7. That Charles had withdrawn from the total sum of $140,915.13 the sum of $81,999.45, leaving a balance due him of $58,915.68 (this latter sum is exclusive of the compen-

sation found to be due to defendant as will hereinafter appear). (Finding VI.)

8. That Charles had not been the exclusive manager and supervisor of the ranch; that "much" of what defendant did was over the protest of the plaintiffs and not with their "full acquiescence"; that defendant's services were of the management type and not that of a mere employee; that the post-dissolution services rendered by defendant were from June 15, 1950 to November 10, 1953; that defendant rendered no services thereafter. (Finding VII, in part.)

9. "That it is true the value of services for managing and supervising a citrus ranch the size of the cultivated portion of the Cascade Ranch is from $193.75 to $233.50 a month. The court finds that the services of Defendant are worth on the average not to exceed $200 a month for the period from June 15, 1950 to November 10, 1953, or a total amount of $8,200.00." (Finding VII.)

10. It was provided that because of a stipulation entered into between the parties, defendant was to pay 23.96 per cent of $1,950 charged by an accountant employed by the parties. (Finding VIII.)

Charles contends that the trial court erred in terminating his right to profits as of May 12, 1953. In subheading 4, just set forth, we pointed out that Finding IV is to the effect that Judge Vicker's finding of the terminal date as May 12, 1953, was affirmed by this court. There is no such affirmation. In commenting upon the decision of the District Court of Appeal in Vangel v. Vangel, 116 Cal.App.2d 615, 254 P.2d 919, we said that Charles' right to participate in post-dissolution profits "should not have been terminated as of January 1, 1951. That period, it was determined, should extend so as to include the proceeds from fruit substantially matured and soon ready for marketing, the final date to be left to the sound judgment of the chancellor." Vangel v. Vangel, 45 Cal.2d 804, 806, 291 P.2d 25. In a memorandum ruling signed February 4, 1957, by Judge Clarence M. Hanson it is stated: "The findings of Judge Vickers, carried into the judgment he rendered, granted to the defendant 23.96 per cent of the value of the partnership property ($235,000) as of the date of dissolution on June 15, 1950, plus 23.96 per cent of the post-dissolution profits from June 15, 1950 to and including the 1953 crops harvested and unharvested on May 12, 1953, but as he did not include anything for the services rendered by the defendant from June 15, 1950 to that date, the judgment was reversed with instructions to ascertain the amount. *The Supreme Court did not suggest that the cut-off date was to be May 12, 1953 but that is probably what it had in mind. However, if a later date should be proper, as the defendant contends, it may not in any event go beyond November 10, 1953.* * * *" The memorandum opinion then sets forth part of an affidavit signed by Charles wherein he states he has done no work on the ranch subsequent to November 10, 1953. November 10, 1953, was apparently the date judgment was entered after the third trial.

In the alternative, Charles argues that if he is not entitled to a share of the profits subsequent to May 12, 1953, that he is entitled to interest on the balance due him as of that date. Section 15042 of the Corporations Code provides that a partner in Charles' position is entitled to "an amount equal to the value of his interest in the dissolved partnership" *or* "In lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership." The District Court of Appeal noted (116 Cal.App.2d 629, 254 P.2d 928) that "From the position defendant has taken on this appeal it is fair to say that *he has elected to take profits rather than interest on the value of his share in the partnership.*" See, also, Vangel v. Vangel, 45 Cal.2d 804, 808, 291 P.2d 25.

[1] By Charles' own admission, he performed no services after November 10, 1953, the date on which the trial court terminated any right to compensation for services. He does argue that his services had been found, on a prior trial, to be worth $750 per month as compared with the $200 per month awarded him on the instant trial. It is sufficient to note that new evidence was adduced at the trial, the judgment of which

is now under consideration, and that there is ample evidence in the record to substantiate the trial court's finding that Charles' services were worth $200 per month, or a total amount of $8,200.

[2] Charles argues, as he has done before, that the 23.96 per cent figure is incorrect and seeks to relitigate the disposition of the two items of $25,000 and $42,000 which were discussed at length in Vangel v. Vangel, 116 Cal.App.2d 629–630, 254 P.2d 927–928, and in Vangel v. Vangel, 45 Cal.2d 804, 807, 291 P.2d 25. We did not say, in the latter case, that the 23.96 per cent figure was incorrect because of the disposition of the two amounts, but that Charles' share of the post-dissolution profits was incorrect because his right to compensation had not been taken into consideration. There is no merit to this contention inasmuch as the matter is res judicata.

[3] There is no merit to Charles' contention that the trial court erred in applying the provisions of section 15038, subdivision (2) (b) of the Corporations Code. This was held to be correct and proper in Vangel v. Vangel, 116 Cal.App.2d 615, 628, 254 P.2d 919, and reaffirmed by this court in Vangel v. Vangel, 45 Cal.2d 804, 808, 291 P.2d 25.

[4] There is no merit to Charles' contention that he is entitled to share in what he claims is the present value of the ranch, the sum of $2,000,000. His claim is based on his argument that because of the location of the ranch it *will* have that value for subdivision purposes. In Vangel v. Vangel, 116 Cal.App.2d 615, 633, 254 P.2d 919, 930, the court noted that the valuation of $235,000 placed on the ranch by the trial court at the date of dissolution of the partnership was "definitive of that question." Furthermore, section 15042 of the Corporations Code provides that the retiring partner's interest "*at the date of dissolution*" shall be ascertained. See, Vangel v. Vangel, 116 Cal.App.2d 615, 627, 628, 629, 254 P.2d 919.

[5] Plaintiffs argue that the sum of $38,090.45 ($37,440.45 plus $650 interest) has been available to Charles since September 10, 1953. This statement is substantiated by the record. Charles' Exhibit "A," the Pritkin, Finkel & Company Accountants' Report, page 2, shows such deposits in escrow to Charles' account. Plaintiffs also point out that the amount of the judgment ($67,115.68) after the fourth trial, has been in escrow since May 3, 1953. The record shows (Charles' Exhibit "A") that from the $38,090.45 deposited in September, 1953, Charles has withdrawn the sum of $6,982.10. The record also shows (as reflected in the findings) that Charles had made other withdrawals in the sum of $75,017.35.[1] It was then found that Charles had a balance due him of $58,915.68 plus the sum of $8,200 as compensation for his services, making a total due Charles of $67,115.68, which has been deposited in escrow to Charles' account since May, 1957. It appears to us that the trial court correctly carried out the mandate of the District Court of Appeal and that of this court and that there has been no error. After the amounts due Charles as his original share of the partnership assets had been deposited to his order, it is obvious that no profits were due him from the use of such assets. Charles' interest in the real property had been adjudged to be $37,440.45; his interest as of June 15, 1950 (the date of dissolution), is shown by his Exhibit "A" to be $48,600.55; his share of the post-dissolution profits from June 15, 1950 to May 12, 1953, as shown by Charles' Exhibit "A" amount to $45,849.39; and his share of the profits on the 1952–1953 crop which was apparently harvested by October 13, 1953, amount to $9,024.74, or a total balance of $140,915.13. Charles' withdrawals from this amount have been heretofore set forth. It will be recalled that in Vangel v. Vangel, 116 Cal.App.2d 615, 630, 254 P.2d 919, 928, it was held that Charles should be entitled to his share of the proceeds of

1. It appears from a letter written by Judge Hanson, dated April 11, 1957, to the attorneys of record, that defendant Charles had received this sum directly from the partnership.

a "crop substantially matured and soon ready for market. While no formula or precise definition can be laid down to determine when such fruit has substantially matured, this determination can properly be left to the sound judgment of the chancellor." As heretofore noted, there was no petition for hearing after that decision, and our opinion in Vangel v. Vangel, 45 Cal.2d 804, 291 P.2d 25, did not disturb that holding. While we did not, as found by the trial court during this trial, approve May 12, 1953, as a "cut-off" date, we did not hold otherwise and reversed only for the purpose of allowing Charles compensation for his post-dissolution managerial efforts on behalf of the partnership. Since the trial court has here, in its sound judgment, aided by the reports of several qualified accountants determined that Charles' interests are as have been heretofore set forth, and since there has been no judicial error, there appears to be no reason to disturb its judgment.

From what has just been said it is clear that there is no merit to Charles' contention that his right to participate in the partnership profits should not have been terminated as of May 12, 1953, since it appears from the record that he was allowed profits on the 1952–1953 crop to October 13, 1953, which would be the latest date that any profits could have accrued from his interest in the partnership real property. As heretofore set forth, Charles' share of the value of the partnership real property was deposited in escrow to his account on September 10, 1953.

Charles also argues that he cannot be put to an election between interest and profits until the amount due him has been finally settled. This argument stems from the statement made by the District Court of Appeal, 116 Cal.App.2d 615, 630, 254 P.2d 919, 928, that since the accounts of the partnership had not been "properly settled * * * he was not required to accept the offer made to purchase his share after the rendition of final judgment, since the accounting should have proceeded 'upon different principles than did the accounting which was actually taken.' Nuland v. Pruyn, supra [99 Cal.App.2d 603, 222 P.2d 261]." The same court pointed out, however, that "From the position defendant has taken on this appeal it is fair to say *that he has elected to take profits rather than interest on the value of his share* in the partnership." 116 Cal.App.2d 615, 629, 254 P.2d 919.

Charles also claims that he is entitled to interest on the amount found to be due him until that amount is either paid, or made available to him. From what has been heretofore said it is obvious that there is no merit to this argument.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

51 Cal.2d 448

Donna Jean COURTELL, a Minor, etc., Respondent,

v.

Hazel M. McEACHEN et al., Appellants.

L. A. 24383.

Supreme Court of California, In Bank.

Feb. 2, 1959.

As Modified on Denial of Rehearing March 4, 1959.

Action was brought against owners of lot for injuries sustained by child five years and nine months old when her clothing caught fire from fire on lot. The Superior Court, Los Angeles County, Frederick F. Houser, J., entered judgment adverse to owners of lot, and they appealed. The Supreme Court, Gibson, C. J., held that instruction of Superior Court, on its own motion, that there was no contributory negligence on part of child was erroneous, where it deprived owners of lot of defense

on which they relied, and that giving of such instruction was reversible error.

Judgment reversed.

Spence, Carter, Schauer, and McComb, JJ., dissented in part.

Opinion, 315 P.2d 351, vacated.

1. Appeal and Error ⇐1064(1)
Negligence ⇐141(10)

In action against owners of lot for injuries sustained by child five years and nine months old when her clothing caught fire from fire on lot, instruction of trial court on its own motion that there was no contributory negligence on part of child was erroneous, where it deprived owners of lot of defense on which they relied, and giving of such instruction was reversible error.

2. Master and Servant ⇐318(1)

In action against owners of lot for injuries sustained by child five years and nine months old when her clothing caught fire from fire on lot, determination of question whether third person, who started fire on lot, was an employee of owners of lot, so that owners of lot would be liable for his negligence, or was an independent contractor, depended on various factors, the most important of which was the degree of control retained by owners of lot.

3. Master and Servant ⇐332(3)

In action against owners of lot for injuries sustained by child five years and nine months old when her clothing caught fire from fire on lot, question whether third person, who started fire on lot, was an employee of owners of lot, so as to make owners of lot liable for any negligence of third person, or was an independent contractor, was a question of fact.

4. Master and Servant ⇐315

Rule that employer is not liable for an independent contractor's negligence is subject to numerous exceptions.

5. Negligence ⇐33(3)

Possessor of land is subject to liability for bodily harm to young children trespassing thereon, caused by structure or other artificial condition which possessor maintains on the land, if place where condition is maintained is one upon which possessor knows or should know that such children are likely to trespass, and condition is one of which possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and children, because of their youth, do not discover condition or realize risk involved in intermeddling in it or in coming within area made dangerous by it, and utility of possessor of maintaining condition is slight as compared to risk to young children involved therein.

6. Negligence ⇐136(15)

In action against owners of lot for injuries sustained by child five years and nine months old when her clothing caught fire from fire on lot, question whether owners of lot were liable if child was a trespasser was for trier of fact.

7. Negligence ⇐136(17)

In action against owners of lot for injuries sustained by child five years and nine months old when her clothing caught fire from fire on lot, question whether alleged employee of owners of lot violated ordinance providing that it shall be unlawful to leave, or cause or permit to be left, any outdoor or open fire unattended by an adult, or such person or persons as may be required in permit issued for any such fire by county fire warden, and that before leaving any such fire person in charge of fire shall thoroughly extinguish fire, was for trier of facts.

8. Negligence ⇐121(1)

Where statute is intended to protect class of persons, in which plaintiff is included, against risk of type of harm he has sustained, a violation of statute gives rise to presumption of negligence, which may be rebutted by evidence of justification or excuse.

9. Negligence ⇐18, 32(1), 33(3)

Ordinances relating to open fires were intended to protect, not only against the spreading of fires, but against all perils

which might arise from fires not properly started, controlled, or extinguished, whether or not the danger materializes on premises where burning is done, and the protection undoubtedly extends to licensees, and also to child trespassers to whom a duty of care is owed by possessor of realty.

10. Negligence ⇐56(3)

In action against owners of lot for injuries sustained by child five years and nine months old when her clothing caught fire from fire on lot, presumption of negligence arising from burning of debris by alleged employee of owners of lots in violation of ordinances could not form a basis of liability, unless violation proximately caused child's injuries.

Murchison & Cumming, R. Bruce Murchison and Warren D. Allen, Los Angeles, for appellants.

Frank W. Swann, Jr., Beverly Hills, for respondent.

GIBSON, Chief Justice.

Defendants, Mrs. McEachen and the administrator of the estate of her deceased husband, appeal from a judgment in the amount of $50,000 recovered by plaintiff as damages for severe burns she sustained while playing on a lot owned by the McEachens in joint tenancy.

A house had been torn down on the lot where the accident happened, and early in 1953 Mr. McEachen, who managed the real property of the couple, engaged Harry Plummer to burn the lumber and debris, which covered the lot. Plummer, an evening-shift worker in a tire factory, was a tenant of the McEachens, renting a house next to the lot, and he agreed to do the burning for one month's free rent. McEachen told him that he could burn a little each day between 9:00 a. m. and 10:30 or 11:00 a. m., and for several mornings after February 1 he burned some debris at approximately the center of the lot. On February 11, the day of the accident, Plummer did some burning in this manner and left the lot about 11:00 a. m., returning to his home.

About 2:30 p. m. on February 11, plaintiff, a girl five years and nine months old, was walking home from school. Several children, among them two daughters and a son of Plummer, were playing on the lot, and one of them called to plaintiff to join them. A woman who saw the accident from her home nearby testified that plaintiff walked to the center of the lot, jumped over something and "stooped down" and that, when plaintiff got up, the back of her dress was on fire. The witness had observed the lot from the time that Plummer started the fire in the morning, and she stated that, when the accident happened, the fire was still smoldering, although there were no flames.

The court determined that plaintiff was capable of being a witness, and she testified that her dress caught fire when, having gone to the center of the lot and having jumped over a pile of wood, she squatted down to pick up a stick. She further said that there were no flames on the lot, that there was a little smoke in the center and embers on the ground, including a six-inch pile under some wood, that she did not know embers could burn her or set her dress on fire, and that she knew of fire only from her mother's stove.

According to one of Plummer's daughters, her brother had started a fire near the front of the lot, and, when plaintiff came onto the lot, the children were playing with that fire, which was about 15 inches high. Both plaintiff and the witness jumped over the fire "a little bit over the side." Plummer's son testified that shortly before the accident the children were playing with a fire he had lighted. Neither of the two Plummer children saw when or how plaintiff's dress caught fire.

Plummer testified that, before leaving the lot on the morning of February 11, he put out the fire by wetting it with a hose, raking it apart and pouring buckets of water over it, and that, when he came out of his house after the accident, he

saw a fire of newspapers or cardboard at approximately the place where he had been burning earlier but did not see any "red coals."

At the trial Mrs. McEachen denied knowing that children were playing on the lot prior to the accident, but it was shown that she had made a statement to the contrary in her deposition. According to Plummer, he knew that his children and others played on the lot after the house had been torn down, and Mr. McEachen had visited him on some occasions when the children were playing there.

Defendants first complain of an instruction given by the court on its own motion that there was no contributory negligence on the part of plaintiff. There are four theories which could warrant the giving of such an instruction: (1) that a child of the age of plaintiff is conclusively presumed to be incapable of contributory negligence; (2) that the evidence established that this particular plaintiff was incapable of such negligence with respect to the accident in question; (3) that it was proved, as a matter of law, that plaintiff, while capable of negligence, had exercised due care; or (4) that, although plaintiff had been negligent, her lack of care could not have contributed to her injury. None of these theories, however, can justify the giving of the instruction in this case.

The questions whether a child was capable of exercising care to avoid the particular danger encountered and whether, if so, the child failed to exercise due care, thereby contributing to the injury, are normally for the trier of fact to determine. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 139, 138 P. 712. In keeping with this rule courts have rejected the theory that a child of plaintiff's age, namely, between five and six, is incapable of contributory negligence as a matter of law. Smith v. Harger, 84 Cal. App.2d 361, 370, 191 P.2d 25; Carrillo v. Helms Bakeries, 6 Cal.App.2d 299, 304, 44 P.2d 604. The evidence was conflicting as to whether plaintiff's dress caught fire because she played near flames or because she squatted down on embers, and a determination of this conflict was obviously essential in order to resolve the questions of plaintiff's capacity to exercise care for her safety and of her contributory negligence. Accordingly, those questions could not properly have been decided as matters of law.

Plaintiff appears to take the position that, in cases involving injury to young children, the trial judge may determine the issue of contributory negligence even though questions of fact are presented. She relies on a statement in Mayne v. San Diego Electric Railway Co., 179 Cal. 173, 177, 175 P. 690, 692, that "as a rule courts upon appeal have not interfered with the discretion of trial courts in referring or in refusing to refer to juries the question as to whether the contributory negligence of children of the age of 14 years or under was such as to prevent their recovery * * *." In that case, however, the trial judge had not decided the issue of contributory negligence but had submitted it to the jury. Thus, the case on its facts does not support plaintiff's position, and the quoted language should not be construed in the manner urged. Contributory negligence is a matter bearing directly upon the outcome of a suit, and, where, as in the present case, the facts are in dispute, there is no rational basis for permitting the judge, rather than the jury, to resolve that matter. So far as has been called to our attention, the existence of such an exceptional power is not recognized anywhere.

[1] The instruction that there was no contributory negligence on the part of plaintiff erroneously deprived defendants of a defense upon which they relied. Although plaintiff has not raised the point, it has been suggested that the error is not prejudicial because, assertedly, the defense was so defectively pleaded that it must be treated as not properly in the case. However, there is nothing in the record to show, and plaintiff does not now claim, that the defect in the pleadings misled or hindered her in any way. Having sought unsuccessfully to strike the defense from the answer, plaintiff was aware that the matter was being treated as subject to trial, and she introduced evidence which, while it may also have been material to her case in chief, undoubtedly tended to rebut the claim of contributory negligence, for example, her testimony that

there were no flames on the lot, that she did not know embers could burn her or set her dress on fire, and that she knew of fire only from her mother's stove. On appeal she has not seen fit to mention the defect and argues only that the instruction given by the court was proper under the evidence. In these circumstances we are not justified in disregarding the effect of the erroneous instruction, and, since the error was clearly prejudicial to defendants, the judgment must be reversed.

[2, 3] There are several other problems which should be discussed in order to guide the trial court in the event of a new trial. One of these concerns the effect, if any, upon defendants' liability of the circumstance that Plummer, rather than defendants, actually did the burning. The determination of whether Plummer was an independent contractor or an employee depends upon a consideration of various factors, the most important of which is the degree of control retained by the McEachens. See Empire Star Mines Co. v. Cal. Emp. Comm., 28 Cal.2d 33, 43–44, 168 P.2d 686. The evidence now before us is inconclusive in regard to this factor since it appears that McEachen gave only a few instructions and did not supervise the burning but that Plummer would have followed additional instructions had they been given. Other pertinent circumstances are also conflicting in their effect, for example, Plummer was paid by the job, rather than by the hour, but burning was not his usual occupation. On such a record, the question as to whether Plummer was an employee or an independent contractor is one of fact.

[4] Obviously, if Plummer was an employee, defendants would be liable for any conduct on his part which, in view of his knowledge regarding use of the lot by children, would constitute a lack of due care. We do not mean to suggest, however, that there could be no liability if it should be found that Plummer was an independent contractor. The rule that an employer is not liable for an independent contractor's negligence is subject to numerous exceptions, including the ones set forth in sections 413 and 416 of the Restatement of Torts.[1] Potter v. Empress Theatre Co., 91 Cal.App.2d 4, 10–11, 204 P.2d 120; see Snyder v. Southern Cal. Edison Co., 44 Cal. 2d 793, 797, 285 P.2d 912; Knell v. Morris, 39 Cal.2d 450, 456, 247 P.2d 352. Those sections relate to a situation where an independent contractor is employed to do work which the employer should recognize as necessarily creating a condition involving an unreasonable risk of bodily harm to others unless special precautions are taken. They impose liability upon the employer for an injury caused by the absence of such precautions if he has failed to take steps to assure observance of the precautions, either by a provision in the contract or in some other reasonable manner (§ 413), or if the independent contractor has not exercised reasonable care to take such precautions (§ 416). It is to be noted that the sections require knowledge of the employer himself concerning the existence of a risk to others, so that a showing of such

1. Section 413 of the Restatement of Torts provides:

"One who employs an independent contractor to do work which the employer should recognize as necessarily creating during its progress, conditions containing an unreasonable risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the absence of such precautions, if the employer (a) fails to provide in the contract that the contractor shall take such precautions (as to which see § 416), or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

Section 416 of the Restatement of Torts provides:

"One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions."

knowledge must be made regardless of what the independent contractor may have known.

[5] Another question is whether plaintiff, who undoubtedly has a cause of action if she was injured by active operations and was a licensee (see Oettinger v. Stewart, 24 Cal.2d 133, 136, 148 P.2d 19, 156 A.L.R. 1221; Rest., Torts, § 341), has no cause of action if she was injured by a condition of the premises and was a trespasser. A child trespasser injured by a condition of the premises may recover if the case comes within the rule set forth in section 339 of the Restatement of Torts, and, of course, a child licensee thus injured has at least an equal right of recovery (see Prosser on Torts (2d ed. 1955) pp. 450, 438–440; Rest., Torts, § 342 and comment (b) thereto). Section 339 reads: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

[6] The duty of the possessor of land under section 339 extends to dangerous conditions "which, though observable by adults, are likely not to be observed by children or which contain risks the full extent of which an adult would realize but which are beyond the imperfect realization of children." However, it does not extend to "those conditions the existence of which is obvious even to children and the risk of which is fully realized by them." Rest., Torts, § 339, comment (b). On the basis of the record now before us, different inferences could be drawn as to the character of the danger encountered by plaintiff, and it would be for the trier of fact to determine whether she was injured by a risk not obvious to her. The question whether the concealed danger, if it existed, should have been recognized as creating an unreasonable risk of serious harm to young children, would also be one of fact unless an affirmative answer is compelled in view of two county fire ordinances which, according to plaintiff, establish defendants' negligence as a matter of law.

Section 1313 of Ordinance No. 2947 provides: "It shall be unlawful to leave, or cause or permit to be left, any outdoor or open fire unattended by an adult person, or such person or persons as may be required in permit issued for any such fire by the County Fire Warden. Before leaving any such fire, such person or persons in charge of such fire shall thoroughy extinguish same by completely covering it with dirt, saturating it with water, or otherwise treating it in such a manner to prevent rekindling of such fire."

Section 1301 of Ordinance No. 5520, which also relates to open fires, provides that a person shall not burn, or cause or permit to be burned, any combustible material unless (a) he first secures a permit to do so, or (b) the burning is done in small heaps between six a. m. and ten a. m. at specified distances from woodland, buildings, or other combustible material, and is attended at all times by an adult having extinguishing equipment, or (c) the burning takes place within the boundaries of an established camp site.[2]

2. Section 1301 of Ordinance No. 5520 provides:
"Open Fires—hours of burning. A person shall not build, light, maintain, or cause or permit to be built, lighted or maintained, any open or outdoor fire, use, or cause or permit to be used, any fire for clearing land, burn or cause or per-

[7] Unless the evidence on a new trial should materially differ from that now before us, a factual issue would be presented as to whether Plummer violated section 1313, but a violation of section 1301 would be shown as a matter of law, since none of the three exceptions to the general prohibition against open fires would be applicable.

[8] It is settled that, where a statute is intended to protect the class of persons in which the plaintiff is included against the risk of the type of harm he has sustained, a violation of the statute gives rise to a presumption of negligence which may be rebutted by evidence of justification or excuse. Porter v. Montgomery Ward & Co., Inc., 48 Cal.2d 846, 849, 313 P.2d 854; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 588, 177 P.2d 279. While there is no claim of justification or excuse, defendants take the position that the ordinances were designed to protect against the spreading of fire and not against bodily injury suffered by one coming voluntarily into the area of danger, particularly if the one injured is a trespasser. It may be noted, however, that the portion of Ordinance No. 5520 relating to issuance of permits for open fires makes clear that the fire warden is to consider the prevention of the spreading of fire "or" the protection of public safety.

[9] In our view, the reasonable construction to be given the ordinances is that they are intended to protect not only against the spreading of fire but against all perils which may arise from fires not properly started, controlled or extinguished, whether or not the danger materializes on the premises where the burning is done. The protection undoubtedly extends to licensees on those premises, and there is no reason to conclude that it does not also extend to child trespassers to whom a duty of care is owed under the rule set forth in section 339 of the Restatement of Torts. The person who is responsible for the burning is charged by the ordinances with knowledge that unreasonable risks of harm are presented by the contingencies sought to be prevented, including the dangers to trespassing children resulting from conditions not obvious to them. A violation of the ordinances would, absent a showing of justification or excuse, give rise to a presumption of negligence if the jury were to find against defendants on the questions regarding existence of a concealed risk and knowledge of use of the lot by children.

[10] A presumption of negligence arising from burning by Plummer in violation of the ordinances could not form a basis of liability, of course, unless the violation proximately caused plaintiff's injuries. There would be a question in this connection as to whether the accident resulted from the fire started by Plummer or a second fire assertedly lighted by his son.

The judgment is reversed.

SHENK and TRAYNOR, JJ., concur.

SPENCE, Justice (concurring and dissenting).

I concur in the reversal of the judgment upon the principal ground stated for re-

mit to be burned, any brush, trash, rubbish, stubble, or other flammable or combustible material, unless:

"(a) He first secures from the County Fire Warden, State Forester, or a United States Forest Service officer having jurisdiction, a permit so to do, or

"(b) Such burning is in one or more small heaps or piles, where the fire is set in dooryard premises, corrals, gardens, or plowed fields, at a distance not less than five hundred (500) feet from any woodland, timber, or brush-covered land, or land containing dry grass or other flammable vegetation, and there is at least one adult person in actual attendance with water, garden hose, shovels or other fire extinguishing equipment on hand in charge of such fire at all times during its burning, and such burning is done not less than twenty-five (25) feet from buildings, structures, or other combustible material, and further that such burning is done only between the hours of 6:00 a. m. and 10:00 a. m. of the same day, or

"(c) Such burning is within the boundaries of any established camp site, as defined in Section 1316."

versal in the main opinion. It is there correctly declared that "The instruction that there was no contributory negligence on the part of plaintiff erroneously deprived defendants of a defense upon which they had relied * * *. In these circumstances we are not justified in disregarding the effect of the erroneous instruction, and, since the error was clearly prejudicial to defendants, the judgment must be reversed." I must dissent, however, from the views expressed in the main opinion upon the more fundamental questions involved on this appeal. Furthermore, I am of the opinion that the reversal should be accompanied with directions to the trial court to enter judgment in favor of defendants.

This is one of a series of recent appeals involving the question of the nature of the duty owed by the landowner to the trespassing child. My views on this question were set forth at some length in my dissenting opinion in Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48, and need not be repeated here. But regardless of the conflicting views expressed in the Reynolds case, it seems entirely clear that the present case involves only the common, obvious risk of fire for which liability for injuries to the trespassing child should not be imposed upon the landowner or those acting on his behalf.

Turning first to the facts presented by the record, it is true that conflicting inferences could be draw as to whether the minor plaintiff was injured through contact with the flames of the fire built by other children or through contact with the embers of a fire previously built in the middle of the vacant lot by Plummer. It may also be conceded that conflicting inferences could be drawn as to whether Plummer was an employee or an independent contractor. But even if all conflicting inferences are resolved in favor of plaintiff, the imposition of liability here appears to be wholly inconsistent with our prior decisions, which strictly limit the type of cases in which liability may be imposed upon the landowner for injuries to the trespassing child.

Accepting plaintiff's testimony, it showed that while she did not see any "flames," she saw "live embers" and "smoke" arising therefrom. Her explanation of her rash act in squatting down there was that she had never seen "live embers" before. The fact remains, however, that any risk which she encountered was a common, obvious risk of fire. To intimate, as does the main opinion, that the risk described by plaintiff could be found by the trier of fact to be a "concealed" risk, or a "hidden" or "masked" risk as required by the authorities, is to indulge in a contradiction of terms. No risk can be more common or more obvious than the risk presented by the ordinary trash fire built upon the surface of the ground. Such was the only risk presented here under any view of the evidence.

It is significant to note that the main opinion does not cite a single case which has imposed liability upon the landowner to the trespassing child under similar circumstances. On the other hand, the great weight of authority supports the view that no liability should be imposed here. Moon v. Payne, 97 Cal.App.2d 717, 218 P.2d 550; Dunbar v. Olivieri, 97 Colo. 381, 50 P.2d 64; Paolino v. McKendall, 24 R.I. 432, 53 A. 268, 60 L.R.A. 133; Fitzmaurice v. Connecticut R. & Lighting Co., 78 Conn. 406, 62 A. 620, 3 L.R.A.,N.S., 149; American Advertising & Bill Posting Co. v. Flannigan, 100 Ill.App. 452; Erickson v. Great Northern Ry. Co., 82 Minn. 60, 84 N.W. 462, 51 L.R.A. 645; Coleman v. Robert Graves Co., 39 Misc. 85, 78 N.Y.S. 893, affirmed 97 App.Div. 411, 89 N.Y.S. 1040; Carlow v. John A. Manning Paper Co., 221 App.Div. 415, 223 N.Y.S. 358; Zaia v. Lalex Realty Corporation, 261 App.Div. 843, 25 N.Y.S.2d 183, affirmed 287 N.Y. 689, 39 N.E.2d 300; Stinnett v. Liberty Aircraft Products Corp., 273 App.Div. 909, 77 N.Y.S.2d 357; Eason v. State, 201 Misc. 336, 104 N.Y.S.2d 683; Krystopowicz v. Reading Co., 40 Pa.Dist. & Co.R. 304;

City of Harlan v. Peaveley, 224 Ky. 338, 6 S.W.2d 270; Lentz v. Schuerman Bldg. & Realty Co., 359 Mo. 103, 220 S.W.2d 58; see cases collected 36 A.L.R. 34, 192; 27 A.L.R.2d 1187, 1191.

Some of the cited fire cases, as well as other cases, have involved violations of ordinances but such violations were not deemed material as the ordinances, like the ordinances here, were obviously not enacted for the protection of trespassing children. As was said in Lopez v. Capitol Co., 141 Cal.App.2d 60, at page 69, 296 P.2d 63, at page 67: "The ordinance added nothing to respondents' duty insofar as the duty to trespassers is concerned."

The main opinion does not discuss the above-cited cases or any of the prior decisions of the courts of this state dealing with the fundamental question involved. It merely quotes section 339 of the Restatement of Torts and, like the dissenting opinion in Knight v. Kaiser Co., 48 Cal.2d 778, 785, 312 P.2d 1089, equates its requirements with mere "lack of due care." Thus the main opinion places upon the landowner a duty toward the trespassing child which is measured by precisely the same standard as the duty owed by the landowner to a child who is a business invitee. The imposition of such duty is contrary to numerous prior decisions in this state. Knight v. Kaiser Co., supra, 48 Cal.2d 778, 312 P.2d 1089; Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971; Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598; Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282; Lopez v. Capitol Co., supra, 141 Cal.App.2d 60, 296 P.2d 63; Lake v. Ferrer, 139 Cal.App.2d 114, 293 P.2d 104; Ward v. Oakley Co., 125 Cal.App.2d 840, 271 P.2d 536; Betts v. City and County of San Francisco, 108 Cal.App.2d 701, 239 P.2d 456; Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472; King v. Simons Brick Co., 52 Cal.App.2d 586, 126 P.2d 627; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993; Reardon v. Spring Valley Water Co., 68 Cal.App. 13, 228 P. 406; Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 174 P. 414.

The reading of these authorities demonstrates the impropriety of discussing the duty of the landowner toward the trespassing child in the conventional terms of "lack of due care" or "negligence" unless it appears that the landowner's premises presented some uncommon or concealed danger which brings the situation within the recognized exception to the general rules limiting his liability. Then, and then only, does the law impose upon him the added burden of using "due care" to safeguard trespassing children from such uncommon or concealed danger. No such situation is shown by the record here.

There is a further suggestion in the main opinion that plaintiff might have a cause of action upon the theory that she was injured through "active operations" of defendants. Reference is made to Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221. While the so-called "active negligence" doctrine may be applied where a defendant who was on the premises was chargeable with some new act of negligence after the injured person had entered thereon (Yamauchi v. O'Neill, 38 Cal.App.2d 703, 102 P.2d 365), no authorities have been found which hold that the circumstances of the present case would fall within its scope. Any risk of harm here resulted solely from the leaving of the premises in the condition described, and such leaving constituted, at most, mere "passive negligence" as distinguished from "active negligence" within the meaning of the doctrine. There is therefore no question of fact to be determined which could make the "active negligence" doctrine applicable here.

In my dissenting opinion in Reynolds v. Willson, supra, 51 Cal.2d 94, 331 P.2d 48, 56, I referred to the confusion that would inevitably result from the majority opinion there. Such confusion will become worse confounded by the filing of the main opinion here. Both opinions are clearly susceptible to the construction that this court is now, *sub silentio,* "disapproving the former cases" as was advocated in the dissenting opinion in Knight v. Kaiser Co.,

supra, 48 Cal.2d 778, 785, 312 P.2d 1089. Both opinions are likewise clearly susceptible to the construction that this court now, in effect, is approving the erroneous construction placed upon section 339 of the Restatement of Torts in Copfer v. Golden, 135 Cal.App.2d 623, 288 P.2d 90. Nevertheless, no mention whatever is made of "the former cases" or of the Copfer case in the main opinion here. Unfortunately, the bench and bar will still be compelled to speculate upon this court's views concerning the proper construction of section 339 of the Restatement of Torts and upon this court's views as to whether "the former cases" are to be followed or ignored.

As indicated in my dissent in Reynolds v. Willson, supra, 51 Cal.2d 94, 331 P.2d 48, I believe that section 339 of the Restatement of Torts, properly construed, is entirely consistent with "the former cases." See Knight v. Kaiser Co., supra, 48 Cal.2d 778, 312 P.2d 1089; Melendez v. City of Los Angeles, supra, 8 Cal.2d 741, 68 P.2d 971; Wilford v. Little, supra, 144 Cal.App. 2d 477, 301 P.2d 282. On the other hand, I do not believe that the majority opinion in the Reynolds case or the main opinion here can be reconciled with those decisions. I am in accord with Dean Prosser's version of the proper construction of section 339, where he states: "There are some dangers common in the community which any child of sufficient age to be allowed at large may be expected to understand and appreciate—such as the usual risks of fire and water, * * *." [51 Cal.2d —, 331 P.2d 57.] Prosser on Torts, 2d Ed., p. 441. There is no evidence in the record before us which shows anything more than the "usual" risk of fire. Furthermore, it is not suggested that anything more could be shown on a retrial of the cause.

I would therefore reverse the judgment and would accompany such reversal with directions to the trial court to enter judgment in favor of the defendants.

SCHAUER and McCOMB, JJ., concur.

CARTER, Justice (concurring and dissenting).

I agree with that portion of the majority opinion which determines the issue of liability of the defendants in this case but disagree with the discussion and the conclusion with respect to the issue of contributory negligence of the plaintiff, Donna Jean Courtell.

From my examination of the record in this case it appears clear that contributory negligence is not an issue for the following reasons: First, there is no sufficient allegation in the answer of any of the defendants to raise an issue of contributory negligence of any of the plaintiffs. Second, there is no basis for the conclusion that the issue of contributory negligence is available to defendants because no testimony was offered on this issue and the case was not tried upon the theory that contributory negligence was an issue. The record discloses that all of the testimony offered on behalf of plaintiff was testimony relating to her conduct, which was necessarily a part of her case in chief.

It is true that in the second affirmative defense of the answer of defendants there is an attempt to plead contributory negligence generally. A demurrer and motion to strike this defense were interposed. The demurrer was overruled and the motion to strike denied. Under the settled law of this state plaintiffs' attack upon this defense should have been sustained. From this state of the record it cannot be said that contributory negligence was pleaded or that the pleadings were sufficient to give rise to the issue of contributory negligence. No testimony was offered by either party on the issue of contributory negligence and the fact that instructions were submitted on this issue is of no consequence.

While it is my view that it is within the province of the trial judge to determine in the first instance whether a child of tender years may be guilty of contributory negligence, for the reasons above stated, it is not necessary for this court to determine in this case whether the trial judge

abused his discretion in holding as a matter of law that plaintiff Donna Jean Courtell was not capable of exercising care to avoid the particular danger encountered by her which resulted in her injury and that she could not, therefore, be guilty of contributory negligence.

In California, as a general rule, a defendant must specially plead contributory negligence of the plaintiff in order to rely on that defense. Kenny v. Kennedy, 9 Cal. App. 350, 351, 99 P. 384; Kofoid v. Beckner, 70 Cal.App. 624, 630, 234 P. 113; Hoffman v. Southern Pacific Co., 84 Cal.App. 337, 346, 258 P. 397. But where plaintiff's contributory negligence appears from the allegations of the complaint or evidence introduced in his behalf, the defense is available to the defendant though not pleaded in his answer. Green v. Southern Pacific Co., 132 Cal. 254, 64 P. 255; Hall v. City and County of San Francisco, 188 Cal. 641, 206 P. 459; Kenny v. Kennedy, supra, 9 Cal.App. 350, 99 P. 384. Another exception to the general rule exists where it appears from the record that the issue of contributory negligence was actually and intentionally tried by the introduction of pertinent evidence, provided it is shown that the parties consciously participated or acquiesced in such trial as if the issue had been made by the pleadings. Ortega v. Cordero, 88 Cal. 221, 227, 26 P. 80; Lein v. Parkin, 49 Cal.2d 397, 400–401, 318 P.2d 1.

The plea must set forth the facts on which the defense of contributory negligence is predicated and not merely state the conclusion of the pleader that the plaintiff was guilty of negligence contributing to the injury. Crabbe v. Mammoth Channel Gold Mining Co., 168 Cal. 500, 505, 143 P. 714. "It is not necessary to use the specific term of contributory negligence, *although a concise statement of the facts indicating the commission or omission of acts which would be required of one under similar circumstances in the exercise of ordinary care and which would appear to directly contribute to the injuries complained of must be alleged. It is not sufficient to merely allege in the form of a conclusion that the acts complained of were due to the negligence or carelessness of the plaintiff.*" Hoffman v. Southern Pacific Co., 84 Cal.App. 337, 347, 258 P. 397, 401.

Where an improper pleading is shown to exist it is at the very least subject to a special demurrer (see, Campbell v. Genshlea, 180 Cal. 213, 217, 180 P. 336; Fleischmann v. Lotito, 6 Cal.2d 365, 367, 57 P.2d 922), and some cases have held that a general demurrer should be sustained (Foerst v. Hobro, 125 Cal.App. 476, 479, 13 P.2d 1055; Callaway v. Novotny, 128 Cal.App. 166, 169, 16 P.2d 1013).

Applying these rules to the case at bar, the question for determination is whether defendant's allegations in his second special defense constitute an adequate plea of contributory negligence. If not then the demurrer to this defense should have been sustained or the motion to strike the same should have been granted. For the reasons stated below it appears that the allegations contained in this pleading are insufficient to state a valid plea of contributory negligence.

The plea reads in part "That if in fact plaintiffs * * * were injured * * * then said injuries and damages, if any * * * are due to the negligence and carelessness of the plaintiffs * * * and that said negligence and carelessness * * * proximately and concurrently contributed to and brought about whatever injuries and damages plaintiffs * * * may have sustained."

It is at once evident in reading this pleading that there are no facts included therein that indicate the commission or omission of acts which would be required of one under similar circumstances in the exercise of ordinary care and which would appear to directly contribute to the injuries complained of. Failure to allege any fact or facts from which the negligence occurred renders the complaint fatal (Church v. Headrick and Brown, 101 Cal.App.2d 396, 225 P.2d 558; Potter v. Richards, 132 Cal. App.2d 380, 282 P.2d 113) for the reason

that there is a failure to show a causal connection between the act and injury. Furthermore there is no evidence which would support a finding of contributory negligence.

Although these complaints are concerned with negligent acts of the defendant the same rules apply when defendant pleads contributory negligence. Hoffman v. Southern Pacific Co., supra. Thus, defendant's failure to describe any acts of negligence on the part of the plaintiff to show a causal connection between them and the injury is fatal.

I would, therefore, affirm the judgment.

Rehearing denied; CARTER, J., dissenting.

51 Cal.2d 558

GEDDES & SMITH, INC. (a Corporation), Appellant,

v.

SAINT PAUL-MERCURY INDEMNITY CO. (a Corporation), Respondent.

Sac. 6914.

Supreme Court of California, In Bank.

Feb. 10, 1959.

Action by building contractor against insurer of manufacturer of aluminum doors to recover amount of judgment obtained against manufacturer. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment for insurer, and contractor appealed. The Supreme Court, Traynor, J., held that where aluminum doors sold to contractor developed defects within six months after installation and fell apart, and door failures were unexpected, undesigned and unforeseen and were not result of normal deterioration but occurred suddenly long before any properly constructed door might be expected to wear out or collapse, failure of doors constituted an accident within policy whereby insurer agreed to pay on behalf of manufacturer all sums which manufacturer became obligated to pay by reason of destruction of property caused by accident and insurer was liable for damages to houses resulting from such failure.

Judgment reversed.

Spence, Shenk, and McComb, JJ., dissented.

Opinion, 320 P.2d 231, vacated.

1. Insurance ⇐616½

Insurer that has been notified of an action against insured and refuses to defend on ground that alleged claim is not within policy coverage is bound by judgment in the action, in absence of fraud or collusion, as to all material findings of fact essential to judgment of liability of insured, but insurer is not bound as to issues not necessarily adjudicated in prior action and can still present any defenses not inconsistent with judgment against insured.

2. Insurance ⇐616½

Where insurer was obligated to defend any actions against insured for damages within policy coverage, but insurer refused to defend action against insured and judgment was rendered against insured, but issue concerning scope of policy coverage was not adjudicated, insurer was entitled to present defense that damages were excluded from coverage, in action against it by party who obtained judgment against insured.

3. Insurance ⇐434

Where policy excluded liability for injury to or destruction of goods or products which were sold by insured and out of which accident arose, endorsement containing provision that nothing therein should vary terms of policy other than as stated and excluding products liability for damage to property other than products themselves and bodily injuries did not increase coverage and its cancellation left coverage and exclusions fully intact.

4. Insurance ⇐434

Where aluminum doors sold to building contractor developed defects within six months after installation and fell apart, and door failures were unexpected, undesigned and unforeseen and were not result of normal deterioration but occurred suddenly long before any properly constructed door might be expected to wear out or collapse, failure of doors constituted an "accident" within policy whereby insurer agreed to pay on behalf of insured door manufacturer all sums which manufacturer became obligated to pay by reason of destruction of property caused by accident and insurer was liable for damages to houses resulting from such failure.

See publication Words and Phrases, for other judicial constructions and definitions of "Accident".

5. Insurance ⇐512, 513

Where policy issued to manufacturer of aluminum doors covered liability imposed upon manufacturer because of injuries to or destruction of property caused by accident, insurer was not liable for expense of handling defective doors and their replacement, or loss of profits and good will sustained by purchaser of manufacturer's doors which were defective and resulted in damage to houses in which they were placed.

Riggins, Rossi & Kongsgaard and Clarence N. Riggins, Napa, for appellant.

Desmond, McLaughlin & Russell and Jerome M. McLaughlin, Sacramento, for respondent.

TRAYNOR, Justice.

Plaintiff appeals from a judgment for defendant in an action to recover on an insurance policy issued by defendant to California Aluminum Products, Inc., hereinafter referred to as Aluminum Products.

Plaintiff, a building contractor, ordered 760 aluminum doors, door jambs, and attached hardware from Aluminum Products in November, 1950. The doors were to be used in 76 houses being constructed by plaintiff in the cities of Napa and Fairfield. The deliveries of the doors occurred from December, 1950, to February, 1951. The doors were kept in storage for some time, and plaintiff began to install them in May, 1951, and installed all of them within a few months. After installation, defects appeared in some of the doors within a few days and in others after various periods of time ranging up to six months. Some of the doors sagged on their hinges and dragged on the floors. Some went out of shape. Parts of some of the doors fell out. Some doors could not be closed and others that were closed became locked in place and could not be opened. Plaintiff notified Aluminum Products, which undertook to supply other doors. Many of the new doors had the same defects as the old. Some were found damaged when received by plaintiff. Some could not be used because they were unsuitable; for example, 22 doors shipped as replacement-bathroom doors were equipped with chimes and letter drops. Aluminum Products shipped a total of 2,604 doors before enough suitable doors were obtained, and plaintiff was engaged in handling, storing, repairing, removing and installing doors for over a year.

In May, 1952, plaintiff brought an action against Aluminum Products alleging breach of warranty and negligence. Plaintiff alleged that by reason of expenses incurred in removing, installing, repairing, storing, and shipping doors, expenses incurred in office overhead during the time it was engaged in settling disputes arising out of installation of the doors and loss of profit, it was damaged in excess of $100,000. Aluminum Products notified defendant and asked it to defend the action. Defendant refused to do so on the ground that damage to the doors was excluded from coverage under the policy issued to Aluminum Products. Aluminum Products then undertook the defense of the action. It denied the allegations of the complaint and filed a cross-complaint for some $8,000 alleged to

be unpaid on the doors. When that action came on for trial, counsel for both parties stipulated findings of fact and conclusions of law. Pursuant thereto, the court found that allegations of the complaint were true, that nothing was unpaid on the doors, entered judgment on the complaint for plaintiff in the sum of $100,000 and costs, and entered judgment against Aluminum Products on the cross-complaint.

Plaintiff then brought this action against defendant to recover the amount of the judgment under the insurance policy issued by defendant to Aluminum Products. The judgment roll of the prior action was admitted into evidence.

[1, 2] The policy in question was issued for the period from May 1, 1951, to May 1, 1952. Under the terms of the policy defendant was obligated to defend any actions against Aluminum Products alleging damages within the policy coverage. An insurer that has been notified of an action and refuses to defend on the ground that the alleged claim is not within the policy coverage is bound by a judgment in the action, in the absence of fraud or collusion, as to all material findings of fact essential to the judgment of liability of the insured. The insurer is not bound, however, as to issues not necessarily adjudicated in the prior action and can still present any defenses not inconsistent with the judgment against the insured. Sawyer v. Sunset Mutual Life Ins. Co., 8 Cal.2d 492, 499–501, 66 P.2d 641; Artukovich v. St. Paul-Mercury Indem. Co., 150 Cal.App.2d 312, 320–321, 310 P.2d 461; see Rest., Judgments, § 107a, pp. 513–518. Defendant contends that the judgment against Aluminum Products is only presumptive evidence of the matters necessarily adjudicated therein because it was a stipulated judgment. This question need not be considered since the trial court's findings in the instant case on issues necessarily adjudicated in the prior action are the same as the findings in the prior action. Thus, the findings on such issues are supported by the record of the prior judgment, whether it be considered as conclusive on those issues or only as presumptive evidence thereon. The issues that defendant litigated in the trial court and that are raised in this appeal concern the scope of policy coverage and were not adjudicated in the prior action.

The pertinent provisions of the policy are as follows. Under Coverage "C," "Property Damage Liability other than Automobile," defendant agreed: "To pay on behalf of the Insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law or contract because of injury to or destruction of property, including the loss of use thereof, caused by accident." Under "Exclusions" it is provided that: "This Policy does not apply: * * * (e) under Coverage C, to injury to or destruction of (1) any goods or products * * * sold * * * by the Insured * * * out of which the accident arises." Endorsement number 1, effective May 1, 1951, entitled "Exclusion of Products Liability," provides: "It is agreed that the policy does not apply to: (1) the handling or use of, the existence of any condition in or a warranty of goods or products * * * sold * * * by the named insured occurring after the insured has relinquished possession thereof to others * * *." Endorsement number 4 was executed on April 1, 1952, and provided that retroactive to May 1, 1951, the "exclusion of products liability endorsement number 1 is cancelled flat." The policy provides that it applies to accidents taking place during the policy period.

[3] Plaintiff contends that since endorsement 1 excluded liability for any breach of warranty of goods sold after the insured had relinquished possession thereof to others, its cancellation by endorsement 4 must be interpreted as providing coverage to the extent theretofore excluded, and that accordingly damages for breach of warranty in the sale of the doors were necessarily covered. There is no merit in this contention. Each of the endorsements contains the provision: "Nothing herein contained shall be held to vary, alter, waive or extend any of

the terms, conditions, provisions, agreements or limitations of the undermentioned Policy, other than as above stated." Coverage A provides for bodily injury liability. Coverage C includes damages "because of injury to or destruction of property, including the loss of use thereof, caused by accident." Exclusion (e) excepts "injury to or destruction of (1) any goods or products * * * sold * * * by the Insured * * * out of which the accident arises." Endorsement 1 is an additional products liability exclusion. It excludes products liability for damage to property other than the products themselves and bodily injuries. It neither increases the coverage nor limits the exclusions otherwise provided, and its cancellation by its express terms leaves such coverage and exclusions fully intact. Accordingly, plaintiff cannot recover under the policy unless the damages were damages "because of injury to or destruction of property, including loss of use thereof, caused by accident," and were not damages because of "injury to or destruction of (1) any goods or products * * * sold * * * by the Insured * * * out of which the accident arises."

[4] Defendant contends that there was no injury to or destruction of property caused by accident. No all-inclusive definition of the word "accident" can be given. It has been defined "as 'a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly and without design of the person injured.' Rock v. Travelers' Ins. Co., 172 Cal. 462, 465, 156 P. 1029, 1036, L.R.A. 1916E, 1196; Richards v. Travelers Ins. Co., 89 Cal. 170, 175, 26 P. 762, [23 Am. St.Rep. 455]." Zuckerman v. Underwriters at Lloyd's, 42 Cal.2d 460, 473, 267 P.2d 777, 784. It "'includes *any event which takes place without the foresight or expectation of the person acted upon or affected by the event.*'" Richards v. Travelers Ins. Co., 89 Cal. 170, 176, 26 P. 762, 763; see also, Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245, 252–253, 286 P. 2d 1000; Moore v. Fidelity & Cas. Co., 140 Cal.App.2d Supp. 967, 971, 295 P.2d 154. "Accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122, 126. The door failures were unexpected, undesigned, and unforeseen. They were not the result of normal deterioration, but occurred long before any properly constructed door might be expected to wear out or collapse. Moreover, they occurred suddenly. It bears emphasis that we are concerned, not with a series of imperceptible events that finally culminated in a single tangible harm (cf., Canadian Radium and Uranium Corp. v. Indemnity Ins. Co., 342 Ill.App. 456, 97 N.E.2d 132, 139–140), but with a series of specific events each of which manifested itself at an identifiable time and each of which caused identifiable harm at the time it occurred. The trial court found that "these defects, in some cases, developed within a few days after [the doors] were installed and in some cases as much as six months elapsed after the doors were installed, but that eventually all the original 760 doors so sold and delivered by the California Aluminum to plaintiff proved defective and fell apart. That said doors sagged on their hinges, went out of shape, they dragged on the floors and the inside parts of said doors fell out. That when said doors came apart they would frequently lock themselves in place and could not be opened. In other cases doors that were closed and locked would fall apart and come open. That when the dwelling houses were occupied by purchasers, as hereinafter set forth, the occupants would frequently leave their premises with the doors closed and locked and on their return find the doors had come apart and the houses were wide open. That in many cases, by reason of these defects in the doors, it was impossible for the occupants to lock the doors, or even to close the doors at night. That when tem-

peratures arose in the houses the said doors would also emit noises that sounded like the explosion of fire crackers." Thus, although it may have taken many months for all of the doors to fail and fall apart, it is clear that each door, when it failed, failed suddenly. At one moment it was a usable door, at the next it was not. Had the door failures resulted in direct physical injury to the houses, the accidental cause of the harm would be obvious, but other harms flowing from the door failures were likewise accidentally caused. Accordingly, the crucial issue is which, if any, of these harms were within the policy coverage.

It is not disputed that injury to or destruction of the doors themselves was excluded by exclusion (e). Plaintiff contends, however, that both the houses and its business were damaged by the door failures. With respect to the houses its position is supported by Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122. In that case the insured sold defective plaster that was used to plaster a house. The plaster shrank and cracked to such an extent that it was of no value and had to be removed so that the walls and ceilings could be replastered with a different material. Injury to the plaster itself was excluded from coverage. The court held, however, that injury to the house had occurred and was covered under a clause identical with Coverage C in the present case. "No one can reasonably contend that the application of a useless plaster, which has to be removed before the walls can be properly replastered, does not lower the market value of a building. Although the injury to the walls and ceilings can be rectified by removal of the defective plaster, nevertheless, the presence of the defective plaster on the walls and ceilings reduced the value of the building and constituted property damage. The measure of damages is the diminution in the market value of the building, or the cost of removing the defective plaster and restoring the building to its former condition plus any loss from deprival of use, whichever is the lesser." 65 N.W.2d at page 125. In Volf v. Ocean Accident & Guar. Corp., 50 Cal.2d 373, 325 P.2d 987, a case also involving defective plaster, we distinguished the Hauenstein case on the ground that in the Volf case it was not necessary to remove the defective plaster before replastering the house. In the present case, however, it was necessary to remove the defective doors before they could be replaced, and we see no reason for not following the Hauenstein case and permitting recovery for damages to the houses according to the rule stated therein.

[5] Plaintiff's judgment against the insured was not limited to such damages. In addition to costs of removal of the doors and loss of use of the houses, it included the other costs of handling the defective doors and their replacements, loss of profits, and loss of goodwill. Plaintiff contends, however, that these additional items of damages constituted damages to its business and goodwill and were therefore damages "because of injury to or destruction of property." We cannot agree with this contention.

When Coverage C is read in the light of the exclusions applicable thereto, it is clear that the word property refers to physical or tangible property. Thus it is such property, not goodwill or a business entity, that is ordinarily thought of as the subject of use, and it is to damage to such property that all of the exclusions are directed. Any breach of contract may harm the business of the injured party, and if sufficiently serious, may affect his goodwill. Such damages, however, are not commonly thought of as injuries to or destruction of property within the meaning of a public liability insurance policy. Defendant did not undertake to insure against all breaches of contract caused by accident. It required an injury to or destruction of property and excluded injury to or destruction of goods or products sold by the insured. The significance of this exclusion would be obvious had the defects appeared before any of the doors had been installed. In such event it could not be seriously contended that an injury to property other than the

doors had occurred within the meaning of the policy even though plaintiff's inability to use them seriously interfered with its business and injured its goodwill. Such damages are no less outside the coverage of the policy because there was also damage to the houses.

To summarize, it appears from the specific facts found that there was injury to the houses caused by accident and that therefore the trial court's conclusion to the contrary cannot stand. Since the judgment against Aluminum Products, however, also included additional elements of damages not covered by defendant's policy, we cannot grant plaintiff's motion to amend the findings and enter judgment for the full amount sought in its favor.

The motion to amend the findings is denied and the judgment is reversed for further proceedings in accord with the views herein expressed.

GIBSON, C. J., and SCHAUER, J., concur.

CARTER, Justice.

I concur in the judgment and in the majority opinion except the reasoning therein that the case of Volf v. Ocean Accident & Guar. Corp., 50 Cal.2d 373, 377, 325 P.2d 987, is distinguishable from Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122, relied upon in support of the conclusion reached in the case at bar. In my opinion the conclusion reached by a majority of this court in the instant case is inconsistent with that reached by it in the Volf case. In my dissenting opinion in the Volf case I set forth in detail the reasons why the insurance policy there involved was ambiguous and why, under the decided cases, such ambiguity should be resolved in favor of the insured. I pointed out that the primary function of insurance is to insure—to provide full coverage of the indicated risk. Businessmen are not usually lawyers and in the normal course of events must rely on the agents of insurance companies when buying insurance. If this court continues to "interpret" patently ambiguous and inconsistent clauses in insurance policies to the detriment of the insured rather than resolving such ambiguities in his favor, the door will be opened for still more ambiguities and even less insurance coverage for the money expended than is presently the case. It is my view that this court could, and should, when such an ambiguous policy is before it, hold without equivocation that the provisions which are confusing and ambiguous as to the liability covered will be resolved in favor of the insured. If a few of such forthright decisions were rendered by this court in this field it would not be long before insurance policies were more clearly and understandably written to express the true intent of the parties and there would be less litigation involving insurance policies.

SPENCE, Justice.

I dissent.

The policy coverage was limited to "liability imposed * * * because of injury to or destruction of property, * * * *caused by accident.*" (Emphasis added.) The trial court found: "That it is not true that any of the defects in any of said doors or any of the expenses incurred or losses sustained by plaintiff was caused by accident." In my opinion this was the only finding which the trial court could properly have made under the undisputed facts. There was no "sudden and unexpected" event or anything which happened "suddenly and unexpectedly" so as to bring the situation within any accepted meaning of the phrase "injury to or destruction of property, * * * caused by accident." Zuckerman v. Underwriters at Lloyd's, 42 Cal.2d 460, 473, 267 P.2d 777, 784; Rock v. Travelers' Insurance Co., 172 Cal. 462, 465, 156 P. 1029, L.R.A.1916E, 1196; Richards v. Travelers Ins. Co., 89 Cal. 170, 175, 26 P. 762. Thus, the effect of the majority opinion is to convert a so-called public liability policy, limited to liability imposed for damage "caused by accident," into an agreement to indemnify the insured against liability for the insured's failure faithfully to per-

form its contractual obligations regardless of the showing of any "accident."

In Volf v. Ocean Accident and Guarantee Corporation, 50 Cal.2d 373, 325 P.2d 987, a somewhat similar policy was involved. This court found it unnecessary there to determine the scope of the insuring clause using the term "caused by accident," as the facts clearly brought the situation within one of the exclusionary clauses of the policy. Ibid, 50 Cal.2d at page 375, 325 P.2d 987. In my opinion, this court could have properly reached the same result in the Volf case by holding that the facts did not bring the situation within the plain provisions of the insuring clause. This court there distinguished Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122, but in the present case, the majority relies upon that case to support its position. I do not believe that the cited case was correctly decided, and therefore I would not follow it.

The majority opinion also cites and relies upon Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245, 286 P.2d 1000. The policy there was quite similar, insuring against liability for damages "caused by accident." The insured sold rancid peanut oil which was used by its customer in the manufacture of food products. The use of such oil by its customer "ruined all food products in which it was used, and damaged the machinery employed in the manufacture of same." 135 Cal.App.2d at page 252, 286 P.2d at page 1004. The court there quoted the approved definition of accident as something "which happens suddenly and unexpectedly" (135 Cal.App.2d at page 253, 286 P.2d at page 1005) and held that the liability of the insured was embraced within the terms of the insuring clause. Unlike the present case, the use of the rancid peanut oil there "suddenly and unexpectedly" caused damage to both the entire mass of the food product into which it was mixed and to the machinery used in the processing. Here, nothing happened "suddenly and unexpectedly" and there was no damage to the houses except for the fact that the doors themselves proved to be defective. It is therefore clear that the insured's liability was not a liability for damage "caused by accident."

I would affirm the judgment.

SHENK and McCOMB, JJ., concur.

51 Cal.2d 478

CALIFORNIA WATER & TELEPHONE COMPANY (a corporation), Petitioner,

v.

PUBLIC UTILITIES COMMISSION of State of California, et al., Respondents.

S. F. 19690.

Supreme Court of California, In Bank.

Feb. 2, 1959.

Rehearing Denied March 4, 1959.

Proceeding to review order of Public Utilities Commission purporting to modify terms of certain contract between water utility and subdivider. The Supreme Court, Schauer, J., held that Public Utilities Commission could not compel water utility to extend its mains to new, proposed residential community to be created by subdivider in nondedicated territory, on terms other than those agreed to by the utility.

Order annulled.

Gibson, C. J., and Traynor, J., dissented.

1. Public Service Commissions ⇐6.8

The Public Utilities Commission is not charged with enforcement of private contracts; its function is to regulate public utilities and compel enforcement of their duties to public but not to compel them to carry out their contract obligations with individuals.

2. Public Service Commissions ⇐6.8

Public Utilities Commission can neither modify a public utility's contract nor order the utility to perform a contract, whether modified or unmodified, though it may, within limits of its jurisdiction, order utility to render certain services on certain terms and conditions, and, in so doing, it is not bound by terms of utility's previously negotiated contracts.

3. Constitutional Law ⇐81

Order directing public utility to devote its property to some use other than public use to which utility has dedicated property cannot be justified as exercise of police power.

4. Corporations ⇐382½

A public utility may limit its dedication of facilities to a territorial area.

5. Public Service Commissions ⇐6.7

A public utility may not be compelled to extend its service beyond territorial limits of its dedication, irrespective of nature of utility involved.

6. Corporations ⇐382½

In measuring territorial scope of a utility's dedication of its facilities, fundamental distinction exists between railway companies and other utilities such as water, gas, electric power and telephone companies, in that the latter forms of utilities normally extend their lines to their customers, while railway companies' customers bring themselves to the utility.

7. Waters and Water Courses ⇐194

When water utility has dedicated its service to inhabitants of municipality, territorial scope of its dedication may ordinarily be measured by municipality's boundaries, and in proper case, utility may be required to make reasonable extensions of its lines to accommodate increased demand of growing municipality.

8. Waters and Water Courses ⇐194

Water utility which had extended service to one portion of subdivided ranch could not be held to have dedicated its service to the remainder of that ranch merely because it claimed right to extend its service into the remainder especially when its contemplated possible future service was expressly made conditional, by agreement with subdivider, on explicit Public Utilities Commission approval of extension plan as tentatively offered.

9. Public Service Commissions ⇐32

Court could not disturb finding of Public Utilities Commission, if there was any evidence before Commission to support that finding.

10. Corporations ⇐382½

To hold that public utility property has been dedicated to public use is not a trivial thing, and such a dedication may never be presumed without evidence of unequivocal intention.

11. Corporations ⇐382½

The evidence of unequivocal intention to dedicate public utility property necessary to sustain a finding of dedication need not be expressly stated and it may be inferred from the acts of the owner and his dealings in relation to the property.

12. Corporations ⇐382½

Dedication of utility property is normally evidenced by some act which is reasonably interpreted and relied upon by public as a holding out or indication of willingness to provide services on equal terms to all who might apply.

13. Waters and Water Courses ⇐194

A water utility, by the mere act of signing agreements stipulating conditions under which it would extend service to new subdivisions in previously nondedicated area, would not be held to have made a dedication of its property to the public use in such area and such agreements could not empower the Public Utilities Commission to compel extension of mains and conduits on conditions other than those specified by utility in the agreements.

14. Waters and Water Courses ⇐194

In proceeding to review Public Utilities Commission order purporting to modify terms of contract between water utility and subdivider, evidence was insufficient to support implied finding that utility had ded-

icated its service to territory in question when it had, pursuant to special agreements, extended service to certain houses within the area.

15. Corporations ⇐382½

Actual rendition of public utility service to only a restricted class or eligible segment of public may be held to constitute a dedication of service to public. West's Ann.Public Util.Code, § 207.

16. Waters and Water Courses ⇐194

The provision of the Public Utilities Code stating that no water corporation shall begin construction of line without first obtaining certificate of public convenience and necessity but providing that such certificate shall not be necessary for extension into a territory contiguous to an existing line does not free water utility from all regulation when it contracts to extend mains beyond dedicated service area. West's Ann.Public Util.Code, § 1001.

17. Waters and Water Courses ⇐194

Under the Public Utilities Code, when water utility undertakes to extend its mains beyond dedicated area, it may do so only on terms and conditions stated in its main extension rule on file with Commission and it must obtain authority for any arrangements which deviate therefrom. West's Ann.Public Util.Code, § 532.

18. Waters and Water Courses ⇐194

Under the Public Utilities Code when water utility extends service, until provisions deviating from utility's main extension rule are approved by Commission, they are of no force and effect. West's Ann. Public Util.Code, § 532.

19. Waters and Water Courses ⇐194

Public Utilities Commission may properly regulate terms on which extensions into new areas may be voluntarily made by water utility and may regulate service which must be given within area to which utility is dedicated but it may not compel water utility to extend mains into wholly new proposed residential community to be created by subdivision in nondedicated territory on terms other than those agreed upon by utility. West's Ann.Public Util. Code, §§ 532, 1001.

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Everett C. McKeage, Chief Counsel, Roderick B. Cassidy, Asst. Chief Counsel, Cyril M. Saroyan, Senior Counsel, Rita L. Heiser, Asst. Counsel, San Francisco, Twohig, Weingarten & Schmidt and Saul M. Weingarten, Seaside, for respondents.

SCHAUER, Justice.

This is a proceeding to review an order of the Public Utilities Commission which purports to modify the terms of a certain contract between petitioner and respondent Sawyer, and directs petitioner to re-execute the contract "as modified" by the commission and thereupon to specifically perform such "contract." We have concluded that the commission has acted in excess of its jurisdiction and that the order under review must be annulled.

Petitioner is a public utility engaged in the business of supplying water service to consumers in certain portions of Monterey County. The contract involved provides for the extension of petitioner's water mains and services into unimproved land which respondent Sawyer proposes to subdivide and which petitioner considers outside its dedicated service area. The commission premises its authority to make the subject order on its finding that petitioner has dedicated its service to the territory involved. Petitioner contends that the evidence is insufficient to sustain the finding of public dedication as to the subject area and that petitioner is therefore being deprived of its property without compensation in violation of its constitutional rights. For reasons hereinafter indicated we have concluded that petitioner's argument should be sustained. Because of the nature of the issue it is necessary to summarize all of the evidence which conceivably could tend to support the commission's holding.

In 1948 petitioner's admitted territory of dedicated service extended as far south as the southern boundary of an area known as Carmel Highlands. In that year respondent Sawyer purchased some 1,146 acres of land lying immediately south of Carmel Highlands. This land is known as the Victorine Ranch and, at the time of the Sawyer purchase, apparently contained but two dwelling houses and was in fact, as the name implies, a ranch or farm and not a residential area.

Following oral discussions with certain officers and employes of petitioner and after receiving letters from the manager of its Monterey Peninsula Division to the effect that "our installations at Carmel Highlands can be extended to the Victorine Ranch with storage tanks which would supply any development that might be contemplated in this area," and that "It would not be necessary to supplement our present supply from any other sources," respondent Sawyer proceeded to subdivide some 23 acres, hereinafter referred to as Tract No. 1, install a water distribution system therein, and construct an 8 inch water main from that distribution system to a 3 inch water main of petitioner's at its termination point some 400 feet north of the southern boundary of Carmel Highlands. This work was completed in October, 1948, and petitioner's local representatives prepared and presented to Sawyer for his consideration and signature a certain proposed contract for the extension of petitioner's service. However, neither Sawyer nor petitioner signed the document.

This unsigned proposal apparently contemplated the extension of petitioner's service to Tract No. 1 as an area contiguous to that being served by petitioner and also contained proposed agreements for possible later extensions of service to future subdivisions of the balance of the Victorine Ranch area. As to Tract No. 1 the proposed contract provided, in substance, that upon respondent Sawyer's transferring to petitioner ownership of the distribution system and 8 inch pipeline which he had constructed, petitioner would extend its service to Tract No. 1 as a public utility and would refund "the actual cost of the installation of said facilities" in conformance with petitioner's then effective subdivision main extension rule. Such extension rule (designated Rule and Regulation 19B) provided, in effect, that applicants for main extensions to serve subdivisions would pay the construction costs of the extension and would receive from petitioner, for a period not to exceed ten years, an annual refund of 35 per cent of the gross revenues collected from consumers within the subdivision.

The unsigned document also provided that respondent Sawyer would, as a condition precedent to petitioner's being obligated to supply water to areas other than Tract No. 1, construct at his own expense some 5,000 feet of 8 inch pipeline running from the northern terminus of the 8 inch pipeline installed by Sawyer to the southern terminus of petitioner's certain 8 inch pipeline in Carmel Highlands. There was no refund provision concerning the 5,000 foot pipeline.

The parties, having failed to agree, resumed negotiations and on July 8, 1949, reached agreement. They signed a contract which provided, among other things, that respondent Sawyer in effect transferred to petitioner, without obligation to refund, the pipeline and Tract No. 1 distribution system which he had constructed. Petitioner then connected its 3 inch main with the 8 inch main constructed by Sawyer and commenced service to Tract No. 1. Petitioner concedes, and has conceded throughout, that Tract No. 1, but only No. 1, thereby became and is now within its dedicated public service area. The order of the commission presently under review does not concern the terms of petitioner's service to Tract No. 1; it relates solely to the nature of petitioner's obligation, if any, to extend its mains and services to new subdivisions proposed to be created in other areas of the Victorine Ranch.

Under the July, 1949, contract petitioner conditionally agreed, in effect, to extend its mains and services from time to time to other contemplated subdivisions of the Vic-

torine Ranch land lying below the 600 foot contour. Such main extensions were to be made in accordance with petitioner's Rule and Regulation 19B, *provided that Sawyer, as a condition precedent,* deposited with petitioner $20,000 toward the cost of the installation by petitioner rather than by Sawyer of the aforementioned 5,000 feet of 8 inch pipeline running from the northern terminus of the 8 inch pipeline in Carmel Highlands. Sawyer agreed to pay petitioner's actual construction costs and construction was to begin upon deposit of the $20,000. Petitioner agreed to refund any portion of the $20,000 that should prove in excess of the actual construction costs, but there was no provision for refund of the actual construction costs themselves. Respondent Sawyer agreed to commence accumulating the $20,000 by opening an escrow savings account and depositing the sum of $1,500 therein concurrently with each and every sale of a lot in Tract No. 1.

Paragraph 9 of the agreement provides that "This agreement shall at all times be subject to such changes or modification of the Public Utilities Commission * * * as said Commission may from time to time direct *in the exercise of* [its] *jurisdiction.*" (Italics added.) Such provision is required by and was inserted pursuant to the commission's General Order No. 96. General Order No. 96 also states that no public utility such as petitioner "shall hereafter *make effective* any contract or arrangement for the furnishing of any public utility service * * * under conditions other than the * * * conditions contained in its tariff schedules on file and in effect at the time, unless it first obtain the authorization of the Commission to carry out the terms of such contract or arrangement * * *. Each such contract shall contain a provision indicating the understanding of the parties that it shall not become effective until such authorization of the Commission is obtained." (Italics added.) The latter provision was not inserted in the subject contract and petitioner did not submit the contract for the commission's approval but, as hereinafter shown, it was not until 1954 that Sawyer requested petitioner to "make effective" the contract for service beyond the original contiguous areas of Tract No. 1.

Petitioner also agreed to apply to the commission, within 60 days after execution of the contract (July 8, 1949), for a certificate of public convenience and necessity to render water service as a public utility in that portion of the Victorine Ranch lying below the 600 foot contour. Petitioner has not made such application and holds no certificate or franchise to serve the Victorine Ranch area.

In 1954 respondent Sawyer sought water service for certain areas of the Victorine Ranch other than Tract No. 1. Petitioner advised Sawyer that it would not extend its mains or services unless and until Sawyer complied with the condition precedent and, as specified in the contract, deposited with petitioner $20,000 for the construction of the 5,000 foot pipeline. Sawyer did not deposit the $20,000 but, on November 29, 1954, filed a complaint with the commission. The complaint alleged the substance of the foregoing facts, among other things, and prayed that petitioner be required to reduce its demands and extend service to the entire Victorine Ranch territory in accordance with its Rule and Regulation 19B. Petitioner filed an answer which, among other things, contested the commission's jurisdiction to grant the prayed-for relief. Hearings were held during April and July, 1955.

After the case was submitted but prior to a decision, the parties, on May 21, 1956, signed a proposed compromise agreement. LeForust, Inc., to whom respondent Sawyer had previously sold certain undeveloped portions of the Victorine Ranch, was a party to such agreement. This proposed compromise evidenced a full meeting of the minds of the parties and a clear statement of their intended contractual rights and obligations but, inasmuch as under General Order No. 96, hereinabove quoted, the proposed agreement would not be fully valid and *effective* without approval of its terms by the Public Utilities Commission, the parties expressly declared such approval to be a prerequisite to *any effectiveness* of the

proposed agreement. The agreement provided that in place of meeting the condition theretofore agreed upon (the immediate deposit of $20,000 to be credited against Sawyer's obligation to pay *all of* the actual cost of constructing the 5,000 foot pipeline specified in the 1949 agreement) respondent Sawyer would "pay to" petitioner $24,000 but would not be obligated to pay any further amount toward petitioner's costs of making the necessary extension to its facilities. Petitioner agreed that upon receipt of the $24,000 it would proceed to construct an 8 inch pipeline some 560 feet in length connecting the 8 inch pipeline originally installed by Sawyer with a certain 8 inch pipeline of petitioner's which terminates on "Lower Walden Road." This latter pipeline is not 8 inches in diameter throughout its entire length; it contains some 1,500 feet of smaller pipe. Petitioner agreed to replace the smaller pipe so as to provide a continuous 8 inch main leading to the Victorine Ranch.

The $24,000 was, of course, intended to substantially defray petitioner's construction costs for the addition but was stipulated in the compromise agreement to be a "firm amount" not subject to readjustment upon determination of petitioner's actual construction costs. It was also agreed that as to any future main extensions —i. e., extensions *after its service would have become dedicated to the new area*— petitioner's main extension rule in effect at the time of such extension would be applicable, rather than the Rule and Regulation 19B which was in effect at the time of the 1949 agreement.[1]

Respondent Sawyer also agreed to request the commission to dismiss his complaint with prejudice and approve the 1949 agreement as amended by the 1956 agreement. In this regard the 1956 agreement provided as follows: "It is mutually agreed by the parties hereto that unless and until the Commission shall have, upon the application of [Sawyer] * * *, dismissed said complaint with prejudice and approved the 1949 Agreement, as amended hereby, all in such manner as to make such dismissal and approvals full, final and unconditional and subject to no further change without the consent of the parties hereto, this Agreement shall be of no force or effect and the rights, duties and obligations of the parties hereto shall remain as they were prior to the execution hereof." Except as expressly proposed to be modified, the agreement of July 8, 1949, was ratified and affirmed.

Pursuant to the terms of the 1956 proposed compromise agreement, Sawyer, on May 23, 1956, submitted the contracts to the commission for its approval and requested dismissal of his complaint with prejudice.

On August 29, 1956, the commission rendered its decision. Its opinion notes petitioner's argument to the effect that petitioner has not dedicated its public service to the Victorine Ranch properties other than Tract No. 1, and that the commission therefore has no jurisdiction to order an extension of service or regulate the conditions upon which petitioner's mains may be extended. The commission opinion, however, concludes that petitioner is subject to "whatever order in this proceeding [the commission] * * * may deem appropriate with respect to the facilities and service contemplated by [the 1949] * * * agreement *and by the [1956] amendments thereto.*" (Italics added.) This conclusion is apparently based on (1) the commission's interpretation of the contracts involved and (2) its finding "that [petitioner] * * *, by execution of the 1949 agreement *and the 1956 amendments thereto,* has unequivocally indicated its intent to dedicate and *has in fact dedicated* its service, as set forth in said amended agreement, to the balance of the Victorine Ranch properties." (Italics added.) The above quoted finding, as appears from the above recited facts and as is hereinafter explained in more detail, is untenable.

1. In 1954 the commission promulgated a new main extension rule. Its refund provisions are considered less onerous to the utility.

The commission opinion then turns to what it terms "a consideration of the merits" of the agreement and concludes that petitioner's main extension rule in effect in 1949 should apply to future extensions and that Sawyer should not be required to pay the $24,000 contemplated in the 1956 agreement; that Sawyer should be required to pay no more than the actual cost of constructing the 560 feet of 8 inch pipe connecting the pipeline originally constructed by Sawyer with petitioner's "Lower Walden Road" pipeline, that petitioner should stand the cost of removing the "bottlenecks" in the latter pipeline. Placing emphasis on paragraph 9 of the 1949 agreement, which states that the agreement shall "at all times" be subject to modification by the commission "in the exercise of [its] jurisdiction," the commission entered its order: (1) Denying petitioner's motions to dismiss the Sawyer complaint. (2) Denying Sawyer's request for approval of the agreements and dismissal of his complaint. (3) Directing petitioner "to carry out the terms and conditions of its agreement of July 8, 1949, as amended by its agreement of May 21, 1956 * * * *as modified to the extent and in the manner set forth in the preceding opinion* * * *." (4) Directing petitioner *"to re-execute said agreement* of July 8, 1949, *as amended by the agreement of May 21, 1956, and as modified by this order* * * *." (Italics added.) (5) Denying all other relief prayed for by Sawyer, with the exception of the institution of an investigation by the commission into petitioner's "Monterey subdivision main extension contracts and practices," such investigation having already commenced. A petition for rehearing was denied.

[1, 2] Petitioner contends that the commission has acted in excess of its jurisdiction in that the commission's order purports to modify a private contract and order its re-execution and specific performance "as modified." As stated in Atchison, T. & S. F. Ry. Co. v. Railroad Comm. (1916), 173 Cal. 577, 582, 160 P. 828, 2 A.L.R. 975, "the * * * commission is not a body charged with the enforcement of private contracts. [Citation.] Its function * * * is to regulate public utilities and compel the enforcement of their duties to the public [citation], not to compel them to carry out their contract obligations to individuals." The commission cannot "modify" a public utility's contract or order a public utility to perform a contract, whether "modified" or "unmodified." It may, however, within the limits of its jurisdiction, order a public utility to render certain services on certain terms and conditions, and in so doing it is not bound by the terms of a utility's previously negotiated contracts. (Cf. Motor Transit Co. v. Railroad Commission (1922), 189 Cal. 573, 581 [4], 209 P. 586.) The commission argues that the record supports its determination that petitioner has dedicated its service as a public utility to the entire Victorine Ranch area rather than just to Tract No. 1 therein, and that consequently the order under review merely utilizes various provisions of the contracts in the course of directing petitioner to extend its mains and services to the balance of the ranch on conditions which the commission has found reasonable.

[3] The law is clear that an order directing a public utility to devote its property to some other use than the public use to which the utility has dedicated the property cannot be justified as an exercise of the police power. As appears from Pacific Telephone & Telegraph Co. v. Eshleman (1913), 166 Cal. 640, 680, 137 P. 1119, 50 L.R.A.,N.S., 652. "[I]n dealing with public utilities, regulation of use within the dedicated use is as far as the police power may be extended, and * * * when the regulation exceeds this, it is always void for unreasonableness and may, depending upon the form and character of the order, be also void as an attempt to take property without compensation * * *." In that case the commission had ordered Pacific Telephone Company to "permit a connection between its long distance lines and the local lines of the [competing] * * * companies [Tehama County Telephone Company, and Glenn County Telephone Com-

pany], under which, by the use of the switchboards, operators, and lines of the Pacific Company, its property and its agencies, the petitioning companies and their subscribers would have the same rights to all the long distance instrumentalities of the Pacific Company as its subscribers and patrons." (At page 669 of 166 Cal., at page 1129 of 137 P.) In opinions annulling the commission's order it was pointed out (166 Cal. at pages 669–670, 690–701, 137 P. at pages 1129–1130, 1138–1143) that the Pacific Company had dedicated its property to telephone service conducted by itself for the benefit of its own patrons and to the service of local companies in noncompeting territory, but had not made such dedication to the use of rival and competing companies, and held (166 Cal. at pages 686–687, 702–703, 137 P. at pages 1136–1137, 1143) that to compel it to provide service to such companies would be to subject its property to a new use which would constitute a taking without compensation first being paid to the owner as required by the California Constitution, art. 12, § 22.

[4] This court has likewise recognized that a public utility may limit its dedication to a territorial area. (Hollywood Chamber of Commerce v. Railroad Comm. (1923), 192 Cal. 307, 219 P. 983, 30 A.L.R. 68; Atchison, etc. Ry. Co. v. Railroad Comm. (1916), supra, 173 Cal. 577, 160 P. 828; Del Mar Water, Light & Power Co. v. Eshleman (1914), 167 Cal. 666, 140 P. 591, 948.) In the last cited case we annulled an order which directed a water company to extend its pipeline and render service to a certain individual. (See at pages 678–683 of 167 Cal., pages 595–597 of 140 P. 591.) Although there was some doubt whether the company was a public utility, such was assumed to be the fact and this court based its decision on failure of the evidence to show, and of the commission to find, that the individual concerned was within the territorial area to which the company had dedicated its public service. The court further commented on the limited nature of the supply of water itself, and declared (167 Cal. at page 681, 140 P. at page 597) that "There can be no doubt, therefore, that the owner of a water supply may make a limited dedication of it to public use, *confining the use to such territory as he sees fit.* Nor can there be any doubt that one owning a water supply is not compelled to dedicate all of it to public use, or that he may dedicate a part of it, only, to such use * * * Accordingly, our decisions have recognized and have repeatedly declared the right of a water company to make such limited dedication and to decline to furnish its water to persons not within the area it has undertaken to serve. [Citations.]" (Italics added.)

The commission, however, argues that certain language appearing in the decision of Hollywood Chamber of Commerce v. Railroad Comm. (1923), supra, 192 Cal. 307, 219 P. 983, indicates that a public utility water company may be ordered to expand into territory outside its dedicated service area in the interest of public convenience and necessity. As applied to the circumstances of the case at bar the argument is without merit. In the cited case this court held (192 Cal. at pages 313–314, 219 P. at pages 985–986) that the commission is without jurisdiction to order a street railway company to extend its lines into new territory in which it has no municipal franchise to operate. We recognized (192 Cal. at pages 312–313, 219 P. at pages 985–986) that the territorial scope of a utility's dedication might be measured by the territorial scope of the municipal franchises the utility had acquired, but reasoned that "whereas these other utilities [water, gas, electric, telephone] are given franchises [and hence have dedicated their services] to supply the inhabitants of the particular community," the territorial scope of the railway company's franchise included only the land over which the company had obtained permission to run its lines.

This court further stated among other things (at page 312 of 192 Cal., at page 985 of 219 P.): "The argument of the Railroad Commission seems to be predicated upon the erroneous assumption that

a street railway company's public duty is analogous to the duties of a water, gas, electric power, or telephone company, *which are required to expand their facilities to meet the demands of a growing community.* (Lukrawka v. Spring Valley Water Co. [1915], 169 Cal. 318, 146 P. 640, * * *)" (Italics added.) Respondent commission now suggests that the italicized portion of the above quotation establishes that a water company may be compelled to extend its service beyond its dedicated area. But as hereinafter shown a reading of the court's opinion shows no support for the commission's suggestion.

The Lukrawka case involved a corporation which was organized "under the act of April, 1858 [Stats.1858, p. 218], for the purpose of supplying the city and county of San Francisco and the inhabitants thereof with a sufficient supply of water." (At page 321 of 169 Cal., at page 641 of 146 P.) Certain residents of San Francisco sued the company to compel it to extend its water mains and provide them with water. The court pointed out (169 Cal. at page 324, 146 P. at page 642) that "The act of 1858 in express terms confers on corporations accepting the franchise extended under it, the privilege of using the streets of the municipality in which it has undertaken to operate for laying its pipes and conduits. The respondent could acquire no right to engage in the business of supplying water to the city and county of San Francisco, with an easement over all the streets of the municipality, unless under a franchise granted by the state for that purpose and with such a right. It was for the benefit of the public that the franchise was extended; to secure to the municipality * * * and its inhabitants an adequate supply of water * * * [Page 325 of 169 Cal., page 643 of 146 P.] This was the purpose and this the condition upon which the franchise was offered and when it was accepted by the respondent it constituted a contract between the state and the respondent under which the rights, duties, and responsibilities of each were fixed * * * The franchise was not offered, nor could it be accepted, with any limitation as to the area to be fixed by the corporation organized under the act within which in the municipality it would furnish water to its inhabitants." The holding was that by accepting the franchise the water company had also assumed the obligation "to anticipate the natural growth of the municipality it had undertaken to serve as a whole and to take reasonable measures to have under its control a sufficient supply of water and make gradual extensions of its distributive system to meet the reasonable demands for water by the growing community." (Page 325, of 169 Cal. page 643 of 146 P.) The court further commented (169 Cal. at page 326, 146 P. at page 643), that it had not been cited to any authority holding that a corporation "operating under the terms of a *franchise such as is involved here*" (italics added) is not required to extend its water system into new territory in the city of its franchise. There is no suggestion that the commission could require the water company to extend its lines and services to some other city or new community lying beyond the bounds of the franchise it had accepted. It is thus clear that in the Lukrawka case the court was concerned with the peculiar obligations of a water company which had been organized and had accepted a franchise under the particular statute there involved (Act of April, 1858), rather than with any general power of the public utilities commission to order a public utility to extend its service beyond the territorial limits of its dedicated area, and that neither the Lukrawka nor the Hollywood case supports the commission's suggestion that it has such power.

[5–7] To summarize, the above cited cases are uniformly to the effect that a public utility may not be compelled to extend its service beyond the territorial limits of its dedication. This is true regardless of the nature of the utility involved. In measuring the territorial scope of a utility's dedication a fundamental distinction exists between railway companies

and other utilities such as water, gas, electric power and telephone companies. This distinction stems from the fact that the latter utilities normally extend their lines to their customers, whereas a railway company's customers bring themselves to the utility. This distinction is most apparent in cases like Hollywood and Lukrawka, wherein a public utility has acquired a franchise to operate within a municipality. The extent and terms of such franchises constitute persuasive evidence of the territorial scope of the utility's dedication. When a railway company obtains a franchise to operate within a municipality it normally merely acquires permission (and impliedly obligates itself to the public) to run its lines over certain specified streets or strips of land; it does not acquire permission or obligate itself to extend its lines should the municipality grow in the future. The territorial scope of a railway's dedication is limited to a relatively narrow strip of land and, from the nature of the business, it is up to the public to bring itself to the railway company's line. Such is normally not the situation with respect to water companies and like utilities which extend their lines to individual customers within the areas to which they are dedicated. When a water company acquires a franchise to operate within a municipality, it normally (although not necessarily) acquires permission (and impliedly obligates itself to the public) to extend its lines along all the streets in the municipality, including streets to be built in the future, so that it may bring its service to all customers embraced within the territorial limits of the municipality. It follows that when a water utility has dedicated its service to the inhabitants of a municipality, the territorial scope of its dedication may ordinarily be measured by the municipality's boundaries, and, in a proper case, it may be required to make reasonable extensions of its lines to accommodate the increased demands of a growing municipality. But it is only within the territorial scope of its dedication that a water utility, or any other utility, may be compelled to extend its lines.

[8] The commission also suggests that as a matter of law petitioner must be held to have dedicated its service to the balance of the Victorine Ranch properties, because it claims the right to extend its service into that territory. Such reasoning, which transmutes a claimed privilege into an avowed obligation, is clearly untenable; this is even more obviously true here where the claimed privilege or, more accurately, contemplated possible future service, was itself expressly made conditional on explicit commission approval of the extension plan as tentatively offered.

[9–12] The next issue is whether the evidence is sufficient to support the commission's finding that petitioner has dedicated its public service to the territory involved. If there was any evidence[2] before the commission that could support its finding of dedication, such finding will not be disturbed. (Kern County Land Co. v. Railroad Comm. (1934), 2 Cal.2d 29, 35 [3], 38 P.2d 401; Western Canal Co. v. Railroad Commission (1932), 216 Cal. 639, 646[1], 15 P.2d 853; Samuel Edwards Associates v. Railroad Comm. (1925), 196 Cal. 62, 70[4], 235 P. 647; Butte County Water Users Assn. v. Railroad Comm. (1921), 185 Cal. 218, 231[8], 196 P. 265; Van Hoosear v. Railroad Commission (1920), 184 Cal. 553, 555[2], 194 P. 1003; see also, California Portland Cement Co. v. Public Utilities Comm. (1957), 49 Cal.2d 171, 175 [3], 315 P.2d 709; Southern California Edison Co. v. Railroad Comm. (1936), supra, 6 Cal.2d 737, 747[6], 59 P.2d 808.) Petitioner has admittedly dedicated its property to public use in various areas of Monterey County. The question is whether the evidence supports the finding

2. For the purposes of this argument we do not consider the possible effect of section 1760 of the Public Utilities Code. (See Southern Pac. Co. v. Public Utilities Comm. (1953), 41 Cal.2d 354, 361, 260 P.2d 70; Southern California Edison Co. v. Railroad Comm. (1936), 6 Cal.2d 737, 748–750 [7, 9, 11], 59 P.2d 808.)

that petitioner has made such a dedication with respect to the balance of the Victorine Ranch area. As stated in Allen v. Railroad Commission (1918), 179 Cal. 68, 85, 175 P. 466, 8 A.L.R. 249, "To hold that property has been dedicated to a public use is 'not a trivial thing' [citation], and such dedication is never presumed 'without evidence of unequivocal intention.'" (See also, Trask v. Moore (1944), 24 Cal.2d 365, 373[3], 149 P.2d 854; Klatt v. Railroad Commission (1923), 192 Cal. 689, 702[2], 221 P. 926; Richardson v. Railroad Commission (1923), 191 Cal. 716, 721[3], 218 P. 418.) However, such unequivocal intention need not be expressly stated; it may be inferred from the acts of the owner and his dealings and relations to the property. (Samuel Edwards Associates v. Railroad Comm. (1925), supra, 196 Cal. 62, 70[2], 235 P. 647.) Dedication is normally evidenced by some act which is reasonably interpreted and relied upon by the public as a "holding out" or indication of willingness to provide service on equal terms to all who might apply. (See Samuel Edwards Associates v. Railroad Comm. (1925), supra, 196 Cal. 62, 70[3], 71[7], 235 P. 647; Traber v. Railroad Commission (1920), 183 Cal. 304, 312, 191 P. 366; City of San Leandro v. Railroad Commission (1920), 183 Cal. 229, 234[2], 191 P. 1; Producers Transp. Co. v. Railroad Comm. (1917), 176 Cal. 499, 503–505, 169 P. 59; Camp Rincon Resort Co. v. Eshleman (1916), 172 Cal. 561, 563–564, 158 P. 186; Thayer v. California Development Co. (1912), 164 Cal. 117, 126–132, 128 P. 21.) If the evidence reveals any acts on the part of petitioner which were reasonably relied upon by the public as an expression of petitioner's willingness to extend its mains to the uninhabited balance of the Victorine Ranch and render public utility service therein whenever members of the public should occupy that area and request such service, the commission's order will not be annulled.

[13] The commission in its written opinion states: "We * * * find that [petitioner] * * * by execution of the 1949 agreement *and the 1956 amendments thereto,* has unequivocally indicated its intent to dedicate and *has in fact dedicated* its service, as set forth in said amended agreement, to the balance of the Victorine Ranch properties." (Italics added.) But the mere signing of the 1949 and 1956 agreements furnishes no evidence of public dedication. For one thing, the 1956 agreement has not become effective and the commission errs to the extent that it treats that agreement as binding upon petitioner. That agreement clearly states that it "shall be of no force or effect" unless and until the commission "shall have * * * dismissed [the Sawyer] * * * complaint with prejudice and approved the 1949 Agreement, as amended hereby * * *" Neither of the conditions precedent has occurred and the 1956 agreement is inoperative. Furthermore, it is manifestly arbitrary and unreasonable to hold that the mere signing of these agreements evidenced a dedication of property to public use in a previously non-dedicated area, so as to *ipso facto* empower the commission to compel the extension of petitioner's mains on conditions other than those specified by petitioner in the agreements, and without which petitioner, in the exercise of its managerial judgment (cf. Pacific Tel. & Tel. Co. v. Public Utilities Comm. (1950), 34 Cal.2d 822, 828–829[5, 6], 215 P.2d 441), would not have signed the agreements in the first place.

Butte County Water Users Ass'n v. Railroad Comm. (1921), supra, 185 Cal. 218, 228–229[4], 196 P. 265, cited by the commission, is not persuasive to the contrary. In that case this court, despite protest by certain "old consumers" of a water utility, affirmed an order of the commission directing the utility to supply water, beginning with the year 1920, to some 14,400 acres of land not theretofore served by it. In September, 1919, the utility had contracted with the owners of the 14,400 acres to supply such service. In the spring of 1920 it became evident that there was danger of a water shortage due to light rainfall during the preceding winters. Before the

water company actually commenced deliveries to the 14,400 acres the company's pre-1920 consumers filed a complaint with the commission, alleging that the company would not have enough water to serve both their lands and the 14,400 acres of new lands, and asking the commission to direct the company not to supply the latter. The owners of the 14,400 acres intervened, alleging that they had been accepted by the water company as consumers. The commission, on the ground that the interveners occupied the status of consumers and were therefore, as a matter of law, entitled to share pro rata in the available supply, ordered the company to serve them.

Although in affirming the commission's order this court held that the record supported the commission's conclusion that the owners of the 14,400 acres occupied the status of consumers, i. e., persons whom the water company was obligated to serve, the holding did not rely on the mere creation of the September, 1919, contract. The opinion states (at page 228–229 of 185 Cal., at page 269 of 196 P. 265): "The facts in the matter are * * * that in September, 1919, the company and the owners of the new lands contracted for service for those lands; that the company thereupon extended its system and the owners prepared their land, both at very considerable expense; and that prior to January 1, 1920, pursuant to the company's rules, the respective owners had made application to it for water for the ensuing year, and those applications had been accepted, and the owners had paid the company's charges.

"These facts are not disputed, and upon them certainly the owners had become consumers, provided only the company had authority to admit them as such. * * * The relation of public utility company and consumers was established as soon as the company came under obligation to serve and the owners came under obligation to take. Both these obligations had been assumed by the respective parties by January 1, 1920, so far as they could assume them. * * *" In the Butte case the water company had actually extended its system into the new territory and the owners of the 14,400 acres had performed all conditions precedent to the water company's obligation to commence water deliveries. The case is clearly not authority for the proposition that petitioner here dedicated its service to the entire Victorine Ranch by merely signing the 1949 and 1956 agreements.

[14] The commission contends also that the record supports an implied finding that petitioner had dedicated its service to the territory in question prior to the signing of the contracts. The commission's written opinion, as well as its order denying rehearing, indicate that it relied to some degree upon evidence that petitioner serves water to three houses located on the Victorine Ranch a short distance south of Tract No. 1.

Two of those houses existed at the time Sawyer acquired the Victorine Ranch and are served water pursuant to a 1943 contract with their then owner, Joe Victorine. The record reveals that when Victorine applied to petitioner for water service in 1943 the matter was the subject of correspondence between petitioner and the commission. In a letter to the commission dated March 8, 1943, petitioner advised that it was willing to serve Victorine only on condition that it would not be interpreted "as an extension of the company's service area or the dedication of any of the company's water to the Victorine service or the area in which it is located." That area, of course, was farm land, not a growing residential area. By letter of April 12, 1943, the commission suggested to Victorine that "the service be covered by an agreement in order that there can be no cause for future misunderstanding concerning it." Such a contract was entered into and expressly provides that the service is to be temporary in character and to meet an emergency, and is to be supplied from surplus waters; that petitioner may terminate the service at any time upon one year's written notice, and that neither Victorine nor any successor in interest of

his shall acquire any right to receive water except on such temporary basis; that "no water is dedicated to any such uses of Victorine or of the present or future occupants of said residences [sic] or said residences or said real property or any part thereof." By the terms of the contract Victorine agreed to, "at his own cost and expense, furnish and install pipe necessary to accept delivery of water from [petitioner] * * * within [petitioner's Carmel Highlands] * * * service area." There is nothing to indicate that the pipe installed by Victorine became the property of petitioner. Petitioner's rendition of service to the two Victorine ranch houses certainly does not evidence a willingness to assume public utility obligations to all potential inhabitants of the 1,146 acre Victorine Ranch as a residential subdivision area.

The third house referred to by the commission is owned by one Andrews. It appears that in 1954 Andrews was negotiating with Sawyer for the purchase of two acres immediately south of Tract No. 1. Sawyer inquired whether petitioner would serve the property and was informed that petitioner would not serve any area outside of Tract No. 1 until Sawyer complied with his obligation under the 1949 contract. Finally, however, an arrangement was worked out between Sawyer and petitioner whereby the property could be served under a private and limited contract. Pursuant to that arrangement Andrews, *now petitioner,* ran a pipe from the Andrews home to petitioner's mains *in Tract No. 1,* at which point delivery is made and metered. Also pursuant to that arrangement, Sawyer deposited $2,500 from the proceeds of his sale to Andrews in the escrow account provided for by the 1949 contract. Even if we should assume that petitioner thereby dedicated its service as a public utility to this single residence located on the outskirts of Tract No. 1, such service cannot be construed as a representation to the public that like service will be provided all who purchase lots in future subdivisions yet to be developed by Sawyer. The very nature of the arrangement made negates any such inference.

The commission asserts that its finding of public dedication was particularly based upon the testimony of one Neill, who was petitioner's division manager in the Monterey area from 1940 to 1943. Neill testified to the effect that at the time he was connected with petitioner both he and his superiors considered petitioner obligated to serve "the entire Monterey Peninsula, the subdividable land in Carmel Valley from the Mathiot Ranch on down. * * * the Coast line down to and including the [Carmel] Highlands * * *" The Victorine Ranch, of course, lies *beyond* and immediately south of Carmel Highlands. At other times during his examination Neill made statements to the effect that the entire Victorine Ranch was within what he and his superiors considered to be petitioner's "service area." It is clear from Neill's testimony that he used the term "service area" to include all territory into which he expected petitioner, at some future time, to expand. For instance, he included within petitioner's "service area" territory that was then being served by three other water systems which he expected petitioner would eventually absorb. Neill's testimony thus amounts to no more than a statement of his own 1943 conclusion as to what petitioner probably would do in the future. He testified to no acts which could be construed as representations to the public by petitioner that it had dedicated its public utility service to the entire area of the Victorine Ranch or that it would extend its service to that new area whenever requested. His testimony does not support the commission's finding that petitioner has dedicated its service to the public in the balance of the Victorine Ranch area. Nor is any other evidence cited which can support such finding.

This is a situation wherein Sawyer, *as a private individual businessman,* desired, negotiated for, and obtained, a conditioned or provisional obligation running from petitioner *to Sawyer as an individual,* as

distinguished from a member of the public. The most than can be deduced from the dealings between petitioner and Sawyer is that petitioner has conditionally obligated itself to Sawyer as an individual subdivider, to obligate itself to the public in the future when and if the specified conditions precedent have been met. And such conditions have not been met.

[15] Of course, an actual rendition of public utility service to only a restricted class or eligible segment of the public may be held to constitute a dedication of service to the public. (Camp Rincon Resort Co. v. Eshleman (1916), supra, 172 Cal. 561, 564, 158 P. 186; see Commercial Communications, Inc. v. Public Utilities Comm. (1958), 50 Cal.2d 512, 327 P.2d 513.) Section 207 of the Public Utilities Code defines "Public or any portion thereof" as "the public generally, or any limited portion of the public, including a person * * * for which the service is performed or to which the commodity is delivered." In the present case, however, Sawyer has not sought, *much less received,* actual water deliveries to himself for his own use upon the balance of the Victorine Ranch property. He does not appear interested in himself receiving and paying for water deliveries. What he has sought and what he has received is a conditioned contractual obligation running to himself, not as a water consumer, but as a private individual engaged in the business of subdividing uninhabited land.

The commission has relied upon the mere existence of that conditioned and provisional obligation, running to Sawyer as an individual private businessman—who has never met the conditions precedent—as evidence that petitioner obligated itself to "the public"—an unidentified and intangible public—to provide service in an as yet uninhabited area. Such a view is untenable. It follows that the evidence fails to support the finding of dedication and that the order under review must be annulled.

Petitioner further contends that the commission had no jurisdiction whatsoever over the terms and conditions upon which a water public utility may voluntarily agree to extend its mains into non-dedicated territory. Petitioner concedes the commission's jurisdiction over the rates which may be charged for actual water delivery once the mains have been extended and service commenced, but urges that the commission's jurisdiction does not attach until such time as water is actually delivered to consumers; that a water public utility may agree to extend its mains into previously non-dedicated territory upon whatever terms and conditions it pleases. The commission contends that when a water public utility undertakes to extend its mains beyond its dedicated area it must do so on the terms and conditions stated in its main extension rule on file with the commission, or obtain commission authority for any arrangements which deviate therefrom; that until the commission approves provisions deviating from the utility's main extension rule, such provisions are of no force or effect.

[16] Petitioner argues that its main extension rule is applicable only to extensions *within* its dedicated service area; that when it contracts to extend its mains to an area wherein it is under no obligation to the public to serve, it does so as a private corporation free from regulation by the Public Utilities Commission. Petitioner relies on section 1001 of the Public Utilities Code which provides: "No * * * water corporation shall begin the construction * * * of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate [of public convenience and necessity] * * *

"This article shall not be construed to require any such corporation to secure such certificate for an extension * * * into territory * * * contiguous to its * * line, plant, or system, and not theretofore served by a public utility of like character * * *"

Nothing in section 1001 indicates that a water utility is free from all regulation when it contracts to extend its mains be-

yond its dedicated service area. The commission seeks to apply and enforce that part of its General Order No. 96 which states that no public utility such as petitioner "shall hereafter make effective any contract or arrangement for the furnishing of any public utility service * * * under conditions other than the * * * conditions contained in its tariff schedules on file and in effect at the time, unless it first obtain the authorization of the Commission to carry out the terms of such contract or arrangement." As authority for its promulgation of the quoted portion of General Order No. 96, the commission relies on section 532 of the Public Utilities Code which provides that "no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the * * * charges applicable thereto as specified in its schedules on file and in effect at the time * * * The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

[17] Petitioner contends that a water utility cannot be considered to have dedicated its service to the public in a previously non-dedicated area until water is actually delivered in that area; that the commission's jurisdiction to regulate terms and conditions of service does not attach until such time as water is actually delivered; and that therefore the commission has no jurisdiction whatsoever over the compensation charged for the extension of a water utility's mains preparatory to the commencement of actual water deliveries. In other words, petitioner concedes that section 532 is applicable insofar as compensation charged for actual water deliveries is concerned, but contends that the section is inapplicable with respect to the compensation charged for the main extensions which make such water deliveries possible.

But regulation of compensation charged for actual water deliveries could be substantially inadequate to protect the public interest if public utilities were free from all regulation with respect to the compensation charged for the main extensions which make such water deliveries possible. The extension of a water utility's mains in preparation for the actual delivery of water is no less a public utility service than the water deliveries themselves. The cost of installing mains for the delivery of water is a part of the cost of the water deliveries. Petitioner's position on this issue is not tenable. Various cases from other jurisdictions cited by petitioner do not involve statutory schemes of regulation akin to that in California, and are not in point.

[18, 19] We conclude that section 532 of the Public Utilities Code fully supports the commission's position that when a water public utility undertakes to extend its mains beyond its dedicated area it may do so only on the terms and conditions stated in its main extension rule on file with the commission, and must obtain commission authority for any arrangements which deviate therefrom; that until provisions deviating from the utility's main extension rule are approved by the commission, they are of no force or effect. The commission may properly regulate the terms on which extensions into new areas may be voluntarily made and it may regulate the service which must be given within an area to which the utility is dedicated. But this is not to say that the commission may compel a water utility to extend its mains into a wholly new, proposed residential community to be created by a subdivision in non-dedicated territory, on terms other than those agreed to by the utility. It cannot. Neither may the commission accomplish that result by itself proposing the terms on which the utility will contract to enter a new territory, order the utility to enter into such a contract, and then compel it to specifically perform that contract.

The order under review is annulled.

SHENK, CARTER, SPENCE and McCOMB, JJ., concur.

GIBSON, Chief Justice.

I dissent.

I am of the view that the commission's finding that there was a dedication of service by the company with respect to the Victorine Ranch property is supported as to all portions of the ranch other than the part above the 600-foot contour. It is not disputed that, if there was such a dedication, the commission has authority to order the company to extend service to the dedicated area when such service becomes necessary. The order of the commission should be affirmed, with the possible exception of certain provisions discussed hereinafter relating to the form of the order.

In considering the propriety of the commission's order we must keep in mind the rule that the Public Utilities Commission is a statewide agency which derives adjudicating power from the Constitution (Cal. Const., art. XII, § 22) and that its factual determinations, for example, those of public convenience and necessity and of reasonableness, are not subject to re-examination in a trial de novo but must be upheld by a reviewing court if they are supported by substantial evidence. (Southern Pac. Co. v. Public Utilities Comm., 41 Cal.2d 354, 362, 367, 260 P.2d 70; Pacific Greyhound Lines v. Railroad Comm., 11 Cal.2d 427, 429, 80 P.2d 971; see California Portland Cement Co. v. Public Utilities Comm., 49 Cal.2d 171, 175, 176, 315 P.2d 709; cf. Shepherd v. State Personnel Board, 48 Cal. 2d 41, 46, 307 P.2d 4.)

The water company admits that in 1948 its territory of dedicated service extended south to the southern boundary of Carmel Highlands. In that year respondent Sawyer purchased the Victorine Ranch which contained 1,146 acres of land lying immediately south of Carmel Highlands. After receiving letters from an officer of the water company to the effect that its installations could be extended to the ranch with storage tanks that would supply any development that might be contemplated in this area, Sawyer subdivided 23 acres, herein referred to as Tract No. 1, installed a water distribution system therein, and constructed an 8-inch water main to connect with the company's 3-inch main some 400 feet north of the southern boundary of Carmel Highlands.

In July 1949 the parties signed an agreement which provided for the transfer to the water company, without obligation to refund, of the 8-inch pipeline and the distribution system in Tract No. 1. The agreement provided in part as follows: The company, within five days, was to connect its 3-inch main with the 8-inch main and, within 60 days, to apply to the Public Utilities Commission for a certificate of public convenience and necessity "to render water service as a public utility in that portion of said Victorine Ranch lying below the 600 foot contour." Sawyer agreed to pay the company the cost of installing an 8-inch pipeline running some 5,000 feet to connect the one previously built by Sawyer with an existing 8-inch pipe of the water company. He was to create a fund of $20,000 toward this purpose, the fund to be turned over to the company upon the construction of ten homes in Tract No. 1 or in the event Sawyer should subdivide an additional portion of the main tract. The company agreed "to extend its facilities to other portions of said tract lying below the 600 foot contour in accordance with Published Rule and Regulation 19B of Company," provided such additional areas were developed in units of not less than five acres. With respect to the portion of the ranch lying above the 600-foot contour, the company agreed to supply water under terms and conditions acceptable to it, but the contract provided that the company should be under no obligation to serve that area if Sawyer and the company were unable to agree on reasonable terms. It was further provided that the services to be rendered by the company and the rates to be charged should be subject to such rules and regulations as were or should be established by the Public Utilities Commission and that the agreement should be subject to such changes and modifications as the commission might direct in the exercise of its jurisdiction.

The company's Rule 19B referred to above, filed with the commission, provided that applicants for extensions of mains to serve tracts and subdivisions should pay the construction costs of the necessary facilities with certain minor exceptions and should receive from the company, for a period of not to exceed ten years, an annual refund of 35% of the gross revenue collected from consumers within the subdivision. It thus appears that the 1949 agreement was more favorable to the company than its rule on file with the commission with respect to who should pay the costs of the 8-inch main already built by Sawyer, the contemplated 5,000-foot pipeline, and the distribution system for Tract No. 1.

Following execution of the July 1949 agreement, the company connected its 3-inch main with the 8-inch main built by Sawyer and commenced service to Tract No. 1. The company concedes that Tract No. 1 thereby became a part of its dedicated public service area.

The company, however, failed to comply with its unconditional promise, under the 1949 agreement, to apply within 60 days to the Public Utilities Commission for a certificate of public convenience and necessity "to render water service as a public utility in that portion of said Victorine Ranch lying below the 600 foot contour." Moreover, the company did not comply with paragraph X of General Order No. 96 of the commission which, in accord with section 532 of the Public Utilities Code, declares that a water company cannot make effective any contract for furnishing public utility service under conditions other than those contained in its schedules on file with the commission (in this case, Rule 19B of the company) unless it obtains commission authority for any arrangements which deviate therefrom. Here, as we have seen, the 1949 agreement contained several departures, favorable to the company, from its Rule 19B, and these departures, under the law, could not be made effective without approval. The company thus violated the law when it put the 1949 agreement into effect, without commission approval, by proceeding into a portion of the ranch area, namely, Tract No. 1.

In view of the fact that the company proceeded into a portion of the ranch area, commenced service, and operated there for a period of several years, at all times purporting to act under the 1949 agreement, there was clearly a dedication by the company to furnish water to the area, at least in accordance with the terms and conditions of that agreement. One of these terms, and a part of the consideration due to Sawyer, was the unconditional promise of the company to seek within 60 days a certificate of public convenience and necessity with respect to the entire ranch below the 600-foot contour, and the extent of the dedication must be measured by this term of the agreement, which cannot properly be severed from the remainder of the contract. In the analogous case of Lukrawka v. Spring Valley Water Co., 169 Cal. 318, 324, 146 P. 640 et seq., a water company, organized under a statute permitting the formation of corporations to supply water to a city or town, had commenced service to part of San Francisco. It was held that the company, by proceeding under the statute and accepting the statutory franchise which was applicable to the whole city, dedicated its service to the entire city. Although in the present case there is no franchise to show the boundaries of the land to be served, the extent of the area of dedication is clearly indicated by the provisions of the 1949 contract under which the company obligated itself to apply for a certificate of public convenience and necessity as to all portions of the ranch below the 600-foot contour.

The 1949 contract is not, as asserted by the majority opinion, merely a conditioned or provisional obligation upon the part of the company to obligate itself in the future. The existence of the agreement itself is unconditional, and the company's promise to apply for a certificate is likewise unconditional. While the contract by implication makes certain acts by Sawyer conditions

precedent to performance by the company of its obligation to serve the portions of the ranch outside of Tract No. 1 in accordance with Rule 19B, such conditions would merely affect the time for performance of those duties and do not excuse the company's failure to perform its unconditional promises nor operate to terminate the completed dedication. If the company in 1949 had performed its duty to apply for such a certificate and for approval of the terms and conditions of the contract which departed from its Rule 19B, and if the commission had granted those requests and had approved the contract, there obviously would have been a completed dedication of service to the entire ranch below the 600-foot contour. Under such circumstances the commission would have had authority to order the company to render service to the area, upon performance by Sawyer of his obligations under the 1949 agreement, giving Sawyer a reasonable time for performance upon his part within the meaning of the contractual provisions. The company should not be permitted to rely either on the fact that it breached its agreement by failing to apply for the certificate or on the fact that it violated the law by putting the contract into effect without first obtaining commission approval.

The foregoing conclusions are not affected by the fact that in 1956 the company, Sawyer, and a purchaser of a part of the ranch property entered into a compromise agreement which expressly provided that it should have no force and effect until dismissal of Sawyer's complaint and unqualified approval by the commission of the 1949 agreement as modified by the compromise. The 1956 compromise adopted, with certain amendments, the provisions of the 1949 agreement relating to the extension of service to all the ranch below the 600-foot contour but was conditioned upon dismissal of the complaint and unqualified approval by the commission of all the terms of the 1949 agreement as amended by the compromise. The 1956 compromise indicates at least a conditional intent upon the part of the company to dedicate its services to all portions of the ranch below the 600-foot contour, and, in any event, it is clear that the 1956 agreement discloses no desire upon the part of the company to depart from its announced intent, as declared in the 1949 agreement, to extend service to all portions of the ranch below the 600-foot contour. Although the 1956 compromise, standing alone, would not be sufficient to show a dedication, in view of the fact that it was conditioned upon an approval which was never obtained, this is immaterial because, as we have seen, there was a completed dedication of service to the whole ranch below the 600-foot line as a result of the 1949 agreement and the action of the company pursuant thereto in commencing service to part of the ranch.

Under the circumstances of this case the commission, in addition to concluding that the company had dedicated its services to all the ranch property below the 600-foot contour, could also order the company to render service upon terms different from the conditions set forth in the 1949 contract, and the commission was not required to make a choice between accepting or rejecting the agreement as an entirety. As the majority opinion recognizes, the commission may properly regulate the service which must be given in an area to which the utility is dedicated and the terms on which extensions into new areas may be made, and any arrangements made by the utility which deviate from its rules on file with the commission, unless approved by the commission, are of no force and effect. (Pub.Util.Code, § 532; Paragraph X of General Order No. 96 of the commission.) When the company put into effect the 1949 agreement by extending service thereunder to a portion of the ranch area, without complying with its promise to seek a certificate of public convenience and necessity and in violation of the order requiring commission approval of deviations from the company's filed rules, it was bound to know that it acted at its peril. The company thus assumed the risk that the commission would

subsequently conclude that the company had dedicated its services to the entire area as delineated by the promises under which it purported to act, that the company could be ordered to render service within the area under reasonable regulations, and that such contract terms as were not acceptable to the commission could be disregarded.

Any other conclusion would be very unfair to Sawyer and other persons interested in the ranch property, would give the company benefits to which it was not entitled, and would permit the company to circumvent the law requiring commission approval of extensions of service upon terms different from the company's filed rules. The company purportedly acted under the 1949 contract when it entered into the ranch property, began to serve a portion of it, and continued that service during the intervening years to the date of this proceeding. Sawyer and other persons interested in the ranch property clearly had a right to rely upon the fact that the company, by its conduct, indicated that it intended to fulfill the obligations which it had undertaken in 1949, including the unconditional, express promise to apply for a certificate of public convenience and necessity to serve the entire ranch property below the 600-foot contour and the implied in law promise to seek commission approval of the arrangements. In view of all the circumstances, including the contract and the fact that the company was at all times aware of Sawyer's plans to continue subdividing the land, the commission could reasonably conclude that it would be unfair to permit the company, at this late date, to be released from its agreement to apply for permission to serve the entire area. Moreover, it should be noted, in this connection, that the commission could reasonably consider the possibility that, for purposes of economy of operation and public convenience, only one water utility should serve the entire ranch area, that the company's entry into a portion of the area made it impossible for any other utility to perform such unit service unless the company was forced to withdraw, and that, since the company had entered Tract No. 1 under nonapproved conditions but pursuant to its agreement to extend service to the balance of the ranch, the company should be required to serve the portions outside Tract No. 1 as a condition to applying in Tract No. 1 terms of service which depart from Rule 19B.

Contrary to the position taken by the majority opinion the order of the commission, when properly construed, concerns the terms of the company's service to Tract No. 1 and does not relate solely to the company's obligation to serve other areas of the ranch. The terms of extension of the company's service to Tract No. 1, under the 1949 agreement, obviously include the various promises of Sawyer and the company with regard to construction of pipelines, payment therefor, connections with the company's system, and transfer of Sawyer's 8-inch main and distribution system to the company. These promises clearly related to, and were parts of the consideration for, the company's agreement to enter Tract No. 1 as well as for its agreement to apply for a certificate as to other portions of the ranch. Thus, when the commission, by its order, prescribed terms other than those fixed by the 1949 agreement for construction of and payment for pipelines, it was in effect altering the terms of extending service to Tract No. 1 as well as to the remaining property. The majority opinion does not discuss the right of the commission under General Order No. 96 and the undisputed facts of this case to order the company to revise the unapproved terms upon which it entered Tract No. 1 in 1949 or, as an alternative, to withdraw from that tract. If the commission were not permitted to make such an order, any company could ignore the commission, flout the rules discussed above, and establish service on its own exorbitant terms by simply entering a tract and commencing service under private arrangements without obtaining commission approval.

I find no merit in that portion of the majority opinion which appears to argue that there has been no dedication of service

to the ranch area outside of Tract No. 1 because, it is asserted, "Sawyer has not sought, *much less received,* actual water deliveries to himself for his own use" upon this portion of the ranch but, rather, has sought an "obligation running to himself, not as a water consumer, but as a private individual engaged in the business of subdividing uninhabited land." Under the evidence presented here the commission could reasonably conclude that in 1949 Sawyer, to the knowledge of the company, was planning to subdivide the entire ranch property and that the 1949 contract was made in order to assure a water supply for the subdivided area. Unquestionably this was true with respect to Tract No. 1, and the agreement and the other circumstances discussed above are sufficient to justify a similar conclusion with respect to the remainder of the ranch. The use of a contract of this type, subject to approval of the commission, is clearly an appropriate method for a subdivider and a water company to employ for the purpose of establishing for the subdivider, in advance of actual construction, the necessary water supply for his tracts, and it would be wholly unreasonable to require that he receive some of the water for his personal use or that he obtain the signatures of prospective home owners, who are probably unknown to him. The implied finding of the commission that the parties to the agreement contemplated and arranged for service by the company to the public, as distinguished from some private contractual service which would not come within the jurisdiction of the commission, is likewise supported by the provision of the 1949 agreement requiring the company to apply for a certificate of convenience and necessity with respect to the remainder of the ranch property. As we have seen, the factual determinations of the commission, under its constitutional powers, are not subject to re-examination in a trial de novo and must be upheld by this court if they are supported by substantial evidence.

The finding of the commission is that there had been a dedication of service to the balance of the ranch, but the only provision in the contract relating to service above the 600-foot contour is that the company should not be under any obligation to serve that area unless it was able to agree with Sawyer on reasonable terms. There was merely an agreement to agree in the future, which is not sufficient to show a clear intent to dedicate service to the area above 600 feet. However, the portion of the finding as to the upper area is severable, and the deficiency of evidence does not require any modification of the commission's order since it does not direct that any action be taken with reference to the land above the 600-foot contour.

It is not necessary in this dissent to discuss the power of the commission to compel a utility to extend its mains into a wholly new and nondedicated area on terms other than those agreed to by the utility.

In view of the holding of the majority opinion it is likewise unnecessary for this dissent to consider, with respect to the form of the commission's order, whether the company can properly be ordered to "modify" or "re-execute" or "perform" its 1949 contract as amended. The commission, nevertheless, has the power, as the majority opinion recognizes, to order a public utility to render certain services on certain terms and conditions, and, in so doing, it is not bound by the company's previously negotiated contracts. It would be a minor matter to correct, or direct the commission to correct, any technical errors of this type in its order.

In my opinion the order of the commission should be affirmed, except insofar as concerns the possible technical errors referred to above.

TRAYNOR, J., concurs.

Rehearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

51 Cal.2d 531

SANTA FE TRANSPORTATION COMPANY (a corporation), Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, Appellant.

L. A. 24769.

Supreme Court of California,

In Bank.

Feb. 6, 1959.

Rehearing Denied March 4, 1959.

Action to recover taxes paid. The Superior Court of Los Angeles County, Walter H. Odomar, J., rendered judgment for the plaintiff and the defendant appealed. The Supreme Court, Carter, J., held that a railroad subsidiary could not be both a highway common carrier business and a city carrier business and was not entitled to segregate the two operations for tax purposes and thus take advantage of the Motor Vehicle Transportation License Tax Law exemption as a city carrier.

Judgment reversed.

McComb, Shenk and Schauer, JJ., dissented.

Opinion, 328 P.2d 990, vacated.

1. Automobiles ⇐97

Under the statute providing that the motor vehicle tax does not apply where transportation of property is "wholly" within or between incorporated cities "where no portion of the public highway outside the corporate limits of the cities or private property is traversed in such operation", legislature did not intend to exclude from "operation" every incidental service and activity customary and essential in the matter of transporting goods for compensation and hire. West's Ann.Rev. & Tax. Code, § 9653.

2. Statutes ⇐203

Court may not supply language which the Legislature must be deemed to have omitted intentionally.

3. Taxation ⇐204(2)

Exemptions from taxation are to be strictly construed against the taxpayer.

4. Automobiles ⇐97

Railroad subsidiary in conducting both highway common carrier business and a city carrier business was not entitled to segregate the two operations for tax purposes and thus take advantage of the Motor Vehicle Transportation License Tax Law exemption as a city carrier, where all vehicles were used in its intracity operations, its contract with the railroad included deliveries outside the city limits, and where the pickup and delivery service constituted an inseparable part of the entire transportation contract entered into between the railroad and shippers under the railroad's bills of lading. West's Ann.Rev. & Tax.Code, §§ 9601–9607, 9603(a), 9606, 9651–9653.

Edmund G. Brown, Atty. Gen., James E. Sabino, Asst. Atty. Gen., Dan Kaufmann, James C. Maupin, and Jay L. Shavelson, Deputy Attys. Gen., for appellant.

Robert W. Walker and Robert B. Curtiss, Los Angeles, for respondent.

CARTER, Justice.

Plaintiff, Santa Fe Transportation Company, a corporation, hereinafter referred to as plaintiff, or the transportation company, brought this action against the State Board of Equalization for a refund of taxes paid under protest.[1]

Plaintiff transportation company is a wholly owned subsidiary of the Atchison, Topeka and Santa Fe Railway Company. Under an agreement executed in July, 1937 between the transportation company and the railway company, the plaintiff agreed to transport tangible personal property in less than carload lots moving on the railway's bills of lading. Under another agreement,

1. The tax assessed encompassed the period from November 1, 1950 until October 31, 1953. Defendant refunded to plaintiff a penalty assessed by it and paid by plaintiff, and it has been stipulated between the parties that the correct amount to which plaintiff would be entitled is the sum of $33,244.38 which includes $4,958.07 interest.

executed in 1951, the transportation company agreed to perform for the railway company "pickup and delivery" services which were described as the transportation from local freight depots of the railway company in California to the customer's warehouse or place of business in the vicinity of such depots and from the customer's warehouse or place of business to such local depots, of goods moving on bills of lading of the railway company which were either theretofore or thereafter transported by the plaintiff under the same bills of lading of the railway company from one station to another over public highways outside the corporate limits of cities. The railroad bills of lading required the railroad to make pickups and to deliver the goods from the point of origin to the point of destination.

Plaintiff's pickup and delivery services were, for the most part, accomplished by the use of lighter equipment than the "line haul" (inter-city) operations which, for the most part, used heavier equipment. It is conceded by the plaintiff that in 8.8% of the operations line haul equipment was used for pickup and delivery services whereas in 91.2% of the operations the line haul equipment was used in the inter-city operations. In some instances the lighter equipment was used in inter-city operations.

The tax here disputed was assessed by defendant Board of Equalization under the provisions of the California Motor Vehicle Transportation License Tax Law (Revenue & Taxation Code, §§ 9601–9607, 9651, 9652 et seq.).

Section 9603, subdivision (a) defines "operator" as "Any person engaging in the transportation of persons or property for hire or compensation by or upon a motor vehicle upon any public highway in this State, either directly or indirectly."

Section 9606 defines "Gross receipts" as follows: "'Gross receipts' include all receipts from the operation of motor vehicles entirely within this State and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such operations extend, of the receipts from the operation of motor vehicles passing through, into, or out of this State, or partly within and partly without this State. * * *

"'Gross receipts' do not include revenue derived by an express company from the shipment of property over the lines of common carriers, but do include revenue derived by an express company from the transportation of property in motor vehicles operated by it."

Section 9652 provides that: "For the purpose of the proper administration of this part and to prevent evasion of the tax it shall be presumed that the gross receipts from all operations of operators are subject to the tax until the contrary is established."

Section 9651 provides that: "A license tax is hereby imposed upon operators at the rate of 3 per cent of the gross receipts of the operators from operations."

Section 9653 provides that: "This part does not apply to operators of motor vehicles operated exclusively within incorporated cities or between incorporated cities or incorporated cities and private property where no portion of the public highway outside the corporate limits of the cities is traversed in such operation.

"The tax does not apply to the gross receipts derived from the transportation of persons or property wholly within incorporated cities or between incorporated cities or incorporated cities and private property or wholly on private property where no portion of the public highway outside the corporate limits of the cities or private property is traversed in such operation." [2] (Emphasis added.)

It is plaintiff's position that its intra-city pickup and delivery service, even though admittedly part of its inter-city service, was separate and distinct from its line haul operations and thus within the

2. This section was amended in 1955 by the addition of another paragraph which will be hereinafter discussed.

emphasized portion of the exemption statute just set forth. It is argued that the intra-city pickup and delivery service is "wholly" within incorporated cities and not over public highways. Defendant, on the other hand, contends that plaintiff's intra-city pickup and delivery service was an inseparable part of its inter-city service.

There is no dispute as to the facts. The dispute arises over what legal effect is to be given them. Plaintiff's books were kept by an employee of the railway company and were segregated as to pickup and delivery service and line haul operations. There was no segregation when line haul equipment was used for pickup and delivery service and no segregation when the lighter equipment was used for inter-city service. The price charged for pickup and delivery service was 25½ cents per 100 pounds, while the line haul charge was on a cost plus percentage basis. The drivers of the line haul equipment and pickup and delivery service equipment were members of different unions, however, as heretofore noted, both types of equipment were operated to some extent on an inter-changeable basis. All equipment was serviced at the same garage. In some 21 cities, pickup and delivery service was accomplished by equipment other than that owned by the transportation company. Plaintiff transportation company held a certificate of public convenience and necessity from the Public Utilities Commission which authorized it to do both an inter-city and an intra-city business and which authorized it to move on billing of the railway company at its published tariff rates. Plaintiff was also separately licensed as a city carrier.

Plaintiff relies upon the case of California Motor Transport Co. v. State Board of Equalization, 1947, 31 Cal.2d 217, 187 P.2d 745, in support of its position that its intra-city pickup and delivery service was a separate and untaxable part of its business. Defendant board relies on the case of Bekins Van Lines, Inc. v. Johnson, 1942, 21 Cal.2d 135, 130 P.2d 421, in support of its position that the intra-city pickup and delivery service was an inseparable and taxable part of plaintiff's inter-city operations.

In the California Motor case it was held that the inter-city and intra-city operations of the plaintiff were so entirely separate and distinct as to constitute two separate businesses. In the California Motor case the plaintiff was a highway common carrier which operated under a certificate of public convenience and necessity restricted to inter-city operations and which prohibited it from operating any intra-city pickup and delivery service in any of the three cities which were part of its inter-city operations. Plaintiff purchased the equipment of the pickup and delivery service in Los Angeles which had formerly been used by it for its intra-city service; it also purchased the equipment of the Oakland and San Francisco pickup and delivery service. Plaintiff, after acquiring a license as a city carrier, operated the Los Angeles and Oakland pickup and delivery services, and the former owner of the San Francisco pickup and delivery service continued to operate it for the plaintiff. Plaintiff operated its pickup and delivery services under written contracts with the express company which covered only that portion of the goods transported in intra-city movement. There were also separate written contracts covering the inter-city and inter-terminal transportation. It was found by the trial court that different equipment was used for the inter-city and intra-city services; that "'its equipment never deviated from its devotion to the service for which it was licensed. It kept accounts restricted to its character as a highway carrier. * * * That plaintiff is both a highway carrier and a city carrier and it exists in each of these characters by separate authority. Each business [of plaintiff] has a separate license or certificate. * * * The businesses were not confused or entangled and did not overlap. The Court finds that the two operations, that of a city carrier and that of a highway carrier, are just as separate and distinct for all purposes of this case

as if the two operations had been conducted by separate and distinct corporations or legal entities.' " It was also there found that " 'plaintiff has at all times kept separate and distinct books and records covering said pickup and delivery service and entirely independent of books and records covering its intercity operations.' "

In the Bekins Van case (which was decided in 1942 but which involved taxes assessed for the years 1935 and 1936 under the provisions of the California Motor Vehicle Transportation License Tax Act), it was held that intra-city pickup and delivery service which was maintained for the transportation of small consignments to and from inter-city terminals was taxable as part of the gross receipts. This court then stated that: "The trial court in the present case properly concluded that receipts from all hauls which originated in one city for transportation over the public highways or which terminated in a city after such transportation should be treated without distinction as taxable gross receipts from operation.

"It is shown that receipts from intracity business as excepted from the act were not included in the computations of gross receipts from operation as defined by the act. Nor were charges for labor furnished for the purpose of packing and crating goods, or warehousing, included in the gross receipts subject to taxation. All exceptions and limitations provided by the act were contemplated in the additional assessment paid under protest by the plaintiff. The trial court correctly concluded that the assessment of the additional tax was in accordance with the statute." 21 Cal.2d 135, 142, 130 P.2d 421, 425.

In the Bekins case the amounts charged for pickup and delivery service in intracity movement were separately indicated on the way bills; smaller equipment was used for the intra-city operations than was used in inter-city hauls.

In the California Motor case, a majority of this court distinguished the Bekins case as follows [31 Cal.2d 217, 187 P.2d 747]:

"In support of its position that the assessments upon the receipts of pick-up and delivery service performed by plaintiff were lawfully made, defendant relies in particular upon the case of Bekins Van Lines, Inc. v. Johnson, (1942), 21 Cal.2d 135, 130 P.2d 421. The situation in that case, however, does not coincide with that now before us. There it was not proven and found by the court, as here, that the plaintiff conducted two separate and distinct business operations, each of which performed distinct and different services under contracts separately executed with the recipient of the services. Rather, the plaintiff there argued that before the tax rate was applied it was entitled to deduct from its gross receipts for the hauling of goods from its customers' dwellings in one city to those in other cities an amount computed as attributable to services rendered in loading and unloading such goods between house and sidewalk, *as well as amounts 'separately indicated on its way bills received from pick-up and delivery service within municipalities.'* In its opinion this court continued (at page 139 of 21 Cal.2d, at page 423 of 130 P.2d), 'In intercity hauls of small consignments the plaintiff found it more convenient to pick up and deliver with the use of smaller trucks between the point of pick-up or delivery and the larger truck or van which was to transport or which had transported the goods over the public highways. *In other intercity hauls the van or truck received and discharged the load directly at the door.* The plaintiff contends that receipts from such separate pick-up and delivery service within municipalities in connection with intercity hauls should be excepted from assessment under the act because that service is conducted entirely within municipalities and does not employ any part of the public highways.' * * *

"It is to be noted, also, that the court in its opinion in the above cited case points out (at page 142 of 21 Cal.2d, at page 425 of 130 P.2d) that 'receipts from intracity business as excepted from the act [Rev. & Tax.Code, § 9653] were not included [by the Board of Equalization] in the computa-

tion of gross receipts from operation as defined by the act. Nor were charges for labor furnished for the purpose of packing and crating goods, or warehousing, included in the gross receipts subject to taxation,' and that (at page 138 of 21 Cal.2d, at page 423 of 130 P.2d) in its return to the Board for the years in question 'the plaintiff reported its gross receipts from all transportation business in the state exclusive of hauls excepted by section 14 [now § 9653] of the act,' but claimed deductions therefrom as described above. *It thus appears that only receipts from those services which were found to be integral parts of the single operation of moving goods from a dwelling, over the public highways, to their destination outside of the city in which the moving operation originated, were held subject to the tax.* By contrast, plaintiff in the instant case is not moving the goods of its own customers in intercity operations whereof the pick-up and delivery service forms an integral part of a unitary operation, but is rather, as found by the trial court, engaging in two separate and distinct businesses, severally authorized by a certificate of public convenience and necessity and by a permit to operate as a city carrier, in which it renders to an express company, which alone deals with the general public, separate services under separate contracts and with separate and independent bills rendered therefor. Manifestly the fact that the same goods were the subjects of both intracity and intercity transportation does not establish that as a matter of law there was but a single business operation. In truth the plaintiff in its capacity of highway carrier was, as previously noted, prohibited from rendering pickup and delivery service in any of its terminal depot cities and, hence, could carry intercity only the identical goods which were the subject of pick-up and delivery by some other operation or agency." (Emphasis added.)

A comparison of the facts of the case at bar with the distinctions above drawn shows: That plaintiff carried goods for its parent company, the railway company, on the railway's bills of lading; and while plaintiff had two certificates, one of which was an intra-city license, its certificate of public convenience and necessity was not prohibitory but included the right to conduct intra-city transportation; that pickup and delivery service and inter-city operations were rendered under separate contracts although it appears that the original 1937 contract covered intra-city pickups and deliveries as well as line hauls; that while no separate bills were rendered for the two services, different charges were made for intra- and inter-city operations; that pickup and delivery charges were registered by the railway agents and forwarded to the plaintiff which kept monthly summaries and payment was remitted monthly by the agents; that while bookkeeping was segregated on the basis of pickup and delivery and line haul operations, there was some intermingling and overlapping both as to the bookkeeping and the operations themselves in that no distinction was made as to wholly intra-city pickups and deliveries.

In the Bekins case it was held to be of no significance that plaintiff there used smaller equipment for pickup and delivery as a matter of its own convenience. In the California Motor case it was held to be of great significance that there was no overlapping or intermingling of the use of the two types of vehicles and that there was separate billing and a complete separation of the intra- and inter-city accounts as a matter of bookkeeping. It was also held significant in the California Motor case that while the pickup and delivery services were owned by the inter-city transportation company, both businesses were conducted on behalf of an independent third party—the express company. Factually, the case at bar appears more like the Bekins case than it does the California Motor case. The Bekins case was not overruled by the California Motor case but was distinguished only because of the factual differences existing in the two cases.

[1, 2] Plaintiff argues that there is nothing in section 9653 to indicate a legisla-

tive intention that a transportation operation was exempt from taxation only if it is entirely separated from or in no way related to another transportation which is conducted on highways outside the city limits. The answer to this contention lies in the wording of the statute in which it is provided that the tax does not apply where the transportation of property is *wholly* within or between incorporated cities *"where no portion of the public highway* outside the corporate limits of the cities or private property *is traversed in such operation."* (Emphasis added.) A majority of this court said in the Bekins case (21 Cal.2d at pages 140, 141, 130 P.2d at page 424) that "The preparatory activities sought to be excepted are just as much a part of and essential to transportation, and therefore to operation of motor vehicles, as are actual loading and unloadig operations which are also preparatory to the rolling of the vehicle along the highways. To adopt the plaintiff's suggestion would be to add to the language of the definition a limitation which the Legislature did not express and which it must be deemed it did not intend. If the Legislature intended to exclude from 'operation' as defined every incidental service and activity customary and essential in the matter of transporting goods for compensation and hire, it could easily have said so. By failure to use any such limiting words the Legislature indicated its intention of not so limiting or circumscribing the meaning or scope of the act. In re Bush, 6 Cal.2d 43, 56 P.2d 511. Under the applicable rules of construction this court may not supply any language which the Legislature must be deemed to have omitted intentionally."

[3] Plaintiff also contends that the Bekins case was decided on facts occurring prior to the 1939 amendment to the act which, it is argued, constituted a substantive change in the law. This same contention was made with respect to the 1941 codification of what is now section 9653 in San Diego Electric Ry. Co. v. State Board of Equalization, 1948, 89 Cal.App.2d 267, 270, 200 P.2d 573, 575, where the court said: "We find no merit in this contention. No change in the language of the statutes has been made which compels such conclusion; and if the legislature intended, by the slight changes made in the wording of the law, that in determining gross receipts subject to taxation, only that portion of a single fare attributable to transportation in unincorporated territory should be taxed, no reason appears why cryptic language should have been used. Where prorationing has been intended, as provided in section 9606, supra, the legislature has so provided in definite terms; and its failure to provide for the apportionment of gross receipts from intercity travel on a mileage basis, when it specifically so provided regarding interstate travel, is convincing evidence that no such result was intended. It is beyond the province of courts to read into section 9653, supra, language which, we must assume, was intentionally omitted. Furthermore, that the legislature did not intend to provide for prorationing as claimed is indicated by section 9652, supra. Also section 9653 is an exemption statute, and as such is subject to the rule that exemptions from taxation are to be strictly construed against the taxpayer. Cypress Lawn Cemetery Ass'n v. City and County of San Francisco, 211 Cal. 387, 390, 295 P. 813; Bay Cities Transp. Co. v. Johnson, 8 Cal.2d 706, 712, 68 P.2d 710; Miller v. McColgan, 17 Cal.2d 432, 441–442, 110 P.2d 419, 134 A.L.R. 1424; Robertson v. Johnson, 55 Cal.App.2d 610, 614, 131 P.2d 388." Plaintiff's argument that the court in the San Diego case was referring to the 1941 codification, rather than the 1939 amendment, is without merit. The court was referring specifically to the Bekins case as is apparent from its conclusion: "Therefore, our conclusion is that the decisions in In re Bush and Bekins Van Lines, Inc., supra, are applicable and controlling in this case." The 1941 codification of what is now section 9653 divided the section into two parts, changed a comma to a period and substituted the word "does" for the phrase "imposed hereunder shall."

It should be noted that while the trial court made findings which are in accord with the facts heretofore set forth, it concluded that defendant was not entitled to assess the tax because it was levied on "gross receipts from the transportation of goods in operations wholly within the limits of incorporated cities or between incorporated cities where no portion of the public highway outside the corporate limits of such cities was traversed. * * *"

[4] It appears to us that the wording of the statute is significant and that the Legislature undoubtedly intended that the exemption should apply only where entirely intra-city operations were concerned. It, of course, cannot be denied that in the California Motor case the pickup and delivery service while intra-city was incidental to the inter-city operations of the plaintiff there as it was in the Bekins case. There is, of course, in the Bekins case and the one under consideration an intermingling of operations which was not present in the California Motor case although the same company conducted both types of operations in all three cases. In view of the holding in the San Diego case heretofore set forth which involved intra- and extra-city transportation of passengers, the amendment to section 9653 by the addition of subsection (c) in 1955 is interesting. It is there provided that "If any incorporated city imposes any tax or any franchise or license fee measured by the gross receipts *derived from the transportation of passengers and any operator engaged in the transportation of passengers partly within and partly without the city, the tax imposed by this part does not apply to the portion of the gross receipts attributable to operations within the city and included in the measure of the city tax or fee.* The amount of gross receipts to which the tax does not apply under this subdivision shall not exceed the proportion of the operator's gross receipts that the mileage operated within the city bears to the entire mileage over which the operations extend." (Emphasis added.) By the addition of this subsection the Legislature provided for a prorationing of gross receipts where intra- and extra-city *passenger* service was involved. No similar provision has been enacted to take care of the intra- and extra-city transportation of property. In the absence of such legislation, and under the section as it now stands, we do not see how intra-city operations which are an inseparable part of inter-city operations can be considered exempt from the gross receipts tax.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

McCOMB, Justice.

I dissent. I would affirm the judgment for the reasons stated by Mr. Justice Patrosso in the opinion prepared by him for the District Court of Appeal in Santa Fe Transportation Co. v. State Board of Equalization, Cal.App., 328 P.2d 990.

SHENK and SCHAUER, JJ., concur.

Rehearing denied; SHENK, SCHAUER and McCOMB, JJ., dissenting.

167 Cal.App.2d 722

Mary C. BORIS, Plaintiff and Respondent,

v.

Otto J. BORIS, Defendant and Appellant.

Civ. 23368.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1959.

Hearing Denied April 8, 1959.

Proceedings on motion to vacate default interlocutory judgment of divorce. The Superior Court of Los Angeles County, A. E. Paonessa, J., denied the motion and an appeal was taken. The District Court of Appeal, Fourt, J., held that mere fact that defendant had changed his mind, had engaged other counsel, and now wanted

something else did not constitute sufficient ground upon which to vacate judgment.

Affirmed.

1. Divorce ⇐161

That defendant had changed his mind, had engaged other counsel, and now wanted something else did not constitute sufficient ground upon which to vacate default interlocutory judgment of divorce. West's Ann. Code Civ.Proc. § 473.

2. Divorce ⇐161

On motion to vacate default interlocutory judgment of divorce, it was duty of trial court to resolve conflicts in various affidavits. West's Ann.Code Civ.Proc. § 473.

J. B. Mandel, Los Angeles, for appellant.

Schwabacher & Cosgrove, Lancaster, for respondent.

FOURT, Justice.

This is an appeal from an order denying a motion to vacate a default interlocutory judgment of divorce.

A complaint in divorce was filed by the plaintiff on April 8, 1957, wherein she charged the defendant with extreme cruelty, and also alleged the usual statutory requirements, and further set forth that there was certain described community property of the parties. She requested: a divorce; that the property be distributed pursuant to law; support and maintenance for herself; a reasonable attorney's fee; restoration of her former name and other customary demands.

The defendant engaged an attorney who represented him until after the interlocutory decree of divorce was granted. The attorney so engaged consulted with the defendant, prepared an answer wherein the defendant, among other things, set forth that the community property consisted solely of a trailer court business (which trailer court business was not mentioned in the plaintiff's complaint). The answer was filed on April 26, 1957.

On July 12, 1957, the attorney for the wife filed a "Memorandum for Setting Contested Action." On October 17, 1957, the cause was set for trial on February 14, 1958. A "Notice of Trial" dated October 24, 1957, was served upon the defendant and his attorney, and filed in the court on October 25, 1957.

On December 13, 1957, the parties and their attorneys each signed a "Stipulation for Default" in which it was set forth that the answer to the complaint theretofore filed be withdrawn and that the matter be heard as a default, and that each waived notice of all further proceedings. The stipulation was filed February 14, 1958.

On December 13, 1957, after negotiations between the parties and the attorneys, a property settlement agreement, which was prepared by the attorney for the defendant, was signed in his office by the parties, both attorneys being present.

On February 18, 1958, the defendant signed a substitution of attorneys, whereby he substituted his present attorney of record, in the place and stead of the attorney who had represented him up to that time. The consent to the substitution was signed by the former attorney on February 20, 1958, and the substitution was accepted by present counsel on February 21, 1958. The "Substitution of Attorneys" document was filed February 24, 1958.

The defendant's present counsel then filed, on March 7, 1958, what is denominated a "Notice of Motion to Vacate and Open Default and Default Judgment under section 473 C.C.P. because of surprise, inadvertence and excusable neglect." The motion was noticed for hearing on March 26, 1958. Various affidavits were filed, including those of J. B. Mandel (the present attorney for the defendant), Lauretta Boris (sister of the defendant), Susan Gaze and Albert M. Ostrow (friends of the defendant), a letter or unsworn statement of the defendant's brother from Chicago, and an affidavit of the defendant himself. The plaintiff wife filed an affidavit wherein, for all practical purposes, she denied the aver-

ments contained in the affidavits filed by the defendant, and set forth in detail in her own behalf just what did take place. The attorney for the wife also filed an affidavit which contradicted much of what was stated in the defendant's affidavits.

The general thought which seems to run throughout all of the statements filed by the defendant is to the effect that he, the defendant, had physically and mentally deteriorated during the past year and that he could not concentrate on what he was doing. A memorandum of points and authorities was filed, however, the application for relief was not accompanied by a copy of the answer or other pleading proposed to be filed.

The trial court heard the matter on March 26, 1958. At the hearing and during the course of argument, counsel for the defendant stated that he had a medical report (which had to do with the defendant) which he had recently received, however he did not offer the same into evidence and it was not so received. From the record before us it is extremely difficult to ascertain what counsel was attempting to establish at the hearing. The judge repeatedly asked him to point out wherein there had been any surprise, excusable neglect or inadvertence, and on each occasion counsel attempted to point out the inconsistencies or the contradictions in the various affidavits, and attempted to state why the judge should believe those persons who were interested in the defendant, and disbelieve the plaintiff and her attorneys. The judge denied the motion to vacate the default and the default judgment.

The defendant now contends, (1) that the court abused its discretion, and (2) that his proposed offer of impaired judgment was sufficient to raise the issue of incompetence on his part, and that the court erred in not allowing him the opportunity to satisfactorily establish such an issue.

The defendant relies heavily upon certain language set forth in the headnote in the case of Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, as follows: "The failure of a wife to contest an action for divorce resulting in an interlocutory judgment against her, due to fear engendered in her by the representations made to her by her husband and her own attorney that if she did defend, her infant child would be taken from her and its father, and placed in some public institution, is excusable neglect, within the meaning of section 473 of the Code of Civil Procedure."

There was insufficient evidence in the Rehfuss case to show that undue influence was exerted upon the wife which justified her excusable neglect in failing to proceed as she otherwise would, or that there was a collusive agreement entered into between the parties. The trial court was of the opinion that there was no such showing made in the case before us, and the record convinces us that the trial court was correct.

The defendant also cites Garcia v. Garcia, 105 Cal.App.2d 289, 233 P.2d 23, in support of his position. In that case the moving party, the wife, had not been represented by an attorney. The plaintiff himself did not file a counter affidavit to the assertions by the wife. Further, in the Garcia case, the wife's affidavit set forth that she had gone to the office of the attorney for her husband and the husband's attorney had told her that it was unnecessary for her to engage counsel, that she would be given at least one-half of the community property, that their child would remain in her custody, and that the husband would support and maintain the child. The wife did not appear in that case, and the default judgment thereafter entered provided that the husband take practically all of the community property, and further he was to have the custody of the minor child. The trial court denied the wife's motion to vacate the default and the appellate court reversed the judgment, and ordered and permitted the wife to file an answer and cross-complaint. There are no facts of importance in the present case before us which are comparable to the facts of the Garcia case.

Counsel for the defendant has stated in his brief that he made an offer tending to show that the defendant was suffering from Parkinson's disease and that such disease affected the central nervous system and the activity of the brain. We have carefully read the transcripts and the records and we fail to find any such an offer, excepting such as might have been made in a very general way when counsel indicated that he needed some more time—that the defendant was to be referred to a neurologist and a psychiatrist and that an electroencephalogram should be taken. When counsel was asked by the court if he had any testimony to the effect that the defendant was impaired in his judgment and that there had been a deterioration in his mental processes, counsel's reply was that he believed that he could get such testimony. The court asked how, and counsel's only reply was to have the court talk to the defendant.

[1] As we view it, the defendant presented no evidence to show any incompetency on his part, and there is every indication that he, the defendant, followed the usual and proper course under the circumstances, namely, when he was served with a complaint in divorce he took the papers and documents to a competent lawyer of his own choosing, told his own lawyer what he wanted, advised the lawyer of his desires with respect to a property settlement agreement, had his lawyer draw the agreement, caused arrangements to be made whereby the proposals were submitted to the opposing party (the wife in this case), and ultimately convinced the wife and the attorney for the wife of the desirability of executing a property settlement agreement, which they did. The defendant apparently knew what he wanted and got it. The fact that he has changed his mind, engaged other counsel, and now wants something else, does not constitute sufficient grounds upon which to vacate the default and the judgment.

The defendant has cited Galper v. Galper, 162 Cal.App.2d 391, 328 P.2d 487, and Dei Tos v. Dei Tos, 105 Cal.App.2d 81, 232 P.2d 873, in support of his contentions. Neither case, on its facts, is in point and in our opinion neither case is of any assistance to the defendant.

Section 473, Code of Civil Procedure, provides in part as follows:

"[Relief from judgment taken by mistake, inadvertence, surprise or excusable neglect.] The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. *Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted,* and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken." (Emphasis added.)

In this case the affidavits of the moving party did not set forth the reasons and the causes of the excuses for the inadvertence, if such there were.

[2] It is, of course, the duty of the trial court to resolve the conflicts in the various affidavits. The trial judge made the determination in this case and we see no reason why his determination should be disturbed.

Furthermore, as heretofore indicated, the moving party failed entirely to comply with the mandatory provisions of section 473, Code of Civil Procedure, in that no copy of the answer or other pleading proposed to be filed, accompanied the application for relief, nor was it ever filed or offered for filing. Bailiff v. Hildebrandt, 47 Cal.App. 564, 191 P. 42; La Bonte & Ransom Co., Inc. v. Scellars, 90 Cal.App. 183, 265 P. 550; County of Los Angeles v. Lewis, 179 Cal. 398, 400, 177 P. 154.

We find no abuse of discretion upon the part of the trial judge.

The order and the judgment are, and each is, affirmed.

WHITE, P. J., and LILLIE, J., concur.

167 Cal.App.2d 607

Sidney WELTMAN, Plaintiff and Respondent,

v.

Herman H. KAYE, Defendant and Appellant.

Civ. 23043.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1959.

Suit to rescind partnership agreement and purchase of interest in defendant's business. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fourt, J., held that even though it was expressly declared therein that issuance of license for partnership was to be essence of agreement, and even though defendant predicated his claims of fraud, breach of agreement, unclean hands, and failure to do equity upon plaintiff's alleged lack of educational qualifications for license, it would be improper for court to judge how examining board might have ruled concerning plaintiff's eligibility to take examination, where there was no evidence that plaintiff had ever been informed by anyone in authority that he could not qualify to take examination; and held that defendant had not been denied due process or equal protection of laws when trial court sustained objection to his attempt to cross-examine plaintiff about his preparation for collection agency examination and his qualifications and eligibility to take examination.

Affirmed.

1. Constitutional Law ⇐249, 311

Even though it was expressly declared therein that issuance of license for partnership was to be essence of agreement, and even though defendant predicated his claims of fraud, breach of agreement, unclean hands, and failure to do equity upon plaintiff's alleged lack of educational qualifications for license, it would have been improper for court to judge how examining board might have ruled concerning plaintiff's eligibility to take examination, where there was no evidence that plaintiff had ever been informed by anyone in authority that he could not qualify to take examination; and defendant was not denied due process or equal protection of laws when trial court sustained objection to his attempt to cross-examine plaintiff about his preparation for collection agency examination and his qualifications and eligibility to take examination. West's Ann.Bus. & Prof. Code, § 6887(a, b).

2. Partnership ⇐25

Evidence sustained finding that plaintiff had acted promptly after discovering falsity of defendant's representations and that he had not waived right to rescind partnership agreement and his purchase of one-half interest in defendant's firm. West's Ann.Bus. & Prof.Code, § 6850 et seq.

3. Appeal and Error ⇐991, 1010(1)

Whether plaintiff's acts had given rise to waiver of right to rescind partnership agreement and purchase of interest in defendant's business posed essentially a question of fact; and determination by trial court, supported by competent evidence, was binding upon reviewing court.

4. Partnership ⇐327(1)

Complaint for rescission of a partnership agreement and purchase of one-half interest in defendant's business, on ground of misrepresentations as to profits and value of business, was sufficient.

5. Partnership ⇐344

In action to rescind partnership agreement and purchase of interest in defendant's business, it was not, on record presented, error to decree that plaintiff was entitled to retain sum representing moneys previously paid to him for services rendered during continuance of partnership.

Bertram S. Harris, Los Angeles, for appellant.

Joseph Stell and Herbert Murez, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a final judgment for $10,250 plus interest in favor of Sidney Weltman, which sum represents the amount paid by Weltman to Herman H. Kaye for a one-half partnership interest in a collection agency known and operated as Superior Collectors, and decreeing that Weltman was entitled to retain the sum of $2,154.06, which sum represents monies previously paid to Weltman for services rendered during the continuance of the partnership.

The material allegations set forth in plaintiff's complaint consisting of six causes of action, are that prior to March, 1955, Kaye was the sole proprietor of a collection agency operated as Superior Collectors; that Kaye, knowing that Weltman had no previous experience in and was wholly unfamiliar with said collection agency business, solicited Weltman to purchase a one-half partnership interest in said collection agency; that Kaye represented to Weltman that he had earned net profits of $13,200 from the operation of said collection agency in the calendar year 1954, whereas the net profits earned in said business for said year were $680.38; that Kaye represented to Weltman that the value of said business was the sum of $23,000, whereas its value was substantially worthless; that in reliance on the aforesaid and other representations, Weltman was induced to enter into a partnership agreement with Kaye, to purchase a one-half partnership interest in said business from Kaye for the sum of $10,250, and to pay said sum to Kaye; that Weltman first discovered that Kaye's representations and each of them were false and untrue in August of 1955, and that promptly thereafter he served a notice of rescission upon Kaye and demanded the return of $10,250 from Kaye, none of which sum has been paid to Weltman; and that at the special instance and request of Kaye, Weltman performed work and rendered services to Kaye of the reasonable value of $2,500.

Kaye's answer consisted of a denial of the allegations, and, as affirmative defenses, Kaye alleged that his books and accounts at all times during the negotiations were open for inspection by Weltman and his accountant; that Weltman had knowledge of other offers received by Kaye for the purchase of a partnership interest in said business and that Weltman's attorney prepared the written partnership agreement which Kaye signed without legal advice; that on or about May, 1955, Kaye discovered the inability of Weltman to perform his duties as required under the partnership agreement and offered to cancel the partnership agreement, to pay Weltman the sum of $10,250, and to allow Weltman to retain his drawings to date, which offer Weltman refused to accept; that Weltman was paid from the partnership bank account a draw of $2,288.95 plus personal expenses of approximately $50; and that Weltman has failed to perform his duties as required under the partnership agreement and that on August 13, 1955, Kaye gave Weltman written notice of his intention to dissolve the partnership under the terms of the partnership agreement.

The trial court heard considerable testimony and received into evidence many exhibits, including books of original entry and various documents and copies of income tax returns prepared by certified public accountants.

[1] Appellant contends that Weltman perpetrated a fraud against appellant and committed a continuing breach of the partnership agreement; and that Weltman came into court with unclean hands seeking equity, but failing to do equity. Appellant contends Weltman knew he could not obtain a collection agency license because he did not have an education beyond the ninth grade, and that appellant had no such knowledge of Weltman's educational limitations.

The partnership agreement entered into by the parties on March 25, 1955, contains the following provisions:

"5. It is fully understood that Kaye has owned, operated and managed and had full responsibility in the conduct of the collection agency prior to the date

hereof for a period of approximately six years and is familiar with the operation of the same, whereas Weltman has had no previous experience in either the operation or conduct of a collection agency or any similar business. Kaye shall do everything possible within working hours to acquaint Weltman with the problems attendant the operation of a collection agency and give him such assistance as is possible to prepare him for the taking of the written examination prerequisite to the obtaining of an individual license by Weltman to operate a collection agency as is required by the Business & Professions Code of the State of California, Division 3, Chapter 8.

"6. Immediately upon the execution of the within instrument Kaye shall take such steps as are necessary in conjunction with Weltman to make application for licenses with the State of California for said partnership to conduct a collection agency, in the place and stead of his individual license and shall make the necessary change in licenses with the City of Los Angeles. It is distinctly understood and agreed that as a condition subsequent to the purchase of the interest in said business by Weltman that if a license is refused said partnership for any reason whatsoever, and it therefore or for any other reason becomes impossible for the parties hereto to operate a collection agency as said partners, said partnership shall terminate as of the date hereof, and any sums of money that may have been paid shall be returned to the party making said payment.

"It is expressly declared to be the essence of this agreement that a license for said partnership shall be issued by the State of California and the City of Los Angeles within the time prescribed by law after the date hereof.

"7. Weltman agrees to make such preparation as he is able, and to take the examination as is provided by law to become individually licensed to become actively in charge of the business of a collection agency, and if he is not successful on the taking of the first examination shall take said examination from time to time until he shall be successful."

Section 6887 of the Business and Professions Code reads as follows: "The Secretary of State with the concurrence of the board, subject to the provisions of this chapter, may fix and determine by rule and regulation the qualifications of applicants.

"The rules and regulations shall require, among other things, both of the following:

"(a) That the educational qualifications of applicants shall be at least graduation from a four-year high school, or proof satisfactory to the board that applicants are possessed of the equivalent of a four-year high school education in point of intellectual competency and achievement.

"(b) Proof satisfactory to the board that applicants have diligently and in good faith studied the subjects specified as subjects for examination."

Appellant states "It is obvious from the record and from respondent's own testimony and conduct that he cannot conceivably possess the equivalent of a four-year high school education in point of intellectual competency and achievement."

The record before us is completely lacking in information as to the type of proof required by the examining board in making its determination that an applicant is or is not possessed of the equivalent of a four-year high school education in point of intellectual competency and achievement. Deficiency in formal educational requirements is capable of being remedied by the applicant and need not operate as a permanent barrier to eligibility for a license; and the possibility of some delay in obtaining a license was apparently foreseen by the parties because the partnership agreement provides that Weltman was to "take said examination from time to time until he shall be successful."

There is no evidence in the record before us that Weltman was ever informed by anyone in authority that he could not qualify to take the examination, and there is no evidence that he ever made an ap-

plication to take the examination. Under the circumstances, we are of the opinion, that it would be improper for us to attempt to pre-judge how the examining board might have ruled concerning his eligibility to take the examination.

In his reply brief appellant contends that prejudicial error manifested itself and that a full and fair disposition of the matters in issue was prevented when the trial court sustained an objection to his attempt to cross-examine Weltman about his preparation for the collection agency examination and his qualifications and eligibility to take said examination; and, by reason thereof, appellant contends that he was denied due process and the equal protection of the law in contravention of Article 1, Section 13 of the Constitution of the State of California and the Fourteenth Amendment to the Constitution of the United States.

In the absence of an official ruling as to Weltman's eligibility or ineligibility to take the examination, we fail to see wherein the aforesaid limitations on the right to cross-examine, as imposed by the trial court, related to any material issue before the court, or how appellant was prejudiced by reason of any ruling of the trial court pertaining thereto.

[2] Appellant contends that the findings are not supported by the evidence and the judgment is against law. The argument made by appellant in effect is that Weltman should have had notice that something was wrong, and that there was something suspicious about the representations of appellant as early as May 1, 1955. Appellant then argues that Weltman was under a duty at that time to complain about the situation and that Weltman, in having failed to act promptly, had waived his right to rescind. In his brief, appellant has set forth considerable testimony tending to show that Weltman was familiar with the manner in which appellant had conducted business prior to as well as during the operation of the partnership. We have carefully reviewed the entire transcript, which contains conflicting testimony on most of the issues before the trial court, and we are of the opinion that there was substantial evidence to support Finding 16, as made by the court: "That it is true that on or about August 22, 1955, Weltman discovered for the first time that Kaye's representations hereinbefore set forth and referred to, and each of them, were false and untrue, and that on or about August 25, 1955, Weltman caused a written Notice of Rescission to be mailed to Kaye, and said notice was duly received by Kaye on or about August 26, 1955. Said Notice of Rescission was introduced into evidence as plaintiff's Exhibit No. 22."

[3] Whether the acts of respondent gave rise to a waiver essentially poses a question of fact, and the determination made by the trial court, having been supported by competent evidence, is binding upon this court. Smith v. Bull, 50 Cal. 2d 294, 305, 306, 325 P.2d 463; Ambriz v. Petrolane Ltd., 49 Cal.2d 470, 319 P.2d 1.

In Long v. Newlin, 144 Cal.App.2d 509, at pages 512–513, 301 P.2d 271, at page 273, it was stated by Mr. Presiding Justice White: "* * * a contract of co-partnership can be rescinded in the same manner and for the same causes as other contracts. 68 C.J.S. Partnership § 13, page 422. The effect of a rescission is to void the contract *ab initio*. In other words, the effect of the election of plaintiff's assignor to avoid the contract of partnership for the fraud practiced upon him is, that, as between the parties there has never existed any co-partnrship, although of course, having held himself out as an apparent member of the partnership prior to rescission thereof, appellant is not excused from his liability to the creditors of the co-partnership. Under Corporations Code, Section 15039, Subdivision (c), the party entitled to rescind a partnership is also entitled to be indemnified by the person guilty of the fraud or misrepresentation against all debts and liabilities of the partnership."

[4] Appellant also argues "The complaint upon which respondent obtained relief did not state a cause of action; and

for that reason it was error to find in his favor and enter judgment thereon." The rule was well stated in Domino v. Mobley, 144 Cal.App.2d 24, 26, 27, 28, 300 P.2d 324, 326 to be: "An objection to the introduction of any evidence on the ground the complaint does not state facts sufficient to constitute a cause of action is treated as a general demurrer to the complaint and all facts pleaded are deemed to be true. * * * All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. The complaint is to be liberally construed. * * * An objection by a defendant to the introduction of any evidence on the ground the complaint fails to state a cause of action will lie only 'where the admitted averments of the complaint justify a judgment for the defendant, i. e., where no material issue is joined which it is necessary to prove. * * *'"

Suffice it to say with respect to this contention of appellant that in our opinion sufficient facts have been alleged to show the existence of an actionable wrong.

[5] Appellant also argues that "The trial court also entered judgment against appellant for the additional sum of $2,154.06, which was the amount respondent withdrew as a partner; there was no evidence whatever and there was no finding that this was a reasonable amount for services rendered during such period of time he was a partner."

The Supreme Court in Oliver v. Campbell, 43 Cal.2d 298, 306, 273 P.2d 15, with reference to an action for rescission, recently stated, "On the issue of the necessity of restoration or offer to restore the part payment for the services which Campbell had made, the rule applies that such *estoration is not necessary where plaintiff would be entitled to it in any event.* See Kales v. Houghton, 190 Cal. 294, 212 P. 21; Silvey v. Fink, 99 Cal.App. 528, 279 P. 202; Mitchell v. Samuels, 39 Cal. App. 134, 178 P. 336; Sime v. Malouf, 95 Cal.App.2d 82, 212 P.2d 946, 213 P.2d 788; Rest.Contracts, Sec. 349. It is clear that *plaintiff was entitled to receive the $450 paid to him either under the contract or for the reasonable value of his services.*" (Emphasis added.)

With particular reference to the manner of establishing the value of legal services rendered, it was recently stated in Barlin v. Barlin, 156 Cal.App.2d 143, 149, 319 P.2d 87, 91, that "proof of the reasonable value of legal services by expert testimony, while admissible, is not indispensable in establishing the value thereof." A specific finding as to the value of the services rendered by respondent was made in this case: "That it is true that between March 25, 1955, and August 22, 1955, Weltman rendered valuable services to Kaye in the operation of said Collection Agency and that Kaye requested Weltman to perform said services and that the reasonable value of said services was and is the sum of $2,154.06. That said services were useful and valuable to Kaye in maintaining and carrying on said Collection Agency, and Kaye accepted said services and the benefits thereof. That said sum was heretofore paid by Kaye to Weltman in payment of said services."

With respect to this contention, as well as to other of the matters discussed hereinbefore, it is appropriate to quote the language of Mr. Justice Ashburn in the recent case of Grand v. Griesinger, 160 Cal.App.2d 397, 325 P.2d 475, 479: "'The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence on that issue. Unless this is done, the error assigned is deemed to be waived. Kruckow v. Lesser, 111 Cal.App.2d 198, 200, 244 P.2d 19. It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored. Goldring v. Goldring, 94 Cal.App.2d 643, 645, 211 P.2d 342.' Mc-

Cosker v. McCosker, 122 Cal.App.2d 498, 500, 265 P.2d 21, 22. 'A claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner.' In re Estate of Palmer, 145 Cal.App.2d 428, 431, 302 P.2d 629, 631. See, also, 3 Witkin, California Procedure, § 149, page 2330."

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

167 Cal.App.2d 463

EDGAR RICE BURROUGHS, INC., a corporation, Plaintiff and Appellant,

v.

COMMODORE PRODUCTIONS & ARTISTS, INC., a corporation, Defendant and Respondent.

Civ. 22975.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1959.

Rehearing Denied Feb. 18, 1959.

Hearing Denied March 25, 1959.

Action for declaratory relief. Defendant counterclaimed for amount of overpayments to plaintiff. The Superior Court of Los Angeles County, Wallace L. Ware, J., rendered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, White, P. J., held that since defendant's own books, which had been in its possession at all times, had disclosed fact that it had unilaterally overpaid plaintiff, defendant could be deemed to have had actual knowledge of such fact, for purposes of statute of limitations applicable to its counterclaim.

Affirmed in part and in part reversed with directions.

1. Declaratory Judgment ⇐347

In action for declaratory relief, brought by plaintiff contending that agreement giving plaintiff right to terminate contract in event of defendant's failure, for any continuous period of six months, to broadcast "a radio program released over three or more stations simultaneously" contemplated network broadcasts, evidence sustained verdict for defendant, which contended, inter alia, that it need only have three or more stations under contract to broadcast at one time.

2. Appeal and Error ⇐989, 1010(1)

Reviewing court cannot reweigh evidence favorable to respondent, and if that evidence is sufficient as a matter of law, conclusion arrived at by trial court cannot be rejected by reviewing court.

3. Appeal and Error ⇐1010(1)

On appeal, supporting evidence may consist merely of a presumption. West's Ann.Code Civ.Proc. § 1963, subd. 39; West's Ann.Civ.Code, §§ 1614, 1615.

4. Contracts ⇐10(1)

Part performance by promisee furnishes a valid consideration and cures lack of mutuality, if any, that existed originally. West's Ann.Code Civ.Proc. § 1963, subd. 39; West's Ann.Civ.Code, §§ 1614, 1615.

5. Literary Property ⇐7

Properly construed, agreement between parties gave defendant right to use in its radio broadcasts all of plaintiff's published works featuring a named character, with provision that if defendant failed to broadcast over three or more stations simultaneously for any consecutive six-month period plaintiff could terminate agreement; and

after defendant had engaged in broadcasting activities and had expended substantial sums of money over five-year period, and plaintiff had acquiesced and had received its share of profits from such activities, it would be inequitable to permit plaintiff to urge lack of either consideration or mutuality.

6. Copyrights ⇐48

Agreement by which producer granted Canadian distribution rights did not constitute an assignment or delegation of license which producer had received from copyright owner to use material for radio programs, even if producer's duties thereunder were of a personal nature; and producer satisfied its obligation to pay copyright owner 12½ percent of "net profits" when it paid over that percent of what it received from Canadian distributor rather than 12½ percent of total amount paid by Canadian radio stations.

7. Limitation of Actions ⇐182(5)

The statute of limitations is a special defense, personal in its nature, which may be waived or asserted, and party relying on it must affirmatively set it up in his pleadings either by demurrer or answer or it will be deemed to have been waived.

8. Limitation of Actions ⇐182(2)

Where answer sets up new matter constituting affirmative cause of action or counterclaim, such new matter is deemed controverted under provisions of Civil Procedure Code section; and adverse party may, without formal plea, show that attempted defense is barred by statute of limitations; that statute being deemed pleaded by operation of law. West's Ann. Code Civ.Proc. § 462.

9. Limitation of Actions ⇐95(1)

Where defendant's own books, which were in its possession at all times, disclosed fact that it had unilaterally overpaid plaintiff, defendant could be deemed to have had actual knowledge of such fact, for purposes of statute of limitations applicable to its counterclaim for amount of overpayment. West's Ann.Code Civ.Proc. § 338, subd. 4.

Loeb & Loeb, John L. Cole, Alfred I. Rothman, Los Angeles, for appellant.

Dryer, Hails, Burris & Lagerlof and H. Melvin Swift, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal by plaintiff from an adverse judgment in an action for declaratory relief, and in which defendant counterclaimed against plaintiff for the sum of $1,215.75.

On December 21, 1950, the parties hereto entered into a written contract wherein plaintiff granted to defendant the rights to use certain material featuring the character Tarzan "in live and/or transcribed radio broadcasts".

Included in the agreement was a provision that "In the event Commodore (defendant) shall for any continuous period of six (6) months during the term of this Agreement or any renewals thereof fail to broadcast a radio program released over three or more stations simultaneously then Burroughs (plaintiff) shall have the right to terminate this Agreement * * *".

It was in reliance upon this provision that plaintiff attempted to terminate the foregoing agreement. Plaintiff also alleged that the contract had been breached because of defendant's dealing with an organization known as S. W. Caldwell, Ltd., with relation to defendant's Canadian sales of the radio broadcasts, and because defendant allegedly had not fully accounted to plaintiff and paid to the latter the percentage required by the contract. By its amended complaint plaintiff set forth the additional allegation that the aforesaid contract of December 21, 1950 "is void for want of a sufficient cause and is void for want of consideration".

By its answer defendant denied the material allegations of plaintiff's pleadings, pleaded *res adjudicata*, and also counterclaimed for certain monies it had allegedly failed to deduct through mistake and inadvertence, as deductible costs under the

aforesaid contract, and which resulted in overpayments to plaintiff.

The cause proceeded to trial before the court resulting in a judgment denying plaintiff any relief upon its pleadings and that defendant recover on its counterclaim from plaintiff the sum of $1,215.75. From such judgment plaintiff prosecutes this appeal.

[1, 2] Appellant's main contention is that the agreement here in question contemplated network broadcasts of the Tarzan program. That since respondent did not have network broadcasts on the air appellant was entitled to terminate the agreement, and that the findings of the trial court to the contrary are unsupported by the evidence. With this contention we cannot agree. What the contract required was that "In the event Commodore (respondent) shall for any continuous period of six (6) months during the term of this agreement * * * fail to broadcast a radio program released over three or more stations simultaneously then Burroughs (appellant) shall have the right to terminate this agreement * * *".

It is true, as urged by appellant, that an expert witness produced by it testified that the phrase "a radio program released over three or more stations simultaneously" meant in the radio industry, "the draftsman of this document (the contract) was describing a *network* broadcast, three or more stations connected together by way of a *network*". But there was also testimony that at no time during the negotiations leading up to the contract was reference made at any time to a network, or to instantaneous broadcasts, and respondent's expert witness testified that with reference to transcriptions the word "simultaneous" meant the same broadcast within the week or within the month, and that the term "simultaneous" broadcasting "over three or more stations" means in effect that there were three or more stations under contract to broadcast at one time. There was also testimony that from approximately October, 1953 on, all radio stations broadcasting the Tarzan programs were located in Canada, and that the stations in Canada are not on a network. All of the Tarzan radio programs in Canada were transcribed on tapes. In its reply brief, appellant disavows respondent's claim that the former's position is that the language "released over three or more stations simultaneously" requires network broadcasts where there is an instantaneous release from three or more stations and asserts that its contention is that the contract requires network broadcasts. On the issue now under consideration, the court below was confronted with conflicting evidence. The trier of fact weighed this evidence and resolved the conflict in favor of respondent. Under well established rules we cannot reweigh the evidence favorable to respondent and if that evidence is sufficient as a matter of law, the conclusion arrived at by the trial court cannot be rejected by us (Scott v. Nevis, 120 Cal.App.2d 619, 621, 261 P.2d 797; 4 Cal.Jur.2d 487, Appeal and Error, sec. 606).

[3–5] It is next contended by appellant that since the agreement does not obligate respondent to do anything, it is lacking in mutuality of obligation and void for want of consideration. In this claim appellant cannot be sustained. It is well recognized that a written agreement should receive such an interpretation as will make it operative, reasonable and capable of being carried into effect, if that can be done without contravening the intention of the parties, and interpretation which gives effect to a contract is preferred to one which makes it void (Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 166, 88 P. 2d 698, 89 P.2d 386). We believe that taking the agreement now before us in its entirety, it was properly construed by the court as one in which appellant granted to respondent the exclusive right to use the Tarzan material with the provision that if respondent failed to broadcast over three or more stations simultaneously for any consecutive six-month period and did not give a written notice of election, not here pertinent, appellant could terminate the

agreement. The evidence undisputably shows that upon execution of the contract, respondent proceeded to make and produce seventy-five Tarzan episodes at a cost to respondent of approximately $1,000 each (Ross v. Frank W. Dunne Co., 119 Cal. App.2d 690, 697, 698, 260 P.2d 104). What the contract in fact did was simply to give respondent the sole right to use the word "Tarzan" in stories to be broadcasted. We are not here confronted with any evidence to support appellant's theory that consideration was lacking for there was no such evidence. One of the disputable presumptions is that "there was a good and sufficient consideration for a written contract" (Code Civ.Proc., sec. 1963, subd. 39). And on appeal, supporting evidence may consist merely of a presumption (In re Estate of Brimhall, 62 Cal.App.2d 30, 34, 143 P.2d 981; Williams v. Reed, 48 Cal.2d 57, 62, 307 P.2d 353; Thom v. Stewart, 162 Cal. 413, 421, 122 P. 1069). Under section 1614 of the Civil Code, "A written instrument is presumptive evidence of a consideration", and, "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it" (Civ.Code, sec. 1615). Furthermore, even though we assume that the contract here in question was unilateral at its inception, there was part performance by the promisee and that furnishes a valid consideration and cures the lack of mutuality, if any, that existed originally. In Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, at page 658, 67 P. 1086, at page 1088, in which case the contract on the date of its execution was unilateral, the court stated: "The promised consideration had then been partly performed, and the contract had taken on a bilateral character * * *." See also Wilck v. Herbert, 78 Cal.App.2d 392, 407, 178 P.2d 25. In the case at bar the broadcasting of these "Tarzan" programs commenced in the United States on January 4, 1951, and about October, 1953 broadcasting in Canada was commenced. To us it seems inequitable and unjust after some five years during which respondent engaged in these broadcasting activities expending substantial sums of money, in which appellant acquiesced and received its share of the profits therefrom, to say that appellant may now urge the lack of either consideration or mutuality.

[6] It is next urged by appellant that respondent breached the written contract of December 21, 1950 by delegating the duties of the latter to S. W. Caldwell, Ltd. This contention is based on the claim that the agreement herein involved duties of a personal nature which are non-delegable, and secondly, because, by reason of the claimed assignment to S. W. Caldwell, Ltd., respondent thereafter failed to remit to appellant the amounts to which it was entitled under the agreement. Appellant relies upon the rule announced in 2 Williston on Contracts, Rev.Ed., pp. 1172–1176; Coykendall v. Jackson, 17 Cal.App.2d 729, 62 P.2d 746; Sumner v. Nevin, 4 Cal.App. 347, 87 P. 1105; Fitch v. Brockmon, 3 Cal. 348; Bancroft v. Scribner, 9 Cir., 72 F. 988; and La Rue v. Groezinger, 84 Cal. 281, 24 P. 42, that a contract is not assignable and the duties thereunder are not delegable in either of the following situations: (1) where in the nature or circumstances of the case the skill, credit or other personal quality of the party was a distinctive characteristic of the thing stipulated for, namely, the personal nature of the contract itself, or (2) the personal quality of the party was a material inducement to the other party entering into the contract. In the instant case, the agreement recited that appellant was the sole owner of the basic rights and/or copyrights to all published works featuring "Tarzan" as the principal character, that appellant granted to respondent the sole and exclusive right for certain areas of the world, including Canada, "to use 'The material' as well as the name 'Tarzan' in live and/or transcribed radio broadcasts". "The material" was defined as the "basic rights and/or copyrights of all published material (including comic books and newspaper comic strips) featuring 'Tarzan' as the principal character". As respondent points out, there is no re-

striction in the contract on the manner of use of the material granted other than that respondent agrees that the character "Tarzan" shall be the principal character in all broadcasts and that he shall not be incorporated in a humorous or ridiculous fashion in such broadcasts nor shall he ever be maimed or killed.

Upon execution of the contract respondent proceeded to make and produce 75 Tarzan episodes at a cost of approximately $1,000 per episode. Appellant did not supply any of the story material for any of the episodes, and did not supply any other services or facilities in connection with the production of the stories other than the right to use the word "Tarzan".

The undisputed evidence is that a production company of the United States cannot sell its programs in Canada without an agent residing there. Respondent had been doing business in Canada with National Programs, Ltd., which in 1951 sold its distributing rights to S. W. Caldwell, Ltd. Thereafter, S. W. Caldwell, Ltd. acted as respondent's sales distributor or agent in Canada for a number of programs, including the Tarzan series. There is also evidence that respondent told appellant about going into distribution in Canada, and about the Caldwell organization, and that appellant did not object to that method of distribution. There was testimony that all the radio programs broadcast in Canada were transcribed on tape. That the radio tapes were under respondent's control, were within its knowledge and that the program belonged to respondent at all times. Respondent had no written agreement with Caldwell, but had an oral working arrangement. Respondent gave S. W. Caldwell, Ltd. instructions regarding the type of sponsor the program was required to have and helped stimulate sales efforts. We are satisfied that the situation as reflected by the foregoing factual narrative does not bring this case within the purview of the aforesaid cases cited by appellant. We fail to perceive wherein respondent assigned or delegated the license it received from appellant, namely, the right to use "The material" and the name "Tarzan" in radio broadcasts. Looking to the negotiations leading up to the signing of the contract, it seems apparent that appellant was aware that respondent's profits came in part from the sale of the radio broadcasts, and the method by which these sales were made was not encumbered or restricted in any manner by the terms of the contract. The contract specifies Canada as one of the areas in which respondent could use the name "Tarzan" in radio broadcasts. The evidence reflects that a production company in the United States cannot sell its programs in Canada except through an agent residing there. Furthermore, the programs at all times belonged to respondent who simply sold them in Canada through an agent. And we find an acquiescence by appellant in respondent's Canadian sales as evidenced by appellant's acceptance of its share of the profits in accordance with copies of statements rendered by the Caldwell organization, and which were sent to appellant.

As to appellant's claim that by reason of the so-called Caldwell arrangement it was deprived of benefits and profits which it would otherwise receive, it is contended that the agreement provides for respondent paying to appellant in full for all rights granted, 12½% of the net profits, if any, realized by respondent, whether from the sale or otherwise, of the radio broadcasts, and specifies that net profits shall mean the amounts actually received by respondent less certain expenses of production. That sales or distribution expense is not a deductible item of expense. The uncontradicted testimony, says appellant, is that defendant and S. W. Caldwell, Ltd. split the receipts from Canadian radio stations on a 60–40 basis, with S. W. Caldwell, Ltd. remitting to respondent 60% of such receipts and retaining 40% of its share. Respondent paid to appellant 12½% of said 60% which it received rather than 12½% of the total amount paid by the Canadian radio stations. That the result was that by reason of the sales activities being conducted by S. W. Caldwell, Ltd. rather than by respondent, appellant was deprived of a sub-

stantial share of profits to which it otherwise would have been entitled, to-wit, 12½% of the 40% retained by S. W. Caldwell, Ltd.

However, the contract provides that "net profits shall mean *the amounts actually received by Commodore* (respondent)" (emphasis added) less certain items which could be deducted from the amounts actually received. The evidence shows that respondent did actually pay to appellant 12½% of the net amount received by it; sent to appellant copies of statements rendered by S. W. Caldwell, Ltd. to respondent, and respondent also sent its own statements remitting to appellant 12½% of the net amount respondent had received. At the trial appellant's counsel stated: "* * * There is no question but what we got reports right along on the stationery of Commodore Productions and Artists Company, and that they paid us 12½% of whatever that income was. We don't dispute that." All of the foregoing statements and remittances were accepted and kept by appellant without objection. It is also revealed by the evidence that the "Tarzan" radio broadcasts made in South Africa were handled by an agent in Australia who used an accounting procedure similar to that utilized by the Caldwell organization; that appellant knew of this and made no objection. Such remittances from Australia on the South African broadcasts and which were introduced into evidence, show that respondent received a royalty only which was actually sent to appellant, which forwarded the money to respondent, which in turn paid appellant 12½% of that amount. Viewed in the light of appellant's acquiescent conduct as to the Canadian broadcasts, its complaint in regard thereto lacks substance here.

Finally, appellant earnestly insists that respondent's counterclaim is barred by the Statute of Limitations (Code Civ.Proc., sec. 338, subd. 4). In this regard the record reflects that in an earlier action between the parties herein as plaintiff and defendant, plaintiff (appellant herein) in the latter part of 1955 made an audit of defendant's (respondent herein) books. That appellant's auditor later stated to respondent's president that the latter had failed to retrieve approximately $9,000 worth of costs incurred in the production of Tarzan programs (defendant in said prior action being entitled to deduct such costs before accounting to plaintiff therein), and that respondent remitted 12½% of its receipts from a sponsor without deducting from these remittances the amount it was entitled to deduct, because of previously incurred costs, so that appellant received remittances calculated on a higher figure than should have been the case. Respondent did not discover this until the 1955 audit which revealed an overpayment of $1,215.75. This was the first time respondent's auditor, Mr. Mitchell, or anyone in its organization, knew of the overpayment. It is true, as contended by appellant herein, that Mr. Mitchell had been respondent's auditor since 1949 or 1950, and that the books in question from which the overpayments were discovered were at all times in the possession of respondent. Mr. Mitchell admitted that an audit as of January, 1953 might have disclosed the same information which was disclosed in 1955. The same information was in respondent's books and in its possession during the entire period of time and the books were never in the possession of appellant, to the witness' knowledge. The overpayment resulted from respondent's failure to carry forward certain costs from the Dr. Ross series of broadcasts to the new series.

There was introduced into evidence, as respondent's Exhibit A, a document prepared by its accountant, Mr. Mitchell. This exhibit shows that the unrecovered production costs were in existence as of March 31, 1952 and that the overpayment commenced on May 15, 1952, when respondent issued a check to appellant as payment of the latter's share of profit for the month of April, 1952.

The court found that, "It is true that the defendant, through mistake and inadvertence, failed to deduct the sum of $1215.75, as deductible costs, as defined and provided

in said agreement of December 21, 1950. It is true that plaintiff's auditor discovered the error and overpayment while making an audit of defendant's books and records in September and October of 1955." and ordered judgment that respondent recover from appellant on the former's counterclaim the sum of $1,215.75.

Appellant's sole contention is that since action was not commenced within three years after its inception the same is barred by the provisions of subd. 4 of section 338 of the Code of Civil Procedure, which provides for a three-year limitation upon, "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake".

[7, 8] Respondent first contends that the record on appeal fails to show that the alleged bar of the statute of limitations to the counterclaim was ever raised by appellant and therefore, the latter must be deemed to have waived any such defense. That appellant failed to raise the issue by demurrer and that "no mention was made of this alleged defense at the time of trial either by motion to strike the counterclaim or by objection to the receipt of any evidence to support the counterclaim or in any manner whatsoever". We are not in accord with respondent's contention. Subsequent to the filing of respondent's brief, this court, pursuant to stipulation of the parties, ordered the record augmented by including therein the pre-trial order made in the trial court, which discloses the following:

"With reference to the counterclaim contained in the answer of the Defendant it is the contention of the Plaintiff * * * (e) that any cause of action for monies expended by Commodore Productions and Artists, Inc. under the Lewis contract is barred by the statute of limitations." Also, on March 26, 1957, prior to the trial, there was filed by respondent herein, a memorandum entitled, "Defendant's Points and Authorities" wherein appears the following: "5. Is the counterclaim barred by the Statute of Limitations?" together with a discussion of the law and citation of cases concerning the claimed bar of the counterclaim. We are satisfied that while, as contended by respondent, the statute of limitations is a special defense, personal in its nature, which may be waived or asserted, and that the party relying on it must affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived, there is however, another rule which is applicable with regard to the plea of the bar to counterclaims. This rule has developed because of Section 462 of the Code of Civil Procedure, which as was said in Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 745, 47 P.2d 273, 275, may be stated as follows: "Where the answer to a complaint sets up new matter constituting an affirmative cause of action or counterclaim, such new matter is deemed controverted under the provisions of section 462 of the Code of Civil Procedure, and the adverse party may, without formal plea, show that the attempted defense is barred by the statute of limitations, that statute being deemed pleaded by operation of law. (Citing cases.)" In the case at bar, it is manifest that appellant invoked the plea at the trial and the trial court made a finding on the plea thus presented. We therefore conclude that the statute was sufficiently pleaded, was relied upon by appellant as a defense to the counterclaim, was entertained by the trial court and a finding made thereon. See also Hermosa Beach Land & Water Co. v. Law Credit Co., 175 Cal. 493, 495, 166 P. 22; Pacific Improvement Co. v. Maxwell, 26 Cal.App. 265, 268–269, 146 P. 900; Jones v. Peck, 63 Cal.App. 397, 408, 218 P. 1030. The cases of California Employment Stabilization Commission v. MacGregor, 64 Cal.App.2d 691, 693, 149 P.2d 304, and Bliss v. Sneath, 119 Cal. 526, 527–529, 51 P. 848, relied upon by respondent are readily distinguishable from the situation presented by the record herein. Since no pleading to a counterclaim is required, appellant was entitled to raise the statute of limitations as

a defense to respondent's counterclaim without formal plea, the statute being deemed pleaded as to a counterclaim by operation of law.

[9] We come now to a consideration of the reasons advanced by appellant why respondent's counterclaim herein is barred by the statute of limitations. It is the contention of appellant that since the overpayment which was the subject of the counterclaim occurred in 1952, and might have been discovered by respondent as early as 1953 and the counterclaim was not filed until September 11, 1956, respondent cannot avoid the statute. Appellant argues that the books and records of respondent which would have revealed the overpayment were at all times in the possession of respondent and therefore, respondent was at all times chargeable with actual knowledge of what its books would reveal. It is further urged by appellant that since respondent had the means of uncovering the true facts and, since in any event means of knowledge is equivalent to knowledge, the counterclaim is barred by the provisions of section 338, subd. 4 of the Code of Civil Procedure. Appellant relies heavily upon the case of Shain v. Sresovich, 104 Cal. 402, 38 P. 51, which involved an action to recover an overpayment made to defendant by plaintiff's assignors. Plaintiff's assignors and defendant were engaged in a joint venture for the importation and sale of oranges. On July 1, 1886, plaintiff presented to defendant a statement showing an indebtedness to defendant in excess of $2,000 and paid the same. These accounts were kept by plaintiff's assignors in one of their firm books, and the statement of account was prepared by them. The books were stored away until 1890, and in 1891 plaintiff's assignors discovered the error; that they had paid $630 too much. An action was brought on May 5, 1891.

The plaintiff maintained that he was not barred by the three-year period of limitations in an action for relief on grounds of mistake because section 338, subd. 4, Code of Civil Procedure, provided that the cause of action is not deemed to commence until discovery. In the cited case the court stated 104 Cal. at page 405, 38 P. at page 52, "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence. * * *

"Applying the above rule to the present case, we are of the opinion that the plaintiff's assignors had at all times after the payment to the defendant such means of information with reference to the account between them and him, and of the mistake in the payment, that their failure to avail themselves of it charged them with the same result as though they had actual knowledge thereof. The accounts were kept under their supervision, or by their bookkeeper. The statement was made out by him. The book in which the account was kept, and from which the statement was presumably made, was retained by them, and was afterwards used by them, in which to place their own individual transactions, and was afterwards stored away by them. It is not claimed that the defendant ever saw the book, or took any part in the preparation of the statement, or that he sustained any relation to them which entitled them to rely upon any statement of his, or that he made any statement or did any act which induced them to make the payment. Under these circumstances they are not entitled to claim that the 'discovery' of the mistake was within three years of the commencement of the action." To the same effect is the case of Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 487, 45 P. 809, and Merchants' Ice & Cold Storage Co. v. Globe Brewing Co., 78 Cal.App.2d 618, 624, 625, 177 P.2d 963.

Respondent places great reliance upon the case of Hobart v. Hobart Estate Co., 26 Cal.2d 412, at pages 437–439, 159 P.2d 958 at page 972, wherein the court stated: "It is not in every case, however, that a person is barred after three years by failure to

pursue an available means of discovering possible fraud. The statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: 'Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.' (Italics added.) Under this section it was held in Tarke v. Bingham, 123 Cal. 163, 55 P. 759, that the plaintiff was not barred by subdivision 4 of section 338 of the Code of Civil Procedure, since nothing had occurred 'to excite his suspicion, or to put him upon inquiry.' 123 Cal. at page 166, 55 P. at page 760. The court said: 'Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*' (Italics added.) Many other decisions have adopted this view. (Citing cases.) In many cases it has been said that means of knowledge are equivalent to knowledge. (Citing cases.) This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. In the Lady Washington case, the court said (113 Cal. at page 487, 45 P. at page 810) that 'as the means of knowledge are equivalent to knowledge, *if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry* which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.' (Italics added.)"

It is noteworthy that in the Hobart case the court cited and quoted from Lady Washington Consol. Co. v. Wood, supra; Shain v. Sresovich, supra, and Tarke v. Bingham, 123 Cal. 163, 55 P. 759; relied upon by appellant herein, but nowhere in the Hobart case does the court criticize or disapprove the holding in Lady Washington Consol. Co. v. Wood, supra, 26 Cal.2d at page 487, 159 P.2d at page 973, that means of knowledge are equivalent to knowledge and that when "* * * the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts", and 113 Cal. at page 488, 45 P. at page 811, "The plaintiff ought not now to be permitted to say that it did not discover the transactions when they were spread at large upon its records and books of account". As we view the Hobart case, supra, it simply holds that if the circumstances were such as to charge respondent herein with a duty to inquire by reason of its awareness of suspicious facts then it would be charged with actual knowledge. However, the Hobart case does not hold that where as here, the facts were presumptively within respondent's knowledge because its own books, in its possession at all times, disclosed the fact that it had unilaterally overpaid appellant in the sum of $1,215.75, respondent would not be deemed to have had actual knowledge of these facts. We therefore conclude that respondent had at all times after the overpayment to appellant such means of information with reference to the account between them, and of the mistake in the overpayment, that respondent's failure to avail itself of it charged respondent with the same result as though it had actual knowledge thereof. If respondent could prevail on its counterclaim under the facts here present there is no limit to the time in which an action for restitution might be commenced. As was said in Shain v. Sresovich, supra, 104 Cal. at page 406, 38 P. at page 52, "It would be a new proposition in mercantile life, as well as in law, if we should hold that if a merchant, many years

after he had retired from business, on looking over his account books through curiosity, should find that his bookkeeper had made a mistake in the account of one of his customers, he could recover from the customer for the merchandise that had been omitted from his account through such mistake or get back from him the money which he had paid upon a settlement with him."

For the foregoing reasons, that portion of the judgment that defendant recover on its counterclaim from plaintiff the sum of $1,215.75 is reversed with directions to the court below to enter judgment that defendant take nothing on its counterclaim. In all other respects the judgment is affirmed. The parties will bear their respective costs on appeal.

FOURT and LILLIE, JJ., concur.

167 Cal.App.2d 534

Arthur Maxson SMITH, Plaintiff and Appellant,

v.

MUNICIPAL COURT OF GLENDALE JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, State of California, Defendant and Respondent.

Civ. 23349.

District Court of Appeal, Second District, Division 1, California.

Feb. 3, 1959.

Proceeding on application for writ of prohibition and mandate to prohibit respondent court from proceeding to try plaintiff on complaint charging him with violation of Motor Vehicle Code and to compel court to enter order transferring action to municipal court in county seat. The Superior Court of Los Angeles County, Edward T. Bishop, J., entered judgment of dismissal and petitioner appealed. The District Court of Appeal, Nourse, J. pro tem., held that under statute providing whenever a person is arrested for a violation of Vehicle Code that is not declared to be a felony, place specified in notice to appear shall be either before magistrate in county who is at the nearest and most accessible place to where arrest is made or upon demand of person arrested before municipal court judge of county seat, upon demand of arrested person officer is required to specify in the notice or citation that the appearance be before the municipal court judge at the county seat of county in which offense was alleged to have been committed.

Reversed with directions.

1. Prohibition ⇐10(3)

Where petitioner arrested for violation of Motor Vehicle Code sought to prohibit court from proceeding to try him on complaint, petitioner was entitled to writ of prohibition if respondent court in seeking to try him was acting in excess of its jurisdiction even though it might have jurisdiction over petitioner's person and jurisdiction of cases involving misdemeanor charge. West's Ann.Vehicle Code, §§ 476 (c), par. 1, 739; West's Ann.Pen.Code, §§ 1462, 1462.2.

2. Mandamus ⇐61

Where petitioner sought writ of mandate to compel respondent court to enter order transferring action to another court in the county, petitioner was entitled to writ of mandate if respondent court had abused its discretion and he had no speedy and adequate remedy at law.

3. Automobiles ⇐350

Under statute providing that whenever a person is arrested for a violation of Motor Vehicle Code that was not a felony, place of appearance specified in notice should be either before the nearest or accessible magistrate within county in which offense charged is alleged to have been committed or upon demand of person arrested, before municipal court judge in county seat of

county in which such offense is alleged to have been committed, upon demand of arrested person officer was required to specify place of appearance as the municipal court judge at the county seat. West's Ann.Vehicle Code, § 739 and subd. (c).

4. Statutes ⇐212.4

In interpreting statute court must presume that legislature intended that all its provisions have meaning and perform a useful function.

5. Statutes ⇐219

While opinions of Attorney General are not controlling as to meaning of statute, fact that his opinions have not been challenged and he is an officer charged by law with advising officers charged with enforcement of law as to meaning of it entitle his opinions to great weight.

6. Automobiles ⇐350

Where party was charged with a violation of Motor Vehicle Code and demanded the municipal court at the county seat to be his place of trial but arresting officer refused and inserted as place of appearance the nearest most accessible magistrate, arrested party, unless he resisted arrest, had no means of asserting his right to appear before municipal court judge at county seat except by immediately demanding that hearing on charge against him be transferred to the county seat in accordance with his demand, and fact that party was taken into custody and did not sign a promise to appear could not prevent application of statute giving him right to demand county seat as place of appearance for trial. West's Ann.Vehicle Code, § 739; West's Ann.Pen. Code, § 1462.2.

7. Automobiles ⇐350
Mandamus ⇐61

Where party was arrested for a violation of Motor Vehicle Code in Los Angeles County and demanded that place of trial be before the Municipal Court Judge at Los Angeles rather than the nearest and most accessible judge, Municipal Court of Los Angeles Judicial District was proper place for trial and it was duty of other municipal court in Los Angeles County to transfer case to Municipal Court of Los Angeles Judicial District, and since there was no dispute as to the facts court was without discretion to deny motion to transfer and therefore party was entitled to a writ of mandate. West's Ann.Vehicle Code, § 476 (c), par. 1; West's Ann.Pen.Code, § 1462.2.

Robert A. Keller, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Donald K. Byrne, Deputy County Counsel, and Iver E. Skjeie, Deputy County Counsel, Los Angeles, for respondent.

NOURSE, Justice pro tem.

By his petition in this action plaintiff sought from the Superior Court of Los Angeles County writs of prohibition and mandate against the Municipal Court of Glendale Judicial District, County of Los Angeles. Demurrer to his petition having been sustained with leave to amend and petitioner having failed to amend, judgment of dismissal was entered and from this judgment petitioner appeals.

[1, 2] Petitioner seeks to prohibit the respondent court from proceeding to try him on a complaint charging him with the violation of section 476(c) par. 1 of the Vehicle Code and seeks writ of mandate to compel the respondent court to enter its order transferring the action to the Municipal Court of Los Angeles (the county seat). Petitioner is entitled to a writ of prohibition if the respondent court in seeking to try him is acting in excess of its jurisdiction even though it may have jurisdiction over petitioner's person and jurisdiction of cases involving the misdemeanor charged. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 285–291, 109 P.2d 942, 132 A.L.R. 715; Caminetti v. Superior Court, 16 Cal.2d 838, 848, 108 P.2d 911; State v. Superior Court, 14 Cal.App.2d 718, 58 P.2d 1322; Shell Oil Co. v. Superior Court, 2 Cal.App.2d 348, 37 P.2d 1078; Carter v. Superior Court, 176 Cal. 752, 169 P. 667. He is entitled to the writ of mandate if the respondent court has abused its discretion

and he has no speedy and adequate remedy at law. Caminetti v. Superior Court, supra; Dowell v. Superior Court, 47 Cal.2d 483, 304 P.2d 1009; Marr v. Superior Court, 30 Cal.App.2d 275, 279, 86 P.2d 141; Simmons v. Superior Court, 96 Cal.App.2d 119, 132, 214 P.2d 844, 19 A.L.R.2d 288.

Whether the respondent court would be acting in excess of its jurisdiction should it proceed to try him and whether it has abused its discretion in refusing a transfer of the action to the municipal court of the county seat, is dependent upon the construction placed upon section 739 of the Vehicle Code and sections 1462 and 1462.2 of the Penal Code.

The facts as alleged by the petition and which are by the demurrer thereto admitted to be true are in substance as follows: On June 23, 1957, petitioner was placed under arrest in the city of Glendale by a police officer of that city. At the time of the arrest the officer prepared a citation charging petitioner with the violation of section 476(c), par. 1 of the Vehicle Code for allegedly having made a right turn against a red light in violation of that section. Petitioner then demanded that the arresting officer specify in the citation as the place for him to appear the municipal court at the county seat, namely, Los Angeles. This the arresting officer refused to do and specified in the citation the respondent court as the place at which petitioner would, by signing the citation, promise to appear. Petitioner refused to sign this citation and was thereupon taken into custody by the arresting officer and removed to the Glendale police station where he was booked, fingerprinted, photographed and released on bail.

On June 24, 1957, petitioner appeared in the respondent court, objected to the jurisdiction of that court and demanded that the cause be transferred to the Municipal Court of Los Angeles Judicial District. His motion was denied and he was thereupon arraigned upon a criminal complaint charging the violation of the section of the Vehicle Code above mentioned and July 16th was set as the date for plea. On that date petitioner appeared by his attorney and objected to the jurisdiction of the respondent court and filed a written motion to transfer the cause to the county seat and to stay proceedings. On July 22nd this motion was denied and the cause continued to September 3, 1957, for the purpose of plea, the petitioner having waived the time to plead. Thereupon petitioner filed his petition in the superior court.

Section 739 of the Vehicle Code, insofar as is pertinent here, reads as follows:

> "Whenever a person is arrested for any violation of this code, not declared herein to be a felony, * * * and such person is not immediately taken before a magistrate as hereinbefore required or permitted, the arresting officer shall prepare in triplicate a written notice to appear in court or before a person authorized to receive a deposit of bail, containing * * * the time and place when and where such person shall appear.
>
> * * * * * *
>
> "(c) The place specified in said notice to appear shall be *either*:
>
> "(1) Before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where said arrest is made; or
>
> "(2) Upon *demand* of the person arrested, before a municipal court judge * * * at the county seat of the county in which such offense is alleged to have been committed or before a magistrate in the judicial district in which the offense is alleged to have been committed." (Emphasis added.)

Section 1462 of the Penal Code confers jurisdiction on each municipal court within a county of all misdemeanors committed within the county in which such municipal court is established with certain exceptions which are not pertinent here.

Section 1462.2 of the Penal Code so far as is pertinent here reads as follows:

"*Except as otherwise provided in the Vehicle Code,* the proper court for the trial of criminal cases amounting to misdemeanor shall be determined as follows: If there is a municipal * * court having jurisdiction of the subject matter of the case, established in the district within which the offense charged was committed, such court is the proper court for the trial of the case; * * * [Emphasis added.]

"If an action or proceeding is commenced in a court having jurisdiction of the subject matter thereof other than the court herein designated as the proper court for the trial, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he pleads, requests an order transferring the action or proceeding to the proper court. If after such request it appears that the action or proceeding was not commenced in the proper court, *the court shall order the action or proceeding transferred to the proper court.*" (Emphasis added.)

It is petitioner's contention that under section 739 of the Vehicle Code he had the right to select the court before which he would be obligated to appear and having made his demand that he be cited to appear at the county seat, the municipal court there was the proper court for the trial of the action and that the respondent court therefore acted in excess of its jurisdiction in proceeding to try him and abused its discretion in refusing to transfer the action to the municipal court at the county seat.

[3] We are of the opinion that it was the intent of the Legislature to permit the person arrested upon a charge such as that involved here to designate the place at which he should appear and be tried. The section requires the officer to specify in the notice or citation the place at which the person shall appear and provides that this place shall be either before the nearest or most accessible magistrate within the county with reference to the place where the arrest is made or *upon demand of the person arrested,* before a magistrate in the county seat or a magistrate in the judicial district in which the offense was alleged to have been committed. It is respondent's contention that by the use of the word "either" in paragraph (c) of section 739 of the Vehicle Code the Legislature evidenced its intent to give the arresting officer the right to specify in the citation the place at which the arrestee should appear. We do not so read the statute. It is apparent that while the statute requires the officer to specify in the notice one or the other of the two places for the appearance of the arrestee, it does not leave to his discretion which of the two places shall be named. If no demand is made by the arrestee the officer must specify the place of appearance as before a magistrate within the county which has jurisdiction of the offense and who is nearest and most accessible with reference to the place where the arrest is made. But if a demand therefor is made by the arrestee the officer must specify as the place of appearance a municipal court within the judicial district at the county seat or at the demand of the arrestee, before a magistrate in the judicial district in which the offense is alleged to have been committed.

Inasmuch as paragraph (c) (2) of the section provides for a demand on the part of the person arrested, we must assume that the Legislature intended the word "demand" to have its ordinary meaning and the import which that meaning gives to the statute. "Demand" is defined as: "An asking with authority, claiming or challenging as due." The clear import of the statute is therefore to give the right to the arrested person to specify the place of his appearance and trial. If he has a right to demand that as something due him, that right cannot be denied him at the discretion of the arresting officer.

[4] In interpreting this statute we must presume that the Legislature intended that all its provisions have meaning and perform a useful function. Clements v. T. R. Bechtel Co., 43 Cal.2d 227, 233, 273 P.2d 5; Dempsey v. Market Street Ry. Co., 23

Cal.2d 110, 113, 142 P.2d 929; Weber v. County of Santa Barbara, 15 Cal.2d 82, 86, 98 P.2d 492. Certainly it was the intent of the Legislature in enacting paragraph (c) (2) of section 739 that that section should have some efficacy, but if the construction placed upon it by the trial court and which is contended for by the respondent is placed upon it, the paragraph is purely surplusage, for if the arresting officer may disregard the demand of the arrestee the right to make the demand becomes meaningless. Had the Legislature intended that the officer might at his discretion fix the place at which the arrestee should appear, it would have been a simple matter to eliminate paragraphs (1) and (2) of paragraph (c) and change paragraph (c) to read: "The place specified in the notice shall be before any magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense," thus leaving it to the arresting officer to give heed to or ignore the demand of the arrested person that he be cited to appear at the county seat or before a judge of the municipal court in the judicial district in which the offense was committed. It is to be noted that when the Legislature intended that the officer might exercise his discretion in the matter of either taking the arrestee into custody or issuing him a citation it gave this discretion to the officer in express terms. See sections 737 and 737.5, Vehicle Code.

[5] The construction which we have placed upon section 739 is the construction placed upon that section by the attorney general of this State in two opinions rendered to executive officers charged with the enforcement of the provisions of the Vehicle Code. See Opinions of the Attorney General, NS 2582 and NS 3076. Both of these opinions were rendered by the attorney general in 1940. So far as we are advised the construction placed by the attorney general upon the section has not, in the 18 years that have passed since he rendered his opinion, been challenged. While the opinions of the attorney general are not controlling as to the meaning of the statute the fact that his opinions have not been challenged and that he is the officer charged by law with advising the officers charged with the enforcement of the law as to the meaning of it, entitle his opinions to great weight. Carter v. Commission on Qualifications, etc., 14 Cal.2d 179, 93 P.2d 140; Mudd v. McColgan, 30 Cal.2d 463, at page 470, 183 P.2d 10, at page 14; Corey v. Knight, 150 Cal.App.2d 671, at page 678, 310 P.2d 673, at page 678. It is worthy of note that since the attorney general rendered the opinions above mentioned the Legislature has twice amended section 739 but has not made any change in the wording of those portions of the section which were construed by the attorney general in his opinions.

That section 739 of the Vehicle Code provides for a place of trial as well as a place for appearance of persons who have been cited and promised to appear on charges of violation of the provisions of the Vehicle Code other than those specified in sections 736–737 and grants jurisdiction to the judges of the municipal court at the county seat to try such cases seems self-evident. In the first place the provisions of 1462.2 of the Penal Code that "[e]xcept as otherwise provided in the Vehicle Code, the proper court for the trial of criminal cases amounting to misdemeanor shall be determined as follows:" clearly indicates the intent of the Legislature that the provisions of chapters 1 and 2, division 12 of the Vehicle Code should be construed as designating as the proper courts for the trial of cases involving the misdemeanors therein specified the courts before whom the person arrested for such misdemeanors might be cited. In the second place unless section 739 as well as section 736, 737 and 737.5 of the Vehicle Code be construed as giving the right to municipal courts other than the municipal court of the judicial district in which the offense is committed, to try offenses for which a person may be cited before them under those provisions of the Vehicle Code, those courts would not have the right over ob-

jection to try a person appearing before them upon a citation. This is true because under the provisions of section 1462.2 of the Penal Code, other than that part thereof which excepts from its provisions the provisions of the Vehicle Code, it is only the municipal court of the judicial district in which the offense is committed which is the proper court for the trial of the cause.

We hold therefore, that the arresting officer was upon the demand of petitioner required to specify the municipal court at the county seat as the place where petitioner should appear and that the Municipal Court of the Los Angeles Judicial District was the proper court for the trial of the cause.

[6] In arriving at this conclusion we have not overlooked the contention of the respondent that inasmuch as petitioner was taken into custody and did not sign a promise to appear that the provisions of section 739 cannot be applied. We find no merit in this contention, for to uphold it would permit the arresting officer to violate his duty to respect the demand of the person arrested as to the place of appearance and by his violation defeat the rights of the arrestee under the section. The arrested person, unless he resists arrest, has no means of asserting his rights under said section 739 except to do as petitioner did here, immediately demand that the hearing on the charge against him be transferred to the county seat in accordance with his demand to the arresting officer.

[7] The Municipal Court of the Los Angeles Judicial District being the proper place for the trial of the action against petitioner, section 1462.2 of the Penal Code made it the duty of the respondent court to transfer the case to the Municipal Court of the Los Angeles Judicial District. So far as pertinent to this question, section 1462.2 of the Penal Code reads: "If after such request [for transfer] it appears that the action or proceeding was not commenced in the proper court, the court *shall* order the action or proceeding transferred to the proper court." (Emphasis added.) There being no dispute as to the facts the court was without discretion to deny the motion to transfer and petitioner was entitled to the transfer as a matter of right. The order of the court denying the motion to transfer is not an appealable order and while the court's error might be reviewed upon an appeal from the final judgment, this in our opinion is not a speedy or adequate remedy. Petitioner is therefore entitled to a writ of mandate.

The judgment is reversed and the superior court is ordered to issue a peremptory writ of mandate commanding the respondent court to forthwith and without taking any other proceeding transfer the proceedings against the petitioner to the Municipal Court of the Los Angeles Judicial District at Los Angeles.

FOURT, Acting P. J., and LILLIE, J., concur.

167 Cal.App.2d 604

In the Matter of the Guardianship of the Person and Estate of Melvin Ronnie FURR, a Minor.

Theo Melvin FURR, Petitioner and Appellant,

v.

Cordie D. HOLT, Respondent.

Melvin Ronnie FURR, a minor by his Guardian, Cordie D. Holt, Plaintiff and Respondent,

v.

Theo Melvin FURR, Defendant and Appellant.

Civ. 18164.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1959.

Proceeding by father to have maternal grandmother removed as guardian of per-

son and estate of his son toward whose support father had made no substantial contribution although requested to do so in a period of over two years following denial of an earlier petition for removal after which father had been convicted of disturbing the peace. From an order of the Superior Court, Santa Clara County, M. G. Del Mutolo, J., denying the petition, the father appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that father was not a fit and proper person to have custody of his son.

Order affirmed.

1. Parent and Child ⇐2(1)

A father has a superior right to custody of his child over maternal grandmother if father is a fit and proper person to have such custody. West's Ann.Prob. Code, § 1580(8).

2. Guardian and Ward ⇐25

Petition filed by father to have maternal grandmother removed from position as guardian of person and estate of father's child put in issue father's fitness to have custody of his child, and burden was on father to establish his fitness in order to prove that guardianship was no longer necessary. West's Ann.Prob.Code, § 1580(8).

3. Guardian and Ward ⇐25

In proceeding on father's petition to remove maternal grandmother as guardian of his son, father could not go behind an order entered on a prior petition denying father's request for removal of grandmother as guardian when he allowed such order to become final, and it was necessary that he establish that since such order he had rehabilitated himself and was presently a fit and proper person to have custody of his child. West's Ann.Prob.Code, § 1580 (8).

4. Guardian and Ward ⇐25

In proceeding by father to have maternal grandmother removed as guardian of person and estate of his son toward whose support father had made no substantial contribution although requested to do so in a period of over two years following denial of an earlier petition for removal after which father had been convicted of disturbing the peace, evidence sustained finding that father was not a fit and proper person to have his son's custody. West's Ann.Prob.Code, § 1580(8).

John T. Hourigan, Delano, Robert M. Maslow, Beverly Hills, for appellant.

Malovos, Mager & Chasuk, Alfred P. Chasuk, Mountain View, for respondent.

DOOLING, Justice.

Appellant appeals from an order denying his petition to remove respondent, Cordie D. Holt, from her position as guardian of the person and estate of Melvin Ronnie Furr, a minor.

Appellant is the father of said minor, a boy born January 25, 1947, and his mother is dead. Respondent is the minor's maternal grandmother. The minor lived with his grandfather and grandmother from shortly after his birth. The grandfather died in 1953 and since then the minor has continued to live with the grandmother, respondent herein. After the grandfather's death the respondent was appointed guardian of the minor and qualified as such guardian on June 23, 1953. On January 13, 1955 appellant petitioned the court to remove respondent as guardian and that petition was denied on March 4, 1955. No appeal was taken from this order. On July 8, 1957 appellant filed another petition seeking the removal of such guardian and from the order denying that petition this appeal is taken.

[1, 2] The father has a superior right to custody of his child over the grandmother if he is a fit and proper person to have such custody. In re Guardianship of Smith, 42 Cal.2d 91, 93, 265 P.2d 888, 37 A.L.R.2d 867. However where a guardian has been appointed and the parent of the child seeks the removal of such guardian he must satisfy the court that "it is no longer necessary that the ward should be under guard-

ianship." Prob.Code § 1580(8). This puts in issue the parent's fitness to have custody of his child and the burden is on him to establish his fitness in order to prove that the guardianship is no longer necessary. Guardianship of Brock, 154 Cal.App.2d 431, 433–434, 316 P.2d 3.

In this case the record shows that in 1950 appellant was convicted of burglary and served 18 months in San Quentin. He has also been twice convicted of battery, once of being drunk in a public place and once of disturbing the peace. He testified that all of his arrests were due to his drinking and that he has not drunk alcoholic liquors for two years. He is now married and has a home.

[3, 4] Appellant cannot go behind the order of 1955 denying his petition for removal of the guardian which he allowed to become final. That is a binding adjudication that at that time the guardianship was necessary. He must show that since that date he has so rehabilitated himself that he is now a fit and proper person to have the custody of his child. Guardianship of Brock, supra, 154 Cal.App.2d at pages 433–434, 316 P.2d at pages 5–6. In this connection while appellant testified that he is now married and living with his present wife in a suitable home and has not been drinking for two years, it was also proved that after the denial of his previous petition appellant was convicted of disturbing the peace and that although he was gainfully employed and had been requested to contribute to the support of his son he had made no substantial contributions to his support in the period of over two years following the denial of his earlier petition. The court could reasonably infer a lack of the normal parental concern from this continued failure to make any reasonable provision for his son's support, particularly in view of the fact that he and his grandmother have been dependent upon social security payments for their regular subsistence.

The court expressly found that appellant is not a fit and proper person to have his son's custody and we are satisfied that this finding is supported by the evidence.

No claim is made that the provision included in the present order for payments by appellant of $30 per month for his son's support is not reasonable.

The order is affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

167 Cal.App.2d 571

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Randall Hunt ROBERTSON, Defendant and Appellant.

Cr. 6064.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1959.

Defendant was convicted of grand theft and one count of petit theft and from a judgment of the Superior Court of Los Angeles County, Herbert V. Walker, J., the defendant appeals. The District Court of Appeal, Lillie, J., held that the evidence sustained conviction and that there were no reversible errors in ruling on instructions and evidence.

Judgment affirmed.

1. Criminal Law ⇐1144(13)

The appellate court must assume in favor of the verdict every fact which the jury could reasonably have deduced from the evidence and refrain from drawing contrary inferences.

2. Criminal Law ⇐881(4)

The offense of grand theft includes the crimes of larceny by trick and device and obtaining money by false pretenses and a

judgment of conviction of grand theft based on a general verdict of guilty, can be sustained if the evidence discloses the elements of one of the two consolidated offenses. West's Ann.Pen.Code, § 487, subd. 1.

3. Larceny ⇐14(1)

"Larceny by trick and device" is the appropriation of property, the possession of which was fraudulently acquired.

See publication Words and Phrases, for other judicial constructions and definitions of "Larceny by Trick and Device".

4. Larceny ⇐14(1)

If a person with a preconceived design to appropriate property to his own use obtains possession of it by means of fraud or trickery, the taking is "larceny".

See publication Words and Phrases, for other judicial constructions and definitions of "Larceny".

5. Larceny ⇐65

Evidence that household appliances were delivered to defendant's residence upon the strength of credit fraudulently obtained from the vendor by virtue of a preconceived design to misrepresent the defendant's financial standing, and his occupation status, authorized a conviction of grand theft where vendor would not have parted with possession except for its reliance upon the fulfillment of a proper credit standing which, in defendant's case, was unobtainable. West's Ann.Pen.Code, § 487, subd. 1.

6. False Pretenses ⇐14

In prosecution for grand theft, that vendor of the merchandise did not sustain a loss in excess of $200 because the machines were repossessed did not preclude a conviction since financial loss was not a necessary element of the crime. West's Ann.Pen.Code, § 487, subd. 1.

7. False Pretenses ⇐20½

Where defendant sought credit from a store and filled out an application card and falsely told the interviewer the nature of his occupation and he was granted a temporary credit card, with a fifty dollar limitation, and in less than thirty days defendant charged items of merchandise worth over $637, and paid no part of the total sum thus charged, crime of theft by false pretenses was established, as against defendant's claim that the purchases should have been considered as individual offenses each being below the statutory minimum of $200. West's Ann.Pen.Code, § 487, subd. 1.

8. False Pretenses ⇐9

The false pretense must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause.

9. False Pretenses ⇐49(5)

Evidence that defendant charged some $2,100 worth of merchandise, and that the vendor relied upon the defendant's false representations, and that the merchandise was not paid for sustained conviction for grand theft. West's Ann.Pen.Code, § 487, subd. 1.

10. Criminal Law ⇐406(1)

In prosecution for grand theft, where more than a prima facie showing had been made by the prosecution prior to the testimony of arresting officers concerning certain admissions made by the defendant, the admissions were admissible as against the claim that the corpus delicti had not then been established. West's Ann.Pen.Code, § 487, subd. 1.

11. Criminal Law ⇐673(2)

In prosecution for grand theft for obtaining merchandise by fraudulently obtaining credit, admitting testimony from a credit representative was not error where the jury was advised that such evidence was received only to establish that no report was available on the defendant prior to a certain date. West's Ann.Pen.Code, § 487, subd. 1.

12. Criminal Law ⇐371(3)

In prosecution for grand theft, permitting prosecutor to question defendant concerning a $5,000 bracelet he had charged in New York earlier in 1956 and shortly thereafter pawned was not im-

proper as imputing to the defendant a separate and distinct crime where defendant testified that he intended to pay for the merchandise when he made his numerous purchases so that the intent to defraud became a material and necessary element of the people's case. West's Ann.Pen.Code, § 487, subd. 1.

13. Criminal Law ⇐656(9)

In prosecution for grand theft, record did not establish that the trial judge during interrogation relating to a bracelet purchased by the defendant in New York in 1956 gave the jury the impression that the trial judge had formed an opinion of the defendant's guilt. West's Ann.Pen.Code, § 487, subd. 1.

14. False Pretenses ⇐42

In prosecution for grand theft, where intent to defraud was a necessary element of the theft and defendant testified that he intended to pay for the merchandise he had obtained on numerous charge accounts, testimony of the inability of the defendant to make such payments because of his general financial condition was admissible as tending to negative the effect of defendant's denial of any criminal intention. West's Ann.Pen.Code, § 487, subd. 1.

15. False Pretenses ⇐52

In prosecution for grand theft, instructions on grand theft were not error because of failure therein to advise the jury on all of the elements of theft by false pretenses. West's Ann.Pen.Code, § 487, subd. 1.

16. Criminal Law ⇐814(1)

In prosecution for grand theft, an instruction on the law of partnership was not required where the victims who extended credit on the defendant's numerous charge accounts based on his false representations of credit did not rely on the defendant's asserted partnership interest in a particular concern but upon his representation that he was the owner thereof. West's Ann. Pen.Code, § 487, subd. 1.

Randall Hunt Robertson, appellant, in pro. per.

Stanley Mosk, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendant appeals from a judgment, after trial by jury, whereby he was convicted of three counts of grand theft (Sec. 487 (1), Penal Code) and one count of petit theft, being a lesser and included offense than that charged in the fourth count of the information. The trial court denied motion for new trial and his application for probation, and sentenced defendant to the state's prison for the term prescribed by law and to the county jail for six months, the terms to run concurrently.

The prosecution arose out of defendant's activities in securing fraudulent charge accounts at various business establishments. Count I involved the theft from Butler Brothers of household appliances and other merchandise valued in excess of $600; Count II charged the unlawful taking from May Company's Wilshire store of jewelry and other articles over the value of $200; Count III pertained to the theft of merchandise worth more than $1,000 from J. W. Robinson Co., and Count IV involved a similar unlawful transaction with I. Magnin and Company respecting articles valued in excess of $200.

Appellant contends that the evidence was insufficient to convict him on Counts I, II and III; the district attorney and trial judge were guilty of prejudicial misconduct; errors occurred in the admission of certain evidence and errors were committed in the giving and refusing of certain instructions.

Preliminarily, appellant's notice of appeal was tardily filed, being in the form of a telegram dispatched by appellant and received by the clerk on the third day following the expiration of the ten-day statutory period. The attorney general having raised the point in respondent's brief, appellant in his closing brief has set forth certain matters explanatory of the late filing, and we have entertained a countershowing by the respondent which tends to

negative appellant's claims. Although appellant's showing falls short of the "clear and positive testimony" found in People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, 870, we are disposed to consider the appeal on its merits.

Appellant challenges the sufficiency of the evidence to support his conviction on Counts I, II and III. The first of such counts, as heretofore noted, involved his transactions with Butler Brothers where, it appears, in December of 1956, he applied in writing for credit, and represented on the application form that he had a bank account with the Palm Springs office of Bank of America and was listed with Dunn and Bradstreet. Appellant told the credit interviewer he owned Spectrum Electronics at a given address and had been in that business for one year. A thirty-day charge account was opened, and appellant charged merchandise totalling more than $100 over a three-month period. On January 7, 1957, a washer and dryer, valued at $520.30 were delivered to the appellant at his residence address upon his representations in the credit application. This purchase was not, however, charged to appellant's account, but delivered with a conditional sales contract. Appellant did not sign the contract and the machines were subsequently repossessed by the seller upon receipt of information that the appellant was in custody. No loss was sustained by the store, although appellant paid no part of the merchandise charged under the thirty-day account.

It was established that appellant never had an account in any form during November and December of 1956 with the bank at Palm Springs, and his only connection with Spectrum Electronics consisted of a short period of employment, by the real owners, to obtain television sets for demonstration and to secure a Dunn & Bradstreet rating for the firm. A pending agreement by which appellant would become a partner never materialized. Prior to December 20, 1956, there was no record of any Dunn & Bradstreet report on appellant, individually.

Appellant took the stand in his defense and under cross-examination made the following admissions: That he had misrepresented certain facts in the Butler Brothers' credit application and credit applications at other stores; that his income for the entire year of 1956 was between three and four thousand dollars and that he had charged over three thousand dollars' worth of merchandise in the months of December, 1956, and January, 1957; that before such charges he had contracted other debts which were unpaid; that there were civil judgments outstanding against him; that earlier in 1956 he had charged a $5,000 bracelet for which he did not pay, but pawned for $950.

[1] The foregoing facts, pursuant to the recognized rule on appeal, have been summarized in a light most favorable to respondent. Thereunder, we are required to assume in favor of the verdict every fact which the jury could reasonably have deduced from the evidence and to refrain from drawing contrary inferences (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778). Neither the law of this state nor these facts support appellant's claims concerning the insufficiency of the evidence to support his conviction.

[2–6] It is now well established that the offense of grand theft includes the crimes of larceny by trick and device and obtaining money by false pretenses (People v. Ashley, 42 Cal.2d 246, 258, 267 P.2d 271), and a judgment of conviction of grand theft based on a general verdict of guilty, as here, can be sustained if the evidence discloses the elements of one of the two consolidated offenses (People v. Massey, 151 Cal.App.2d 623, 658, 312 P.2d 365); "Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired" (People v. Ashley, supra, 42 Cal.2d 258, 267 P.2d 279); stated otherwise, "(i)f a person, with a preconceived design to appropriate the property to his own use, obtains possession of it by means of fraud or trickery, the taking is larceny" (People v. Mills B. Sing,

42 Cal.App. 385, 391, 183 P. 865, 867), or "if the victim intends title to pass at some time later than the delivery, or upon the fulfillment of some condition not then performed, there may be a larceny." People v. Beilfuss, 59 Cal.App.2d 83, 89–90, 138 P.2d 332, 336. Here the household appliances were delivered to appellant's residence upon the strength of credit fraudulently obtained from the vendor by virtue of a palpably preconceived design to misrepresent his financial standing, his personal holdings and his occupation status. Also, though obliged to do so, appellant neither signed nor returned the contract which was delivered with the merchandise in question. The inference of larcenous intent was clearly deducible from the foregoing, as was the further inference that the vendor would not have parted with possession except for its reliance upon the fulfillment of a proper credit standing which, in appellant's case, was manifestly unobtainable in the light of his several admissions hereinbefore recounted. He cites to us the case of People v. Potter, 90 Cal.App. 94, 265 P. 365, where merchandise was obtained as the result of a representation that defendant had a deposit of $6,000 in a certain bank. This involved a different situation from that in the case at bar where the evidence established that appellant had no account of any kind with the bank of which he claimed to be a depositor. Nor is there any merit to appellant's implied suggestion that Butler Brothers did not sustain a loss in excess of $200 since the machines were repossessed. In cases of this kind financial loss is not a necessary element of the crime (People v. Talbott, 65 Cal.App.2d 654, 659, 151 P.2d 317).

[7] As to Count II, the record reveals that on December 12, 1956, appellant sought credit from May Company's Wilshire store and filled out an application card. He falsely told the interviewer that he was a doctor of osteopathy with offices on Santa Monica Boulevard. The credit department, on that representation, issued to him a temporary thirty-day credit card which, appellant admitted, had a $50 limitation. On six different dates between December 12 and December 23, 1956, he charged items of merchandise worth $637.04, the largest single charge being in the amount of $89.34 for jewelry. Appellant paid no part of the total sum thus charged.

Contrary to appellant's contentions, the facts under this count establish the crime of theft by false pretenses, both title and possession having been deceitfully and fraudulently obtained (People v. Ashley, 42 Cal.2d 246, 258, 267 P.2d 271). Appellant claims, however, that each of the numerous purchases should have been considered as individual offenses, each being below the statutory minimum of $200; and he relies on People v. Rabe, 202 Cal. 409, 413, 261 P. 303, to the effect that multiple takings accomplished by false pretenses constitute multiple offenses. In People v. Howes, 99 Cal.App.2d 808, 818, 222 P.2d 969, as well as Dawson v. Superior Court, 138 Cal.App. 2d 685, 689, 292 P.2d 574, the reasoning of the Rabe case is discussed and distinguished from factual situations more applicable to the one at bar. "From these cases, and others that could be cited, it can be said that the general test as to whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. The particular facts * * * of each case determine the question. If there is but one intention, one general impulse, and one plan, even though there is a series of transactions, there is but one offense, and this is so whether the theft is accomplished by larceny or embezzlement." People v. Howes, supra, 99 Cal.App.2d 818–819, 222 P.2d 976. In Dawson v. Superior Court, 138 Cal.App. 2d 685, 689, 292 P.2d 574, 577, the court points out that by the 1927 amendment to section 484, Penal Code, the many technical niceties once existing between the various forms of larceny were abolished, and all are included under the term "theft." Consequently, "where a person intends by his false representations to initiate an act which will cause him to receive illegally various sums of money, it is far more rea-

sonable to consider the whole plan rather than its component parts * * *"; as a result, the court concluded, a person may be guilty of grand theft by taking numerous benefit payments, all less than $200, from a county welfare department over a period of seven or eight months. The case here, of course, is much stronger, and the evidence justified the implied finding that appellant, discovering he could obtain merchandise on credit, proceeded during the initial monthly billing period to appropriate for himself as much as he could. Appellant's remaining contention as to Count II concerns the asserted inherent improbability of prosecution testimony relative to the extension of credit. The record does not bear out his claims in that respect, even though the store may not have used the best of business judgment on the occasion in question.

[8–11] The third count of the information related to some nine or ten transactions with J. W. Robinson Company between December 14, 1956, and January 22, 1957. On those occasions, he charged approximately $2,100 worth of merchandise, the largest single item being $197 for a camera. He renews the argument that the purchases constituted, at most, a series of petty thefts, which contention has heretofore been discussed and disposed of. Appellant also claims that, absent some reliance by the store upon the assertedly false representations, the crime of theft has not been established, pointing out that some credit check was made through Dunn & Bradstreet before credit was extended. The record, however, reveals that reliance was also placed upon other representations in appellant's application, including his statement that he was a doctor of osteopathy. The case of People v. Daniels, 64 Cal.App. 514, 517, 222 P. 387, cited by appellant, is thus distinguished; there, it appears, the victim made an independent investigation which was the sole inducement for his parting with his money. As declared in People v. Ashley, 42 Cal.2d 246, 259, 267 P.2d 271, 279: "The false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the *sole* inducing cause" (Emphasis added). Appellant further complains that it was error to admit the testimony of arresting officers concerning certain admissions made by him; this, because the corpus delicti had not then been established. The point is not well taken. More than a prima facie showing had been made by the prosecution prior thereto, and only "slight or prima facie proof is sufficient for such purpose" (People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12, 17). Also, no error appears in the admission of testimony from the Dunn & Bradstreet representative, since the jury was advised that such evidence was received only to establish that no report was available on appellant prior to December 20, 1956. Finally, sufficient corroboration was forthcoming, the testimony of each victim being corroborative under the other counts.

[12, 13] Appellant next contends that prejudicial error occurred when the prosecutor was permitted, over objection, to question him concerning a $5,000 bracelet he had charged in New York earlier in 1956, and shortly thereafter pawned for $950. He claims that there was thus imputed to him a separate and distinct crime. In People v. Zerillo, 36 Cal.2d 222, 228, 223 P.2d 223, 227, the court said: "(I)f a defendant takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide" to qualify the effect of such testimony. In the case at bar, appellant testified that he intended to pay for the merchandise when he made his numerous purchases, and thus the intent to defraud became a material and necessary element of the People's case. The admissibility of the New York transaction is thus apparent; as stated in People v. Weitz, 42 Cal.2d 338, 347, 267 P.2d 295, 300: "Inasmuch as the evidence related to transactions similar in material elements to the ones forming the basis of the indictment, it was admissible to show defendant's criminal intent

* * *" The suggested imputation to appellant of still another crime by the reception of evidence as to the source of his income is not borne out by the record. We have also examined the record carefully relative to appellant's claims that the trial judge, during the interrogation relating to the bracelet, gave the jury the impression that he had formed an opinion of appellant's guilt. To the contrary, it appears that court evidenced the proper solicitude for appellant's rights, occasionally sustaining objections on his own motion and otherwise refraining from creating the impression complained of. The isolated instance, to which appellant refers, seems to have stemmed from appellant's persistence in unresponsive and evasive answers.

[14] According to the appellant, the court also improperly permitted the introduction of evidence concerning past obligations, judgments and other debts, all unpaid. As heretofore observed, the intent to defraud is a necessary element of theft and appellant testified that he intended to pay for the merchandise. Certainly, testimony of his inability to make such payment because of his general financial position tends to negative the effect of appellant's denials of any criminal intention. People v. Zerillo, 36 Cal.2d 222, 228, 223 P.2d 223.

[15, 16] Appellant's final point concerns the court's instructions on the crime of grand theft, and the failure therein to advise the jury on all of the elements of theft by false pretenses. We have examined the charge, and the point is not tenable. Appellant also argues that the court on its own motion should have given an instruction on the law of partnership, since that matter was vital to a proper consideration of the evidence. People v. Buffum, 40 Cal.2d 709, 724, 256 P.2d 317. The contention is without merit, since the victims did not rely on appellant's asserted partnership interest in Spectrum Electronics, but upon his representation that he was the owner thereof.

There has been no miscarriage of justice in this case. The appellant was fairly tried and justly convicted and no error is apparent in the record.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

167 Cal.App.2d 580

Priscilla SALA, Plaintiff and Respondent,

v.

Carl CHRISTENSEN, Mie Christensen, Russell Davis and Betty Davis, Defendants and Appellants.

Civ. 9534.

District Court of Appeal, Third District, California.

Feb. 4, 1959.

Rehearing Denied Feb. 25, 1959.

Hearing Denied April 1, 1959.

Action against motel proprietors for injuries sustained by guest when at night she stepped into uncovered crawl or access hole in concrete slab along one side of motel building. The Superior Court, Yolo County, Ben R. Ragain, J., entered judgment on a verdict for plaintiff, and defendants appealed. The District Court of Appeal, Warne, J. pro tem., held that injured guest had been impliedly, if not expressly, invited to use gravel path beside concrete slab as a means of ingress and egress and that whether she was contributorily negligent in using unlighted path instead of well-lighted concrete sidewalks on other three sides of building was a question of fact for jury.

Judgment affirmed.

1. Innkeepers ⇐10.3

Motel guest was impliedly, if not expressly, invited to use gravel path, apparently intended for use as means of ingress and egress, by which she had been led by

proprietor to motel office, and use of concrete slab beside path, which appeared to be a continuation of concrete sidewalks on other three sides of motel was within area of implied invitation as a guest at motel.

2. Innkeepers ⇐10.3

Uncovered crawl or access hole in concrete slab along one side of motel building beside gravel path, which motel guest had been impliedly, if not expressly, invited to use as means of ingress and egress, was not a patent defect at night, in absence of sufficient illumination to see hole.

3. Innkeepers ⇐10.3

Maintenance of uncovered crawl or access holes in concrete slab along one side of motel building beside gravel path, which motel guest had been impliedly, if not expressly, invited to use as means of ingress and egress, without warning her of danger or providing sufficient illumination to make holes visible at night, established failure of motel proprietors to exercise ordinary care to avoid injury to guest, in that they negligently failed to keep premises in reasonably safe condition for those lawfully upon premises.

4. Innkeepers ⇐10.14

In action against motel proprietors for injuries sustained by guest when at night she stepped into uncovered crawl or access hole in concrete slab along unlighted side of building, whether guest was contributorily negligent in using unlighted gravel path beside slab, which she had been impliedly, if not expressly, invited to use as means of ingress and egress, instead of using well-lighted concrete sidewalks on other three sides of building, was a question of fact for jury.

5. Negligence ⇐136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists and reasonable men could draw that conclusion and none other.

6. Negligence ⇐136(9)

Where different inferences may be drawn from the evidence, one for and one against contributory negligence, the one against will be followed, and before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion.

Robert M. Cole, Davis, for appellants.

Chalmers, Sans & Gardner, Woodland, for respondent.

WARNE, Justice pro tem.

This is an appeal from a money judgment entered upon a jury's verdict in a personal injury action.

It appears from the settled statement upon which this appeal is presented that the respondent sustained personal injuries when she stepped into an uncovered "crawl or access hole" on the premises of appellants' motel. The uncovered crawl or access hole is located in a concrete slab on the west side of the motel unit, which respondent had, on the day of the accident, rented from defendants. This slab is approximately 2 feet wide and extends the full length of the building on its west side. On the other three sides of the building are concrete sidewalks approximately 3 feet wide. These sidewalks join the concrete slab to form a continuous flat surface which gave an appearance of the sidewalk extending completely around the building. However, on the west side, and in the so-called slab, are three "crawl" or "access" holes, which were open at the top. The crawl hole which caused respondent's fall and resulting injury is only 25 inches south of the northwesterly corner of the building or approximately 5 feet south of the northerly edge of the sidewalk on the north side. This crawl or access hole apparently extends across the entire width of the slab and at its most westerly end is a little over 4 inches deep. It does not appear in the statement what its depth is at other points throughout its width. Extending along the entire length of the slab, and immediately adjacent thereto, is a well-

packed gravel path leading from the motel unit in question to the motel courtyard. There was no direct illumination on the west side of the building. However, there was some light which came from the yellow lights above the unit doorways on each side of the building and white overhead lights at intervals along the driveway to the north.

Between three and four on the afternoon of the day of the accident respondent rented two units at appellants' motel, one for herself and one for an ill friend. After one of the appellants showed respondent the accommodations, they returned by foot from the unit which respondent rented for herself to the motel office by way of a gravel path adjacent to and on the westerly side of the building, said appellant leading the way. There were no signs or warnings prohibiting travel over the path by guests in the motel units or by the general public nor were there gates or other obstructions closing off the pathway from travel by guests, invitees or the general public nor had they been prevented from using the pathway.

At approximately 9:30 P.M. respondent left her apartment or motel unit with the intention of going to her friend's apartment by way of the gravel path, and as she took one or two steps around the northwest corner of the building she stepped into one of the uncovered access or crawl holes and fell to the ground, thereby receiving injury to her person. There is testimony that it was dark at the time of the accident, and that in order to see the hole one had to get down fairly close to it. On the other three sides of the building there are paved and lighted sidewalks.

Appellants contend that the respondent did not enjoy the status of an invitee on the path or portion of the premises where she fell and that as a matter of law respondent was guilty of contributory negligence in using the unlighted path rather than the illuminated sidewalk around the building. There is no merit in either contention.

[1–3] The occupancy and use of the portion of the premises where the plaintiff was injured was clearly within the area of plaintiff's implied invitation as a guest at the motel. It must be kept in mind that one of the appellants, after showing respondent the motel unit, on returning with respondent to the office used the very pathway which respondent decided to use at the time of her injury, thus impliedly, if not expressly, inviting plaintiff to use the walk. There was nothing to indicate that the respondent should not again use the path. To the contrary, the facts clearly indicate that the path was for the use of anyone lawfully upon the premises as a means of ingress and egress. The accident, however, occurred before respondent had actually set foot on the path. Respondent was still on what appeared to be a continuation of the sidewalk when she stepped into the uncovered crawl or access hole. Respondent had no warning of the existing dangerous condition nor was she aware of it. At the time of the accident the lighting conditions were such that it was not then a patent defect which one could ordinarily see. It was only illuminated by indirect light which came from the sides of the building and from certain lights over the driveway to the north. Under these conditions it is clear to us that the appellants failed to use ordinary care to avoid injury to the respondent by negligently failing to keep the premises in a condition reasonably safe for anyone lawfully upon the premises. Stowe v. Fritzie Hotels, Inc., 44 Cal.2d 416, 282 P.2d 890; 27 Cal.Jur.2d, sec. 28, page 279.

[4–6] As to appellants' contention that respondent was guilty of contributory negligence as a matter of law, appellants argue that respondent was negligent because she decided to use the unlighted path rather than the paved and well-lighted route at the other end of the building. The question of contributory negligence, however, was one of fact for the jury and we cannot say that plaintiff was negligent as a matter of law. Under the evidence the jury could have found that since respondent was not aware

of the hazard she did not act unreasonably in assuming that there was nothing of a dangerous character on the premises, especially in what appeared to be a continuation of the sidewalk. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 385, 240 P.2d 580. Further, as stated in Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829:

"* * * [C]ontributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

167 Cal.App.2d 599

Anita PAPPAS, Plaintiff and Respondent,

v.

David H. BOGARD, Defendant and Appellant.

No. 18112.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1959.

Hearing Denied April 1, 1959.

Action by automobile guest against host for injuries sustained in accident. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., rendered judgment for guest, and host appealed. The District Court of Appeal, Dooling, J., held that instruction that wilful misconduct must be something more than intentional was not deficient on ground that it did not tell jury that element of intent was an essential part of wilful misconduct.

Affirmed.

1. Automobiles ⇐246(3)
Trial ⇐296(3)

In action by automobile guest against host for injuries sustained in accident, instruction equating wilful misconduct with negligence was erroneous, but in view of fact that it advised jury that wilful misconduct was more than negligence, even more than gross negligence, and that there could be no recovery for negligence unless negligence amounted to wilful misconduct as defined in instructions, and instructions properly defined wilful misconduct, error was not prejudicial to host. West's Ann. Vehicle Code, § 403.

2. Automobiles ⇐158

"Wilful misconduct" within Vehicle Code implies at least the intentional doing of something either with a knowledge that serious injury is probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its possible result. West's Ann.Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

3. Automobiles ⇐246(3)

In action by automobile guest against host for injuries sustained in accident, instruction that wilful misconduct must be something more than intentional was not deficient on ground that it did not tell jury that element of intent was an essential part of wilful misconduct. West's Ann.Vehicle Code, § 403.

4. Trial ⇐260(8)

In action by automobile guest against host for injuries sustained in accident, wherein instruction given could only mean that wilful misconduct must be intentional and something more, failure to give host's proposed instruction that wilful misconduct

implied at least the intentional doing of something was not improper. West's Ann. Vehicle Code, § 403.

5. Trial ⇐228(3)

So long as jury is correctly instructed, a party cannot complain that instructions were not couched in particular language.

Bronson, Bronson & McKinnon, San Francisco, for appellant.

William L. Ferdon, San Francisco, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment entered upon a verdict for personal injuries received by plaintiff while riding as a guest in defendant's automobile. It was not contended that defendant was intoxicated and the sole basis of liability presented to the jury was defendant's wilful misconduct. Vehicle Code § 403.

The evidence most favorable to plaintiff would support a finding that while driving southerly on Eleventh Street in San Francisco, and just after being asked by plaintiff: "Why don't you slow down?" defendant without slackening the speed of his car ignored an arterial stop sign, drove into the intersection of Folsom Street at a speed of 40 miles per hour and collided there with a car which had entered the same intersection on Folsom Street.

While defendant asserts that a finding that the defendant was guilty of wilful misconduct was a close question no claim is made that the evidence is insufficient as a matter of law to support such finding. The sole contentions are that the trial court gave one erroneous instruction, and refused one proper and necessary instruction proposed by defendant, both on the subject of wilful misconduct and that as a result the case was submitted to the jury in a prejudicially erroneous legal framework.

The instruction given by the court of which defendant complains is B.A.J.I. 209J:

"You will note from the foregoing that although wilful misconduct is a form of negligence, it is something more than negligence; more even than what might be called gross negligence. A guest may not recover against his [her] host-driver or against the owner of the vehicle in which he [she] was a guest for negligence, however it might be classified, unless that negligence amounted to wilful misconduct, as defined in these instructions."

This instruction was expressly disapproved in Lynch v. Birdwell, 44 Cal.2d 839, 285 P.2d 919, 923, a fact which is noted in 2 B.A.J.I., 4th Edition, page 697 in the note preceding this instruction. We are moved to the comment that B.A.J.I. is a form-book upon which courts and lawyers rely for correct instructions and, after the express disapproval of B.A.J.I. 209J, leaving that instruction in the form-book, even with a cautionary note (which may well not be read by counsel or judge in the pressure of the trial of a particular case) constitutes a trap for counsel and the courts which tends measurably to impair the value of B.A.J.I. for the very purpose which it is designed to serve. Criticism of particular court decisions is a proper function of a text-book and, if the criticism is sound, may and often does perform a very useful function in the long-range growth of the law. But what is proper in a text-book ceases to be proper in a form-book, whose function should be to provide forms which can be relied upon to state the law in a fashion which has met the approval of the courts.

It is to be noted of this instruction however that while stating that wilful misconduct is "a form of negligence," which statement was the subject of the court's criticism in Lynch v. Birdwell, supra, it then advises the jury that it is more than negligence, more even than gross negligence, and concludes that there can be no recovery for negligence, unless that negligence "amounted to wilful misconduct, as defined in these instructions."

[1] While academically, under Lynch v. Birdwell, supra, to equate wilful miscon-

duct with negligence is erroneous, if the definition of wilful misconduct "defined in these instructions" was adequate we cannot see how defendant could be prejudiced by this instruction. Conceding that it was erroneous to describe wilful misconduct as a form of negligence how could the jury be prejudicially misled by this statement when they were explicitly told that they could not find defendant liable unless they found him guilty of wilful misconduct as defined in the instructions, if the instructions adequately stated the elements of wilful misconduct? Where the jury is properly instructed on the facts which they must find to hold the defendant liable the erroneous characterization of the sum of those facts as a form of negligence cannot mislead them. They must still find *those facts* before they can bring in a plaintiff's verdict under the instructions of the court. Sarafini v. City and County of San Francisco, 143 Cal.App.2d 570, 577, 300 P.2d 44. Any chance of confusion on the jury's part was further minimized in this case by the fact that no other instructions defining negligence were given.

Wilful misconduct was defined for the jury in this case substantially in the form set out in B.A.J.I. 209H:

"The words 'wilful misconduct' have a meaning in law additional to that which they have in common usage. If we were to use the words in their ordinary sense, they would mean simply the indulging in wrongful conduct by conscious choice. Such conduct might consist of doing something that ought not to be done or in failing to do something that ought to be done. But in order to be a basis for liability to a guest under our law, the misconduct must be something more than intentional and wrongful; it must be done under circumstances which show either knowledge that serious injury to the guest probably will result or a wanton and reckless disregard of the possible results."

[2] The accepted definition of wilful misconduct first announced by our Supreme Court in Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194, in language quoted from Howard v. Howard, 132 Cal.App. 124, 129, 22 P.2d 279, is phrased as follows [3 Cal. 2d 420, 426, 45 P.2d 197]:

"Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result." (Emphasis in the opinion.) Emery v. Emery, 45 Cal.2d 421, 426, 289 P.2d 218.

[3] Defendant complains that the instruction as given is deficient in not telling the jury that the element of intent is an essential part of wilful misconduct. In this we believe defendant attempts to construe the instruction too narrowly. The jury was told that wilful misconduct must be something more than intentional which can only mean that it must be intentional and something more. The something more is then explained in language approved in Meek v. Fowler, supra, and reapproved at least as late as Emery v. Emery, supra, i. e. "it must be done under circumstances which show either knowledge that serious injury to the guest will probably result or a wanton and reckless disregard of the possible results."

We must accord to the jury ordinary intelligence and we cannot believe that they did not understand from the instruction given that to constitute wilful misconduct they must find: (1) that defendant intentionally did something wrongful and (2) that he did this either with knowledge that it would probably result in serious injury or with a wanton and reckless disregard of the possible result.

[4] Defendant also objects to the failure to give his proposed instruction, which included the statement that wilful misconduct "implies at least the intentional doing of something either with knowledge that serious injury is a probability as distinguished from a possible result, or the intentional doing of an action with a wanton and reckless disregard of its possible result."

[5] Reasonably construing the instruction quoted above, which was actually given by the court, the instruction refused added nothing to the definition of wilful misconduct contained in the instruction given. It is axiomatic that so long as the jury is correctly instructed a party cannot complain that the instructions were not couched in particular language. 24 Cal.Jur., Trial, § 79, pp. 808–810.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

167 Cal.App.2d 567

E. A. TALIAFERRO, Plaintiff and Appellant,
v.
Margaret M. RIDDLE et al., Defendants, Valentine Hartman and Elsie M. Hartman, his wife, Defendants and Respondents.

No. 17907.

District Court of Appeal, First District, Division 1, California.
Feb. 4, 1959.

The Superior Court, Contra Costa County, Homer W. Patterson, J., entered an order quashing service of an alias summons and amended complaint on certain of the defendants, and the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where original complaint was filed on June 21, 1950, and certain of the defendants were not served until May of 1954, and on June 14, 1954, order was made dismissing action as to them, and on March 9, 1957, and on March 28, 1957, an alias summons and amended complaint were served on them pursuant to order of June 18, 1954, directing that they be joined as necessary parties defendant, the June 14, 1954, order of dismissal made such defendants strangers to the action, so that when later they were ordered joined and were named as defendants in amended complaint, they came in as new parties and action commenced anew as to them, and service of summons and amended complaint in March of 1957 was within three years of second commencement of action as to them, and action should not have been dismissed as to them under section of the Code of Civil Procedure requiring service of summons within three years after commencement of action.

Order reversed.

1. Dismissal and Nonsuit ⇐80

Section of Code of Civil Procedure requiring service of summons within three years after commencement of the action does not prevent the bringing of a new action against a defendant, who has been dismissed under that section, by filing a new complaint against him. West's Ann. Code Civ.Proc. § 581a.

2. Limitation of Actions ⇐124

For purpose of computing running of statute of limitations when new party is brought into action, action commences as to him when appropriate amended or supplemented complaint is filed.

3. Limitation of Actions ⇐130(11)

Where original complaint was filed on June 21, 1950, and certain of the defendants were not served until May of 1954, and on June 14, 1954, order was made dismissing action as to them, and on March 9, 1957, and on March 28, 1957, an alias summons and amended complaint were served on them pursuant to order of June 18, 1954, directing that they be joined as necessary parties defendant, the June 14, 1954, order of dismissal made such defendants strangers to the action, so that when later they were ordered joined and were named as defendants in amended complaint, they came in as new parties and action commenced anew as to them, and service of summons and amended complaint in March of 1957 was within three years of second commencement of action

as to them, and action should not have been dismissed as to them under section of the Code of Civil Procedure requiring service of summons within three years after commencement of action. West's Ann.Code Civ.Proc. § 581a.

4. Process ⇐158

Where District Court of Appeal on appeal from order quashing service of alias summons and amended complaint held that neither of the grounds specified in notice of motion to quash supported order appealed from, no other ground for that order was available, since notice of motion, other than for new trial, must state grounds on which it will be made. West's Ann.Code Civ.Proc. § 1010.

E. A. Taliaferro, San Pablo, in pro. per.

Royal E. Handlos, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff appeals from an order of April 1, 1957, which quashed service of an alias summons and amended complaint upon defendants Valentine K. and Elsie M. Hartman. These defendants had been served on March 9 and March 28, 1957, pursuant to an order of June 18, 1954, which directed the joining of the Hartmans as necessary parties defendant.

The notice of motion specified two grounds only: (1) On June 14, 1954, an order was made dismissing this action as to the Hartmans, and (2) they were not served within three years after the commencement of the action.

Neither of these grounds furnishes legal support for the order appealed from.

The dismissal of June 14, 1954, was made pursuant to the mandate of section 581a of the Code of Civil Procedure which requires service of summons within three years after the commencement of the action.[1] The original complaint was filed on June 21, 1950. The Hartmans were served in May of 1954. That order of dismissal decided nothing on the merits and was not res judicata on the question whether the Hartmans are necessary parties. Gonsalves v. Bank of America, 16 Cal.2d 169, 172–173, 105 P.2d 118. It had the procedural effect of making them strangers to the action, so that when later they were ordered joined and were named as defendants in the amended complaint filed pursuant to that order, they came in as new parties and the action commenced anew as to them.

[1] Section 581a does not prevent the bringing of a new action against a dismissed defendant by filing a new complaint against him. We see no reason why a plaintiff cannot do the same, in legal effect, by suitably amending his complaint in the original action upon obtaining leave of court therefor. The reason for such a rule is especially cogent when, as here, the court directed that the new parties be joined as "necessary" parties. The provisions and purposes of section 389 of the Code of Civil Procedure, which sanctions and in some cases requires the bringing in of new parties, would frequently be completely thwarted if the one-year and the three-year limitation periods of section 581a were to commence on the day of the

1. Plaintiff makes an ineffectual collateral attack upon the dismissal order of 1954. It was not appealed from and long since became final. The record supports the order upon the theory that the Hartmans were served as fictitiously named defendants. As such they were defendants from the beginning and thus entitled to invoke the mandates of section 581a. See Brock v. Fouchy, 76 Cal.App.2d 363, 172 P.2d 945; dismissal, upon motion of a fictitiously named defendant, for failure to issue the original summons within one year.

An affidavit asserting that the judge who made the 1954 dismissal order was disqualified to act because of bias and prejudice, was filed on the day the order was made, but the record does not show whether the filing preceded the order, and the order recites that no one appeared in opposition to the motion for dismissal. This is an insufficient basis for a collateral attack upon the order.

filing of the original complaint when a new party is brought in.

[2] It is already established that for the purpose of computing the running of a statute of limitations when a new party is brought into an action, the action commences as to him when an appropriate amended or supplemental complaint is filed. Jackson v. Lacy, 37 Cal.App.2d 551, 558, 100 P.2d 313; Jeffers v. Cook, 58 Cal. 147, 150 (supplemental complaint); Spaulding v. Howard, 121 Cal. 194, 198, 53 P. 563 (supplemental complaint, but cause of action had accrued before filing of the original complaint); John Bollman Co. v. S. Bachman & Co., 16 Cal.App. 589, 591, 117 P. 690, 122 P. 835 (amended complaint). The same principle applies with equal logic to the computation of time "after the commencement of [the] action" under section 581a when a new party is brought in.

[3] It appears that the amended complaint for joinder of the Hartmans was filed June 24, 1954. That marks the date of commencement of the action anew as to the Hartmans. It follows that service of the alias summons and amended complaint in March of 1957 was within three years of the second commencement of the action as to them.

Accordingly, we hold that neither of the grounds specified in the notice of motion to quash supports the order appealed from.

[4] No other ground for that order is available. A notice of motion, other than for a new trial, "must state * * * the grounds upon which it will be made." Code Civ.Proc. § 1010. Only such grounds as are specified may be considered. Westphal v. Westphal, 61 Cal.App.2d 544, 550, 143 P.2d 405; Castagnoli v. Castagnoli, 124 Cal.App.2d 39, 41, 268 P.2d 37; Hernandez v. National Dairy Products Co., 126 Cal.App.2d 490, 493, 272 P.2d 799; and cases cited in each, in the absence of any element of waiver by the opposite party. No such element appears in the record before us.

It does appear that an alias summons which named the Hartmans as defendants and was used in effecting service upon them in March of 1957, was issued on March 8, 1957, more than one year after June 24, 1954, when the action was commenced anew as to them. This suggests the possibility of a failure of the plaintiff to meet the one-year requirement of section 581a and a consequent duty upon the part of the trial court to dismiss the action as to the Hartmans. However, that question was not before the trial court nor is it before us upon this appeal. Its subject matter was not indicated in the notice of motion to quash. Plaintiff would be entitled to an opportunity to explain the seemingly undue delay. For example, a stipulation extending time may have been filed.

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

167 Cal.App.2d 791

David INEZ, Petitioner,

v.

SUPERIOR COURT of the State of California IN AND FOR THE COUNTY OF LOS ANGELES, Respondent.

Civ. 23600.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1959.

Hearing Denied April 8, 1959.

Original proceeding on a petition for writ of prohibition to review an order restoring petitioner to probation following an order terminating his probation. Upon filing of the petition, District Court of Appeal issued an order to show cause. The District Court of Appeal, Patrosso, J. pro tem., held that where petitioner obtained

order terminating his probation on the representation that he wished to return to the Philippine Islands with his own family to live, and court, in entering its order terminating probation, stated that petitioner was not merely to go to the Philippine Islands and then come back to the United States, because if he did probation would be reinstated, and following entry of order terminating probation petitioner entered the Philippine Islands, but remained in the Islands for only 17 days, before returning to the United States, court was warranted, under such circumstances, in revoking its order terminating probation and in reinstating probation, even though generally, following entry of an order terminating probation, a court is without jurisdiction later to vacate such order and restore probation.

Order to show cause heretofore issued discharged, and petition denied.

Criminal Law ⇐982.8

Where petitioner for a writ of prohibition obtained an order terminating his probation on the representation that he wished to return to the Philippine Islands with his own family to live, and court, in entering its order terminating probation, stated that petitioner was not merely to go to the Philippine Islands and then come back to the United States, because if he did probation would be reinstated, and following entry of order terminating probation petitioner entered the Philippine Islands, but remained in the Islands for only 17 days, before returning to the United States, court was warranted, under such circumstances, in revoking its order terminating probation and in reinstating probation, even though generally, following entry of an order terminating probation, a court is without jurisdiction later to vacate such order and restore probation.

Joseph T. Forno, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., Lewis Watnick, Deputy Dist. Atty., Los Angeles, for respondent.

PATROSS, Justice pro tem.

This is an original proceeding to review an order restoring probation following an order terminating probation. Upon filing of the petition we issued an order to show cause.

The petitioner having been found guilty of violating Penal Code, § 67, bribery, he was, on July 6, 1956, placed upon probation for a period of ten years upon various conditions including among others that his place of residence and employment be approved by the probation officer.

On November 27, 1956, petitioner gave notice of a motion for modification of probation which was supported by an affidavit wherein it was averred that defendant "lives in Los Angeles with his wife and child while all of his brothers reside in the Philippine Islands and operate a bus terminal in Manila running buses to the provinces and want defendant to enter the business with them. That defendant wishes to return to the Islands with his own family to live and would like permission to leave and would like permission of this Court to do so. That defendant is informed there is no compact between the United States and the Philippine Islands whereby supervision may be carried on in the Islands."

The motion came on for hearing on December 13, 1956, and in granting the same the court stated: "He [the defendant] will be permitted to leave the country and probation will be terminated when he leaves the United States to become a resident of the Philippine Islands. That means that you are not just to go over to the Philippine Islands and then come back to the United States, because if you do, we will reinstate probation." The order as it appears in the minutes reads as follows: "Probation is modified: Defendant is permitted to return to his home in the Philippine Islands upon payment of remainder of his fine. Probation to be terminated upon his leaving the United States. Released."

Following this order petitioner, during the latter part of March 1957, left the United States for Manila arriving there

on March 28, 1957. In leaving the United States he applied for and was granted a passport and visa permitting him to enter the Philippine Islands as a temporary visitor. He left his wife and child in Los Angeles and he did not dispose of his furniture or any of his other possessions before leaving. He remained in Manila only from March 28, 1957, to April 14, 1957, returning to this country on April 15, 1957. Thereafter he was brought before the court for violating his probation and on October 20, 1958, the court restored probation upon the same terms and conditions as those previously imposed. Petitioner seeks annulment of this last order.

Petitioner contends that the trial court having terminated probation was without jurisdiction later to vacate such order and restore probation. While this is undoubtedly true as a general rule it is without application to the situation here.

Other considerations aside, the court was warranted in revoking its prior order terminating probation by reason of the fact that it had been procured by the petitioner by fraud and deceit practiced upon the court. It is clear that the court's action in modifying probation so as to permit petitioner to return to the Philippine Islands and providing that probation should terminate upon his leaving the United States was made upon the representation of petitioner (and his then counsel) that it was his purpose and intention to leave the United States and permanently establish his residence in the Philippines. In view of the evidence that petitioner applied only for a visitor's permit, representing in so doing that he would be absent from the United States for approximately two months; that he left his wife and child in Los Angeles, as well as his furniture and other possessions, and that he remained in the Philippines for only 17 days, the court was warranted in concluding, as it apparently did, that at the time the petitioner applied for a modification of probation he had no intention of permanently leaving the United States for the purpose of establishing residence in the Philippines and that his representations to this effect were made for the purpose of deceiving the court in order to induce it to grant petitioner's motion.

In People v. Sapienzo, 1923, 60 Cal.App. 626, 629, 213 P. 274, 275, the court in upholding an order revoking a former order granting probation which had been obtained by deceit said: "The case does not present a situation where the court without justification has arbitrarily revoked its order of probation. The evidence upon the hearing for the revocation showed that the court had been deceived and imposed upon in granting the order. To hold under such circumstances that the order could not be revoked would be to sacrifice reason, justice, and the public welfare to technical refinement."

The order to show cause heretofore issued is discharged and the petition is denied.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 657

CAVANAUGH NAILING MACHINE COMPANY, a corporation, Plaintiff and Appellant,

v.

Arthur CAVANAUGH, Defendant and Respondent.

No. 17879.

District Court of Appeal, First District, Division 1, California.

Feb. 6, 1959.

Action by corporation to enjoin former president and general manager from conducting a competing business and for an accounting and declaratory relief. The Superior Court, Alameda County, A. T. Shine, J., rendered judgment for defendant, and plaintiff appealed. The District Court

of Appeal, Fred B. Wood, J., held that testimony of attorney, consulted by defendant and another in relation to joint venture and partnership ultimately incorporated by attorney, concerning such transactions and promises and undertakings made by defendant was not subject to exclusion on ground of attorney-client privilege under West's Ann.Code Civ.Proc. § 1881, and that exclusion of such testimony upon pivotal issues was prejudicial error.

Judgment reversed.

1. Witnesses ⇐199(2)

In action by corporation to enjoin former president and general manager from conducting competing business, testimony of attorney, consulted by defendant and another in relation to their joint venture and partnership, ultimately incorporated by attorney, concerning such transactions and promises and undertakings made by defendant was not subject to exclusion on ground of attorney-client privilege. West's Ann.Code Civ.Proc. § 1881.

2. Witnesses ⇐199(2)

Where two persons mutually employ same attorney to represent them as their common agent and attorney in a particular transaction, communications made by either of them in the presence of the other to attorney are privileged as to strangers to transaction, but not as between either of such persons and attorney. West's Ann. Code Civ.Proc. § 1881.

3. Appeal and Error ⇐1057(1)

Where testimony of interested parties was in sharp conflict as to terms of oral agreements which were material on pivotal issues of case, testimony of only witness, having no interest in outcome of litigation, called to testify as to such matters, was not cumulative and error in excluding such testimony was prejudicial.

4. Witnesses ⇐330(3)

In action by corporation to enjoin former president and general manager from conducting competing business, testimony of witness for plaintiff on cross-examination by defendant that he had not treated defendant for epilepsy related to a collateral matter and contradictory testimony of defendant was not admissible for purpose of impeachment.

5. Corporations ⇐315

A director or officer of corporation may not enter into a competing enterprise which cripples or injures business of corporation of which he is an officer or director.

Haradon M. Dillon, Oakland, for appellant.

Bernard Mendel, Oakland, for respondent.

FRED B. WOOD, Justice.

Plaintiff is a corporation engaged in the business of manufacturing and selling nailing machines. It brought this action against its former president and general manager to enjoin him from the conduct of a competing business upon which he has embarked, also for an accounting and for declaratory relief.

The parties are agreed upon the following facts as shown by certain allegations of the complaint which defendant by his answer has admitted:

In 1948 defendant and Dr. Warren E. Page orally agreed to work together, pooling their inventive ideas and funds in a joint venture to perfect and market nailing machines, sharing profits equally, each to own an undivided half interest in machines developed or produced, Page to furnish the funds required for such joint venture to the extent of his ability so to do. In 1949, defendant and Page entered into a partnership for the purpose of manufacturing and marketing nailing machines, all profits to be divided evenly between them. In 1952, defendant and Page incorporated the partnership, the corporation so formed being the plaintiff herein. Thereafter, until February 29, 1956, defendant was president and general manager of plaintiff.

On or about March 7, 1956, defendant resigned as general manager of plaintiff. On or about March 14, 1956, defendant established next door to plaintiff's principal office a business consisting of the manufacture, sale and repair of mechanical nailing machines and parts identical with the mechanical nailing machines and parts being manufactured, sold and repaired by plaintiff during the time defendant was employed by plaintiff.

The principal issue framed by the pleadings was whether the business of the joint venture, the partnership and the plaintiff corporation, embraced the production, manufacture and sale of all nailing machines, mechanical as well as magnetic, as alleged by the plaintiff, or merely one certain type of magnetic nailing machine, identified by a certain patent, as alleged by the defendant.

Another issue was whether or not the mechanical nailing machine now manufactured by the defendant constituted a trade secret of the plaintiff at the time defendant resigned as general manager, as alleged by the plaintiff and denied by the defendant.

Another issue was whether the mechanical machine which defendant is now manufacturing was developed by him at the expense of plaintiff and in the course of defendant's employment by the plaintiff, as alleged by the plaintiff and denied by the defendant.

The trial court found for defendant upon these issues. It concluded that plaintiff has no interest in the mechanical nailing machine now being independently manufactured by the defendant and that the defendant has violated no fiduciary relation between himself and plaintiff in the production and sale of this machine which is a copy of the theory of a certain machine patented by certain third parties, which patent has expired.

(1) *Plaintiff claims prejudicial error in the exclusion of the testimony of Honorable Charles W. Fisher, Judge of the municipal court, Oakland.*

Defendant and Page consulted Judge Fisher as attorney (prior to his becoming a judge) in relation to their joint venture and their partnership undertakings. Also, he organized the plaintiff corporation for them. Plaintiff called Judge Fisher as a witness to testify concerning those transactions and the promises and undertakings made by defendant during the course thereof. Upon defendant's objection the court excluded such testimony upon the ground of the attorney-client privilege accorded by section 1881 of the Code of Civil Procedure.

[1, 2] This exclusion was clearly erroneous. "Where two persons mutually employ the same attorney to represent them as their common agent and attorney in a particular transaction, the communications made by either of them in the presence of the other to the attorney are privileged as to strangers to the transaction, but are not privileged as between either of them and the attorney. [Citations.]" Petty v. Superior Court, 116 Cal.App.2d 20, 29, 253 P.2d 28, 33.

[3] Defendant concedes upon this appeal that the Petty case correctly states the law and that the exclusion of Judge Fisher's testimony was in error. He urges that the testimony excluded was merely cumulative in nature and, therefore, its omission was not prejudicial. We do not so view it. The scope and terms of the joint venture and of the partnership depended upon oral agreements and the incorporation was an incorporation of the partnership business. Defendant and Page differed radically as to those terms and Judge Fisher's testimony would have corroborated that of Page. Those issues depended upon the credibility, respectively, of defendant and Page. Judge Fisher was the only other witness who did not have an interest in the outcome of the litigation and who was called to testify upon the pivotal issues of the case. We conclude that the exclusion of his testimony was prejudicially erroneous.

[4] (2) *Testimony by defendant that Dr. Page had treated him for epilepsy was erroneously admitted into evidence for the purpose of impeachment.* Dr. Page had been asked, upon cross-examination, if he had not treated defendant for epilepsy. The doctor replied that he had not. That was a collateral matter. Accordingly, Page's answer was conclusive on the defendant and could not be contradicted by him. In re Estate of Gird, 157 Cal. 534, 548, 108 P. 499; People v. Pianezzi, 42 Cal.App.2d 270, 278, 108 P.2d 685.

(3) *Other questions discussed by the parties involve, principally, the sufficiency of the evidence to support certain other findings.*

No purpose would be served for us to discuss those questions in view of the need for a new trial which might develop a quite different set of facts, findings and conclusions.

[5] (4) *Upon a new trial, if one is had, the parties and the court might want to consider the question whether the pleadings present an alleged usurpation of the corporate opportunity,* even though not expressly so labelled. That doctrine we find well expressed in Hall v. Dekker, 45 Cal.App.2d 783, 786–787, 115 P.2d 15, 17:

"It is the established law that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director (Red Top Cab Co. v. Hanchett, D.C., 48 F.2d 236, 238; Hussong Dyeing Mach. Co. v. Morris, N.J., ch. 89 A. 249, 250). Vice Chancellor Leaming thus accurately states the rule in Hussong Dyeing Mach. Co. v. Morris, supra, at page 250 of 89 A. '* * * It was not lawfully possible for the defendant, while a director and treasurer of complainant corporation, to enter into an opposition business in his own behalf of such a nature that it would cripple or injure the corporation that he represented, * * *.'" See also Guth v. Loft, Inc., 1939, 23 Del. ch. 255, 5 A.2d 503, 511, quoted in MacIsaac v. Pozzo, 81 Cal.App.2d 278, 284–285, 183 P.2d 910 and Southwest Pump & Machinery Co. v. Forslund, 1930, 225 Mo.App. 262, 29 S.W.2d 165, 169; 31 Cal.Law Rev. 188.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

167 Cal.App.2d 714

Jane Hamill DOZIER, Plaintiff and Respondent,

v.

Justin P. DOZIER, Defendant and Appellant.

Civ. 23265.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1959.

Hearing Denied April 1, 1959.

Proceeding on petition by mother for modification of child custody provision of divorce decree to permit her to take the child to live with her in Connecticut. From an order of the Superior Court, Los Angeles County, Elmer D. Doyle, J., modifying the decree as requested, the father appealed. The District Court of Appeal, Lillie, J., held that where eight-year-old son's asthmatic and pneumonia attacks would be less frequent and less serious in California's drier climate than in Connecticut and boy was subject to recurrent attacks when he lived in New York and had undergone three serious attacks year before he came to California and son had greatly benefited from California's climate and all doctors agreed that it would be better for him to remain in California, and there was a close and friendly relationship between child and his father, and mother's reason for wanting to return to Connecticut was to live near her family and have her son share their affection, welfare of child

would not be served by permitting his removal by mother from California.

Order reversed.

1. Divorce ⇐296, 312.6(5)

Trial court is given wide discretion in the fixing of custody of child in divorce proceeding and its determination will not be disturbed upon appeal in absence of a manifest showing of abuse, but in exercise of its discretion in custody proceedings, trial court must be guided primarily by welfare and interests of child.

2. Divorce ⇐300

Where eight-year-old son's asthmatic and pneumonia attacks would be less frequent and less serious in California's drier climate than in Connecticut and boy was subject to recurrent attacks when he lived in New York and had undergone three serious attacks year before he came to California and son had greatly benefited from California's climate and all doctors agreed that it would be better for him to remain in California, and there was a close and friendly relationship between child and his father, and mother's reason for wanting to return to Connecticut was to live near her family and have her son share their affection, welfare of child would not be served by permitting his removal by mother from California. West's Ann.Civ.Code, § 213.

3. Divorce ⇐300

Under ordinary circumstances, a mother, who has been awarded custody of child in divorce proceeding, should be permitted to move about freely and any unnecessary or arbitrary restriction on her residence is unreasonable, and fact that by child's removal from state father may be deprived of his visitation rights is generally not alone sufficient to justify restraint on mother's free movement unless the latter is inconsistent with welfare of child. West's Ann.Civ.Code, § 213.

4. Divorce ⇐303(2)

In proceeding on petition by mother for modification of child custody provision of divorce decree to permit her to take child out of state and move to Connecticut where her relatives lived, questions concerning reason husband and wife came to California from New York, who was responsible for separation, whether wife was properly supported before court order, and circumstances surrounding stipulation to an order prohibiting removal of son by one spouse from state without consent of other spouse, were immaterial.

5. Divorce ⇐303(1)

Trial court has continuing jurisdiction of matter of custody of the child in divorce proceeding.

Walter H. Young, Los Angeles, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

LILLIE, Justice.

An interlocutory judgment of divorce was granted after a default hearing, entered March 8, 1957. The parties stipulated that plaintiff have custody of the eight-year-old boy, Nathan, with certain visitation rights reserved to defendant; and that a mutual restraining order preventing Nathan's removal from the state without prior court order or written consent of the other spouse be entered, all of which became a part of the interlocutory decree.

The undisputed facts disclose that plaintiff and defendant had lived with the child in New York and moved to California in September, 1954, where they separated in July, 1956. Since the separation, the child has lived with plaintiff in Los Angeles and is now being regularly supported by defendant, who pays $100 per month for that purpose.

Although plaintiff obtained the divorce, no provision for alimony appears in the decree. However, she is able to work, employable and has engaged in general office work. She desires to go to Connecticut to be near her family, where she believes she can obtain employment. She plans to live with her mother who will take care of the boy while she works.

Approximately five months after the entry of the interlocutory decree, plaintiff filed an Order to Show Cause asking the lower court to modify the interlocutory judgment of divorce by dissolving the restraining order preventing her from taking the child out of the state, on the ground: "(A)ffiant desires to move with said minor child to Stamford or Westport, Connecticut. That affiant's family resides in said State whereas affiant has no family in California." The matter was heard before a Commissioner, and pursuant to his findings of fact and recommendations that "the best interest of the child will be promoted by granting the relief sought by the plaintiff" the trial court entered its order permitting plaintiff to remove the child from California to live in Connecticut subject to certain medical examinations every four months, and physical possession of the child by defendant in July and August of each year. Exceptions to the findings and recommendation of the Commissioner were denied and it is from this order defendant appeals.

Appellant contends that the trial court abused its discretion in that it gave little or no consideration to the rights and welfare of the child but was primarily concerned with the desire of plaintiff to move to a state in which her mother and other relatives live.

[1] As pointed out by respondent, the lower court is given a wide discretion in matters of this kind, and its determination will not be disturbed upon appeal in the absence of a manifest showing of abuse. Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656; Gantner v. Gantner, 39 Cal.2d 272, 246 P.2d 923; Taber v. Taber, 209 Cal. 755, 290 P. 36. However, in the exercise of its discretion in custody proceedings, it is likewise clear that the trial court must be guided primarily by the welfare and best interests of the child. Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656; Ward v. Ward, 150 Cal.App.2d 438, 309 P.2d 965; Shea v. Shea, 100 Cal.App.2d 60, 223 P.2d 32.

[2] The record before us reveals, on the one hand, a plan of plaintiff to live with her relatives in Connecticut; and on the other, a child 8½ years old, subject to severe asthmatic attacks and pneumonia, whose health will be further endangered if taken to the eastern climate, and a close association between the boy and his father. The evidence shows no real compelling cause for plaintiff's anticipated move. She is as employable here as in Connecticut; defendant has monthly paid adequate support for the child; plaintiff is apparently in good health; she is in no financial stress and has no reason for making the move other than to be near her mother and relatives.

Plaintiff was the only witness in support of her application for modification. From her testimony, it is obvious that basically she wants to move to Connecticut because she is now alone, has no relatives in California and her mother, brothers and sisters live at or near Stamford. Her family is very close, all willing to help each other and she plans to live with her 72 year old mother who will care for the child while she works. The mother lives in a two-bedroom apartment with plaintiff's bachelor brother of 42, with whom the boy will sleep. Her two sisters will also be available to help care for the boy if necessary, and he will have the advantage of the companionship of cousins near his own age. Plaintiff has been in California since 1954 and has only a distant cousin here. At the time of the divorce plaintiff was doing general office work but the position she held was terminated. She believes she can obtain more lucrative employment of the same kind in Connecticut although she now has nothing more than the promise of an interview. When asked how the move to Connecticut would be for the best interest of the boy she answered that her relatives could provide a "very, very close family tie which I feel the boy is very much in need of." Defense counsel then asked the question, "And the main reason you want to make this move is so you can be near your family?" to which she responded: "To make it better for my son and myself, yes." In the following part of her deposi-

tion, which was read into evidence, she was again asked the same question to which she replied: "So I can be near my family and so the youngster will know the family. Q. Is there any other reason why you want to make that move? A. That is the main reason."

However, in opposition to plaintiff's application, the uncontradicted testimony of the boy's doctor and his father reveals a heretofore undisclosed serious circumstance concerning the child. Dr. John G. Thom, physician and M.D., familiar with winter conditions on the east coast, testified, without contradiction or impeachment, to the present state of the child's health and his opinion concerning the effect thereon of the anticipated move. The boy has been Dr. Thom's patient since March 10, 1955, at which time he was treated for bronchial asthma. To aid him in his treatment, the doctor requested and received reports from the child's doctors in New York. He last examined Nathan on February 1, 1957, and again on September 9, 1957, and found him still susceptible to bronchial pneumonia or infection and asthmatic attacks. He testified that each time the boy develops a respiratory infection it immediately goes to his lungs and he is much better off in the climate here than in the midwest or the east; and from "the history I have before me of all the repeated attacks he had there and the relative infrequency of the attacks he had here, it would be much better to have him here. I think it would be definitely detrimental to return to the east coast or the middle west." Dr. Thom was asked, "Do you have an opinion as to whether this child is susceptible to bronchial pneumonia or infection" to which he answered, "Yes, he is, still."

The history of the child's bronchial and lung condition obtained by Dr. Thom from Drs. Worthington and Blauner and the Presbyterian Hospital in New York reveals "(T)he respiratory infection and bronchial asthma would frequently end up with pneumonia and that is what was the condition in New York City." In January, 1956, Dr. Thom took out the boy's tonsils, but he testified they had nothing to do with bronchial asthma and he has been sick several times since. He further testified that now the child is in "pretty good health" and has been improving all along; that the last respiratory infection was in April, 1956. On September 13, 1957, Dr. Blauner, one of the boy's New York doctors, wrote to Dr. Thom as follows: "Nathan had recurrent bouts of pneumonia. I strongly recommend that Nathan stay in a warmer and drier climate. I would not recommend the New York climate for him." Counsel for plaintiff moved to strike this statement, but the record shows no disposition of the motion and it remains part of the evidence. The Commissioner then questioned Dr. Thom who testified the boy still has bronchial asthma and will always have it and, although it can be controlled, it cannot be cured; that the last two attacks kept Nathan out of school for a week or two at a time; that an asthmatic attack is brought on by respiratory infection and although antibiotics prevent pneumonia they do not prevent the attacks; that in California they were milder and fewer, those in the east having been more frequent, one the first year, two the second and three the year before he came to California, all having been followed by pneumonia; and that if the child is taken to the east coast there is a likelihood of a recurrence of pneumonia. To this last, an objection was interposed but again no ruling was made thereon.

Defendant, a teacher employed by the Los Angeles City School system, testified in connection with his son's health and his relationship with the boy. He said that in New York the boy's attacks were so frequent he was often unable to retain his strength between them; in February, 1954, he was out of school for two weeks, and in April, 1954, two or three weeks. In 1953 and 1954 he had repeated attacks of asthma and bronchial pneumonia, finally resulting in a bronchoscope examination. Drs. Blauner, Evans and Baker, who treated the boy and examined his X-rays, told defendant he should be taken to a drier

climate; and since his move to California, Nathan has steadily improved in health. When plaintiff obtained the divorce, defendant insisted on the restraining order to prevent the boy's removal from California.

As to the close association with his son, defendant testified that he visited Nathan every other weekend and took him to dinner one night a week on alternate weeks, and when his son is with him they always spend their time together; that they have planned trips of an educational nature such as to Wilmington, Marineland, museums, etc., and in August took a trip to the redwoods. Nathan is enrolled in the Cub Scouts and participates in a swimming program he arranged for the boy; he is interested in machinery and is presently building a scooter. Defendant and his son enjoy a friendly relationship and are fond of each other and since he is approaching adolescence, the father believes it is important for the boy to have this close association with him.

Although plaintiff, in testifying on behalf of her application, did not mention her son's health, she did so on rebuttal and stated the boy has been very healthy and normal and that a change took place in his physical condition after the tonsillectomy, although he has had two colds last winter and had to remain home from school.

[3] Section 213, Civil Code, provides: "A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper Court to restrain a removal which would prejudice the rights or welfare of the child." Heinz v. Heinz, 68 Cal.App.2d 713, 157 P.2d 660; Luck v. Luck, 92 Cal. 653, 28 P. 787. Although plaintiff has always had physical custody of the child, at the divorce hearing she voluntarily agreed to be bound by the order preventing her from taking the boy out of California. There is a conflict in the evidence as to exactly what was said, but it is clear that the day after the divorce was granted, plaintiff called defendant and indicated she expected at some time in the future to take the child to live with her family in Connecticut. Under ordinary circumstances, a mother having custody of a child should be permitted to move about freely, and any unnecessary or arbitrary restriction on her residence is unreasonable. The fact that by the child's removal from the state the father may be deprived of his visitation rights is generally not alone sufficient to justify restraint on the mother's free movement unless the latter is inconsistent with the welfare of the child. Ward v. Ward, 150 Cal.App.2d 438, 309 P.2d 965; Shea v. Shea, 100 Cal.App.2d 60, 223 P.2d 32.

Considering first the cause of plaintiff's proposed move, the record is bare of a more compelling reason than that plaintiff wants to live near her family and have her son share their affection. The evidence shows no real financial, employment, educational, health, or housing consideration involved in plaintiff's proposed move; and indeed, had not the father advised the court of his son's serious health problem, we would not have known the probable danger involved in such a move. We are at a loss to understand the mother's failure to first mention this all-important consideration. We have thoroughly searched the record before us and cannot see how the extensive unimpeached and uncontradicted testimony of Dr. Thom, the boy's present doctor, can be ignored. Both he and the New York doctors claim the child's asthmatic and pneumonia attacks will be less frequent and less serious in California's drier climate. The boy was subject to recurrent attacks in New York, and the year before he came to California he had undergone three serious ones. It is apparent from all who testified, including plaintiff, that Nathan has greatly benefitted from California's climate, has gotten stronger and is now a fairly healthy boy. His improved health is no doubt due to the temperate climate and the fact he is growing older. All of the doctors agree it would be better for the boy to remain in California, and all recommend he should

not be returned to the east. This consideration, together with the close and friendly relationship between the child and his father, as compared with the mere desire of plaintiff to live with her mother and to acquaint the boy with her mother's relatives, leads us to conclude that the substantial evidence in this case overwhelmingly supports the obvious fact that the welfare of the child would not be served by permitting his removal at this time from a climate in which he is now doing well physically.

In addition—the defendant is a father truly interested in the welfare of his son, faithful in supporting the boy and willing and able to spend as much time with him as the court order permits. Much could be said on the point of depriving a boy 8½ years of age of an affectionate and interested father in favor of his mother's relatives who have not seen the child for three years and who know little of him.

There is here no question of unfitness of either parent and unquestionably a child of Nathan's age should have the care of his mother. This no one seeks to alter. Also it must be recognized that ordinarily the one who has custody has the right to live with the child wherever he or she chooses, but the great weight of the evidence in the case at bar, including the uncontradicted testimony relating to the boy's health and his close relationship with his father, in the absence of a more compelling reason for plaintiff's move than her personal convenience and the boy's benefit of her family's association, far from justifies a modification of the order preventing Nathan's removal from California, to which order both parties agreed not six months before. The substantial evidence in this case supports the conclusion that the detriment to the child's health and welfare which is likely to result from his return to the east, and the deprivation of his father's association greatly outweighs any advantage to the boy or his mother of being near her family.

Any argument that a medical examination of the boy every four months to advise defendant whether his son's health is in danger would be of benefit to the child is unrealistic and of little real protection to him for the reason that, due to the inclement eastern weather, his age, his present susceptibility to both asthmatic attacks and bronchial pneumonia or infection, and the fact that each time he develops a respiratory infection it immediately goes to his lungs, there would be little advance notice of any illness; and if under such circumstances defendant must bring an application to modify the custody order to return the boy to California and wait the necessary time for hearing and possible appeal, the child's health could be severely damaged. We conclude that the trial court abused its discretion in modifying the interlocutory judgment.

[4] We agree with respondent that questions concerning the reason the parties came to California in 1954, who was responsible for the separation and whether plaintiff was properly supported before the court order, and the circumstances surrounding stipulation to the restraining order, are immaterial to the issues here on appeal.

[5] The trial court has continuing jurisdiction of the matter of custody and in the future, when the boy is older, stronger, and better able to withstand the eastern climate, if circumstances arise justifying the move, the court may, on proper application, permit his removal. Ward v. Ward, 150 Cal.App.2d 438, 309 P.2d 965; Shea v. Shea, 100 Cal.App.2d 60, 223 P.2d 32.

For the foregoing reasons the order is reversed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

167 Cal.App.2d 794

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Guilford Vance WHITE, Defendant and Appellant.

Cr. 6320.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1959.

Defendant was convicted in the Superior Court, Los Angeles County, Mark Brandler, J., of unlawfully possessing heroin, and he appealed. The District Court of Appeal, Parker Wood, J., held that where police officers, after receipt of communication from informant that resident of house used and sold marijuana, knocked on door and announced they were police officers and there was no reply from within but they heard walking noises and opened unlocked screen door and remained outside and observed woman acting in such manner that the officers could reasonably believe before entering that she was retreating and acting furtively to try to conceal evidence of public offense, entering of house by officers and going to room which she entered and observing defendant there with the heroin was reasonable search, apart from communication from the informant and trial court properly refused to require the officers to disclose name of the informant at trial.

Affirmed.

1. Searches and Seizures ⇐7(1)

Where police officers knocked on door and announced they were police officers, and there was no reply from within but they heard walking noises, opening unlocked screen door and remaining outside was not unreasonable search.

2. Searches and Seizures ⇐7(20)

Where police officers, after receipt of communication from informant that resident of house used and sold marijuana, arrived at the house and knocked on unlocked screen door, announcing they were police officers, and there was no reply from within but the officers heard walking noises, and the officers opened the door but remained outside and observed woman acting in such manner that the officers could reasonably believe before entering that she was retreating and acting furtively to try to conceal evidence of public offense, entering of house by the officers and going to room which she entered and observing defendant there with heroin, was not unreasonable search.

3. Witnesses ⇐216

Where police officers, after receipt of communication from informant that resident of house used and sold marijuana, arrived at house and knocked, announcing they were police officers and upon receiving no answer, opened unlocked door and saw woman acting in such manner that they could reasonably conclude that she was trying to conceal evidence of public offense, and the officers followed her and observed defendant with heroin, the officers had sufficient reason to make the search apart from the informant's communication, and the trial court properly refused to require the officers to disclose the name of the informant at trial. West's Ann.Code Civ.Proc. § 1881.

Harry Weiss, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant White and one Wright were accused, in count 1, with unlawfully possessing heroin; and, in count 2, with unlawfully possessing marijuana. In a nonjury trial, White was convicted on count 1, and was acquitted on count 2. (Wright died prior to the trial.) White was sentenced to imprisonment in the state prison. No finding was made regarding an allegation in the information that White had been previously convicted of violating section 11721

of the Health and Safety Code, a misdemeanor (being addicted to unlawful use of narcotics). He appeals from the judgment and "the Court's order."

Appellant contends that the court erred in refusing to require the prosecution to disclose the name of an informant.

On October 18, 1957, about noon, Officers Cain and Campillo, received information from a confidential informant that one Wright, who resided at a certain address in Los Angeles, used and sold marijuana, that the marijuana would be in the house, and the screen doors were usually hooked with two or three latches. Officer Cain had known the informant about two years, had found on previous occasions that information furnished by the informant was reliable. For a period of time prior to the arrest herein, the officers observed the residence at said address. About 2:45 p. m. of said October 18, they went to the side door of the house and said, in a "medium" loud voice, "Police officers"; and they heard a "walking" noise inside the house. At that time the screen door, which was not latched or hooked, "was opened" [1] and they observed a female person, who was moving very fast —walking hurriedly, enter a doorway of a room in the house. At that time the officers entered the house and went to the bathroom. While the officers were standing in the doorway to the bathroom (the doorway between the dining area and the bathroom), another door to the bathroom (a door between a front bedroom and the bathroom) was opened, and appellant White was in that doorway, and in his hand there were several "balloons" of mixed colors. Officer Campillo told appellant to hand the "balloons" to him (officer). Thereupon appellant handed to him eight "balloons" which contained white powder. Then the officers took appellant and Wright into the front bedroom (adjoining the bathroom). In that bedroom, the officers found five other "balloons" and a measuring spoon on top of a dresser. The spoon contained white powder. Appellant and Wright were arrested. Officer Cain testified that, while the articles were being removed from the dresser, appellant said that he came to the address about thirty or forty minutes before the officers came there, that he brought the contents of the balloons to the house, and that it was heroin. The officers found a jar of marijuana on the porch at that place. Officer Cain testified that Wright said that the marijuana was his property.

The white powder in the "balloons" and the spoon was heroin.

Appellant testified that he arrived at the address (Wright's home) about five minutes before the arrest; he did not bring the "balloons" there; they did not belong to him; after he entered the house he went into the bedroom, and talked with Wright; suddenly Wright said, "Here, take these"; then Wright handed the "balloons" to him and told him to go toward the bathroom; he (appellant) was confused; the police were there immediately; appellant did not tell the officer that the heroin belonged to him (appellant); he did not tell them that he brought the "stuff" there; while he was at the police station, the officers said that he (White) had stated that the heroin belonged to him; he replied that they had him "mixed up" with Wright, who had said that it belonged to him (Wright).

Officer Campillo testified (on rebuttal) that, at the time of the arrest, the appellant was asked about the "balloons" which he had handed to Officer Cain; appellant replied, "[T]hat is all I have"; appellant also said he had been in the house about half an hour.

On cross-examination of Officer Cain, he was asked to state the name of the informant. He replied that he believed that the public interest would suffer if he disclosed the name, and he preferred to have the privilege, under section 1881 of the Code of Civil Procedure, not to answer the question. The objection was sustained.

1. The record does not disclose who opened the door, but it will be assumed that the officers opened it.

The arrest and search were made without a warrant.

When the heroin was offered in evidence, appellant objected to the offer on the ground that the heroin was obtained as a result of illegal search and seizure. The objection was overruled. Thereafter, appellant made a motion to suppress "the evidence" on the ground that there was no probable cause for entering the house and making the arrest and search. The motion was denied.

[1, 2] Appellant contends that since the court did not require the disclosure of the name of the informant, appellant was deprived of the opportunity of presenting impeaching testimony regarding the search and seizure. He asserts further that the heroin was improperly received in evidence in that it was obtained as a result of unlawful search and seizure. The officers went to the door of the house as a result of having received information from the informant. The informant did not accompany them. While they were outside the screen door, and immediately after they had announced they were police officers, they heard a "walking" noise inside the house. Then the officers opened the unlocked screen door and at that time, while they were outside the house, they observed a woman therein, who was walking hurriedly —moving very fast, go into another room. Then the officers entered the house and apprehended appellant while he, with "balloons" of heroin in his hand, was entering the bathroom. It thus appears that the informant did not participate in the acts of searching the house, and that the officers made an independent investigation. In Priestly v. Superior Court, 50 Cal.2d 812, at page 818, 330 P.2d 39, 43, it was said that the effect of the requirement of disclosure of the name of the informer "is to compel independent investigations [by the prosecution] to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish reasonable cause." Under the circumstances in the present case, where there was no response to the announcement by the officers that they were police officers, and where immediately after the announcement they heard a "walking" noise within the house, the act of the officers in merely opening the unlocked screen door, and remaining outside, did not constitute an unreasonable search. While the screen door was open, and before the officers entered the house, they observed a woman therein who was acting in such a manner that the officers could reasonably have believed, before they entered the house, that the woman was retreating and acting furtively in an attempt to quickly conceal evidence of a public offense. Under the circumstances here, the acts of the officers in entering the house, going to the room which the woman had entered, and observing appellant therein with heroin in his hand, did not constitute an unreasonable search.

In People v. Maddox, 46 Cal.2d 301, at page 306, 294 P.2d 6, 9, it was said: "When, as in this case, he [officer] has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that his peril would be increased or that the felon would escape if he demanded entrance and explained his purpose, is not unreasonable."

In People v. Steinberg, 148 Cal.App.2d 855, 307 P.2d 634, the officer had received information from an informant that the defendant was engaged in bookmaking. In that case the officer, using field glasses, watched defendant use a telephone in a room. Then the officer went to the door of the room, looked through a glass door, and said: "Police officers." At that time the officer saw the defendant rise from a desk and move speedily away. Thereupon the officer forced entrance to the room. It was held therein that there was reasonable cause for the arrest and search.

[3] In Priestly v. Superior Court, supra, 50 Cal.2d 812, at pages 818–819, 330 P.2d 39, it was held that if the prosecution relies on communications from an informer to show reasonable cause, it is essential to a

fair trial that the name of the informer be disclosed; and if the prosecution refuses to disclose the name, the court should, on proper motion of the defendant, strike the testimony as to communications from the informer. In the present case, the prosecution did not rely on communications from the informant to show reasonable cause for the search. There was sufficient evidence herein, apart from the informant's communication, to show reasonable cause. The court did not err in refusing to require disclosure of the name of the informant.

As above indicated, the notice of appeal states that the appeal is from the judgment and "the Court's order." It will be assumed that the order referred to is the order denying the motion for a new trial. (At the end of appellant's opening brief he refers to the judgment and the order denying a motion for a new trial.)

The judgment and the order are affirmed.

SHINN, P. J., and VALLEE, J., concur.

167 Cal.App.2d 669

James CASTERLINE and Jessie Irene Casterline, Plaintiffs, Respondents and Cross-Appellants,

v.

Mary Ellen YOUNG, Defendant, Appellant and Cross-Respondent.

Civ. 9410.

District Court of Appeal, Third District, California.

Feb. 6, 1959.

Action for damage suffered in traffic accident. From an order of the Superior Court, Yuba County, Warren Steel, J., granting plaintiffs' motion for a new trial upon all statutory grounds, the defendant appealed and the plaintiffs cross-appealed from the judgment entered upon verdict for defendant. The Supreme Court, Van Dyke, P. J., held that minute order stating that court had taken motion for new trial under advisement and had duly considered the evidence sufficiently disclosed that basis of order granting a new trial included court's determination that it ought to be granted upon ground of insufficiency of the evidence.

Order affirmed and plaintiffs' appeal dismissed.

1. New Trial ⇐163(1)

Minute order stating that court had taken motion for new trial under advisement and had duly considered the evidence sufficiently disclosed that basis of order granting a new trial included court's determination that it ought to be granted upon ground of insufficiency of the evidence. West's Ann.Code Civ.Proc. § 657.

2. Appeal and Error ⇐717

If there is any doubt as to proper interpretation of language of minute order as rendered by clerk, document signed and filed by court referring to minute order may be referred to for aid in interpreting minute order. West's Ann.Code Civ. Proc. § 657.

3. Appeal and Error ⇐1145

Affirmance of order granting plaintiff's motion for new trial automatically vacates judgment rendered against plaintiff.

J. Adrian Palmquist, Oakland, and Francis T. Cornish, Berkeley, for plaintiff-respondent-appellant.

Rich, Fuidge & Dawson, Marysville, for defendant-appellant-respondent.

VAN DYKE, Presiding Justice.

This action was brought by plaintiffs to recover for damage suffered in a traffic accident. Trial to a jury resulted in a defense verdict. Plaintiffs moved for a new trial upon all statutory grounds. A new trial was granted and defendant appeals.

Plaintiffs have cross-appealed from the judgment entered upon the verdict.

[1] After submission of the motion for a new trial, the court filed a document entitled "Memo on Motion for a New Trial" wherein the court stated:

> "Plaintiffs have filed herein their Motion for New Trial upon all of the statutory grounds and in particular have devoted much of their argument to claimed misconduct upon the part of defense counsel while arguing the case to the jury wherein reference was specifically made to the fact that the Defendants carried liability insurance in a specified amount. It is unfortunate that the subject of insurance crept into the case at all and no doubt it was due, to some extent at least, to the sparring back and forth between counsel in their arguments.
>
> "However, this injected issue, standing alone, would not appear to be too important although it could have had some effect with the jury, but entirely separate and apart therefrom arises in the Court's mind a more serious question as to the weight, sufficiency and probative force of the evidence, including the evidentiary value of the physical facts, to justify the verdict which the jury returned.
>
> "Under such circumstances, it becomes the duty of the Court to set aside such verdict and grant a new trial.
>
> "Therefore, the motion will be granted, and counsel may prepare an order accordingly."

On the day the foregoing document was filed, the clerk entered the following in his minutes:

> "Plaintiffs' motion for a new trial in the above entitled action having been heretofore argued, submitted and by the Court taken under advisement and now the Court having duly considered the evidence and being fully advised in the premises finds [files] its opinion and ordered that said motion for a new trial be, and the same hereby is granted."

Appellant contends, first, that under the provisions of Section 657 of the Code of Civil Procedure it cannot be said the court granted the new trial upon the ground of the insufficiency of the evidence and, second, that the record will not support the granting of a new trial upon any other ground.

Section 657 of the Code of Civil Procedure provides:

> "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground."

We think the rule which must govern the decision on this appeal is well stated in Legg v. Mutual Benefit Health & Accident of Omaha, 136 Cal.App.2d 887, 891, 289 P.2d 550, 552, 290 P.2d 87:

> "It is well settled that when the order provides simply that a new trial is granted, such order is a general one and does not include insufficiency of the evidence * * * 'The statute,' however, 'does not require that the order specify insufficiency of the evidence to sustain the verdict in any particular words or language. If the language used is susceptible of being interpreted as tantamount to granting a new trial on account of the insufficiency of the evidence to sustain the verdict, or if it may be inferred from the language used that such was the ground upon which the order was made, it is uniformly held to have been based upon that ground. Where the nature of the order itself necessarily implies that the trial court deemed it necessary to reexamine the facts, a statement in the order that

the evidence is insufficient is not essential. When the order granting the motion goes beyond a mere general order (a new trial is granted) and uses any language that reasonably can be construed as including insufficiency of the evidence, the language will be interpreted as including that ground.'"

[2] The language used in the minute order sufficiently indicates that the new trial was granted upon the ground of the insufficiency of the evidence. It clearly recites that the court, in determining the motion, had considered the evidence. It went well beyond the general order and we think sufficiently disclosed that the basis of the order granting a new trial included the court's determination that it ought to be granted upon the ground of insufficiency of evidence. If there be any doubt as to the proper interpretation of the language of the minute order as entered by the clerk, the document signed and filed by the court and referred to in the minute order may be referred to for purpose of interpretation. See City of Daly City v. Smith, 110 Cal.App.2d 524, 529, 243 P.2d 46; People v. One 1951 Ford Sedan, 122 Cal.App.2d 680, 683, 265 P.2d 176. What is said in that document could hardly be more plain to the point that the trial court was ordering a new trial upon the ground of insufficiency of the evidence. Said the court in that document: "Entirely separate and apart therefrom arises in the Court's mind a more serious question as to the weight, sufficiency and probative force of the evidence, including the evidentiary value of the physical facts, to justify the verdict which the jury returned." This language is clearly the origin of the language used by the clerk in entering the minute order wherein he recites that the court has duly considered the evidence.

The record on appeal shows that the evidence was much in conflict. The record clearly affords support for an order granting a new trial upon the insufficiency of the evidence.

[3] For the reasons given the order appealed from is affirmed. Since the affirmance of the order granting a new trial will automatically vacate the judgment from which respondents have appealed, that appeal is dismissed. See Lee v. Cranford, 107 Cal.App.2d 677, 681–682, 237 P.2d 986.

SCHOTTKY and PEEK, JJ., concur.

167 Cal.App.2d 593

Nicolas Esa DUDUM, Francis Dudum, a minor, by his guardian ad litem, Nicolas Esa Dudum, and Said Bajalia, Plaintiffs and Appellants,

v.

CITY OF SAN MATEO, a municipal corporation, Defendant and Respondent.

Civ. 18104.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1959.

Action by automobile driver and passengers against city for personal injuries suffered in intersectional collision with truck. The Superior Court, San Mateo County, Aylett R. Cotton, J., granted city's motion for summary judgment and plaintiffs appealed. The District Court of Appeal, Draper, J., held that where suit was based upon assertion that corner stop sign, which would have required automobile driver to stop, was obscured by tree and thus constituted dangerous condition of public property and city, filed affidavit averring that at or before accident there was no tree growing in or forming part of public property and that only trees growing in the vicinity were situated on private property and plaintiffs' counter-affidavit alleged that stop sign was ob-

scured by tree rooted not far from stop sign, affidavits did not negate the existence of triable issue of fact.

Judgment reversed.

1. Judgment ⇐186

Validity of summary judgment for city on ground that tree obscuring stop sign was situated on private property and that therefore obscured sign did not constitute defective condition of public property is to be determined by the sufficiency of affidavits considered upon such motion and deficiencies in affidavits could not be remedied by resort to controverted allegations of the pleadings. West's Ann.Code Civ. Proc. § 437c; West's Ann.Gov.Code, § 53051.

2. Municipal Corporations ⇐847

Stop signs are "public property" within statute providing that a local agency is liable for injuries resulting from the dangerous or defective conditions of public property. West's Ann.Gov.Code, § 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Property".

3. Municipal Corporations ⇐723

City's liability may be based upon factors other than structural or mechanical defects.

4. Automobiles ⇐279

A municipality is not liable for failure to install a boulevard stop sign or to direct traffic at an intersection, but once a stop sign is installed, city's failure to maintain it properly, in absence of determination that the protected street is no longer a through or arterial highway, creates an actionable condition of public property.

5. Municipal Corporations ⇐857

Placing of a stop sign in a location so that private property wholly obscures it from the view of those it is intended to warn, presents a fact question as to whether a dangerous or defective condition of public property existed. West's Ann.Code Civ.Proc. § 437c; West's Ann.Gov.Code, § 53051.

6. Appeal and Error ⇐863

On appeal from summary judgment the District Court of Appeal is limited to the facts shown by the affidavits and is to determine only whether the facts so shown give rise to a triable issue. West's Ann.Code Civ.Proc. § 437c; West's Ann. Gov.Code, § 53051.

7. Judgment ⇐181(4)

Summary judgment procedure is drastic and should be used with caution.

8. Judgment ⇐185.3(21)

Where automobile driver and passengers' suit against city for personal injuries as result of intersectional collision with truck was based upon assertion that corner stop sign, which would have required automobile driver to stop, was obscured by tree and thus dangerous condition of public property was created, and city, on motion for summary judgment, filed affidavit averring that on or before accident there was no tree growing in or forming part of any public property and that only trees growing in the vicinity were situated on private property and plaintiffs' counteraffidavit alleged that stop sign was obscured by tree rooted not far from stop sign, affidavits did not negate existence of triable issue of fact. West's Ann.Code Civ.Proc. § 437c; West's Ann.Gov.Code, § 53051.

Jack H. Werchick, San Francisco, for appellants.

Ropers & Majeski, Redwood City, for respondent.

DRAPER, Justice.

Plaintiffs appeal from summary judgment (Code Civ.Proc. § 437c) in favor of defendant city. The action seeks damages for personal injuries allegedly suffered in the collision of an automobile driven by plaintiff Nicolas Dudum with a truck driven by defendant Goin and owned by him and other defendants. Plaintiff Nicolas, with the other plaintiffs as passengers, drove east on Second Avenue in San Ma-

teo. The truck was travelling south on Delaware Street, and the vehicles collided in the intersection of these two streets. Plaintiffs' claim against defendant city is based upon the assertion that the stop sign at the southwest corner of the intersection—the sign which would require plaintiffs' car to stop—was obscured by a tree, thus constituting a dangerous or defective condition of public property (Government Code, § 53051), which, with the concurring negligence of defendant Goin, proximately caused the collision and the resulting injury to the three plaintiffs.

[1] Validity of the summary judgment is to be determined by the sufficiency of the affidavits considered upon the motion (McComsey v. Leaf, 36 Cal.App.2d 132, 133, 97 P.2d 242), and deficiencies in the affidavits cannot be remedied by resort to controverted allegations of the pleadings (Kimber v. Jones, 122 Cal.App.2d 914, 265 P.2d 922; Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244).

Defendant city filed the affidavit of its city engineer averring that at or before the accident there was no tree growing in or forming any part of any public property at the southwest corner of this intersection, and that the only trees growing in the vicinity of the corner are situated on private property. Plaintiffs' counter-affidavit alleges that the stop sign "was obscured by the branches and foliage of a tree that was rooted not far from the stop sign." Looking to the omissions as well as the allegations of the two affidavits, we must conclude that the sign was in fact obscured by branches and foliage of a tree, but that the obscuring tree was located upon private property. Whether the branches of this privately-owned tree overhung public property cannot be determined.

[2] Stop signs are "public property" within the meaning of Government Code, § 53051. Irvin v. Padelford, 127 Cal.App. 2d 135, 273 P.2d 539; Ervin v. City of Los Angeles, 117 Cal.App.2d 303, 256 P. 2d 25; Rose v. County of Orange, 94 Cal. App.2d 688, 211 P.2d 45. Respondent, however, contends that the dangerous or defective condition must be found in the public property itself. It is true that in Ervin the stop sign fell and struck a pedestrian, in Rose it had fallen and had been lying on the ground for some days, and in other traffic signal cases (Silva v. County of Fresno, 63 Cal.App.2d 253, 146 P.2d 520; Bady v. Detwiler, 127 Cal.App. 2d 321, 273 P.2d 941; Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 288 P.2d 989) the signal was itself defective.

[3] But the rule is clear that a city's liability under Government Code, § 53051 may be based upon factors other than structural or mechanical defects. "There can be no doubt that a dangerous or defective condition can be created by the use or general plan of operation of government operated property, as well as by a structural defect." Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 153, 108 P.2d 989, 994; see also Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 267 P. 918. In Teilhet v. County of Santa Clara, 149 Cal.App.2d 305, 308 P.2d 356, 358, this court rejected the contention that "the dangerous or defective condition contemplated by the statute must be a tangible defect and that smoke in the atmosphere over a public highway cannot constitute such a condition," and affirmed judgment against the county in favor of a driver whose automobile collided with another on the smoke-obscured highway.

[4] The rule is clear that a municipality is not liable for failure to install a boulevard stop sign (Perry v. City of Santa Monica, 130 Cal.App.2d 370, 279 P.2d 92), or to direct traffic at an intersection (Goodman v. Raposa, 151 Cal.App. 2d 830, 835, 312 P.2d 65). But once a stop sign is installed, the city's failure to maintain it properly (in the absence of determination that the protected street is no longer a through or arterial highway) creates an actionable condition of public property. Irvin v. Padelford, supra, 127 Cal.App.2d 135, 273 P.2d 539; Rose v. County of Orange, supra, 94 Cal.App.2d 688, 211 P.2d 45. In the latter case the

fact that the stop sign had been lying on the ground for some days before the accident might be deemed to indicate a defective condition of its supporting standard, which of course was public property. But in Irvin, the stop sign was wholly removed because the street light pole to which it was affixed had been taken down by city employees to repair wiring. There was no showing of any defect in the stop sign. Liability was based on the fact that its total absence, when a driver on the through street was entitled to rely on its protective presence, created a dangerous condition of public property. We are unable to distinguish a sign which is wholly absent from one which is physically present but cannot be seen by those whose vehicles it is designed to stop.

[5] Respondent, however, stands upon the fact that the tree which obscured plaintiff's view of the sign grew upon private property. Even if it be conceded that concealment of the sign by public property would create a dangerous condition within the meaning of Bauman v. City and County of San Francisco, supra, 42 Cal.App.2d 144, 108 P.2d 989, the city argues that the dangerous condition resulted solely from the privately owned tree. But the affidavits may be construed to show that the tree obscures the sign only because of the location chosen for the sign by the city. The position of public property in relation to other public property, as in the juxtaposition of the sand box and the baseball area in Bauman v. City and County of San Francisco, supra, may create a dangerous condition of public property. Clearly the placing of a stop sign in a location where view of it was blocked by another item of public property, whether a light standard, another sign, or a public building, would present a like fact question as to whether a dangerous or defective condition of public property existed. Indistinguishable is a situation wherein a stop sign is so placed that private property wholly obscures it from the view of those it is intended to warn. In such situation, the placing of the stop sign in the obscured position, rather than the mere existence of the obscuring property, causes the dangerous or defective condition of the sign. The affidavits before us do not show the relative positions of sign and tree. It may well be that the choice of a slightly different location for the sign would have made it fully visible and yet have met all other requirements for the placing of a stop sign.

[6–8] We are limited to the facts shown by the affidavits (Kimber v. Jones, supra, 122 Cal.App.2d 914, 265 P.2d 922), and are to determine only whether the facts so shown give rise to a triable issue (Coyne v. Krempels, supra, 36 Cal.2d 257, 223 P.2d 244). The summary judgment procedure is drastic and should be used with caution. Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 556, 122 P.2d 264. We conclude that, under the rules applicable to summary judgments, the affidavits here do not negate the existence of a triable issue of fact, and that the case must be tried rather than determined on a motion for summary judgment.

Respondent's brief suggests that there is no showing of proximate cause since plaintiff driver was not on the arterial street where, as in Irvin v. Padelford, supra, 127 Cal.App.2d 135, 273 P.2d 539, he could have relied on the assumption that he was protected by stop signs on the side streets. The issue of proximate cause is not raised by the affidavits and is therefore not before us at this time. We note, however, that concealment of the stop sign could be a proximate cause of the collision if it be shown that defendant truck driver knew of the stop sign, relied on its protection to him as a driver on the arterial street, and so acted in such reliance that his conduct and plaintiff's failure to stop, if excused by the claimed concealment of the sign, concurred as proximate causes of the collision.

In consideration of this case, we have been limited to an inquiry whether the ultimate facts which might be found from the allegations of the affidavits show the existence of any triable issue. The evi-

dence adduced at trial may support none of the possible fact conclusions suggested in this opinion, or may warrant findings not suggested here. Our decision in no way limits the trier of the facts, but merely determines that the case cannot be disposed of on motion for summary judgment.

Judgment reversed.

KAUFMAN, P. J., and DOOLING, J., concur.

167 Cal.App.2d 453

Lazar DROPO and Anka Dropo, his wife, Plaintiffs and Respondents,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, and Joseph Brown, Defendants and Appellants.

No. 17887.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1959.

Rehearing Denied Feb. 27, 1959.

Hearing Denied March 25, 1959.

Action for death of pedestrian struck by city's streetcar. From a judgment of the Superior Court, City and County of San Francisco, William F. Traverso, J., defendants appealed. The District Court of Appeal, Bray, J., held, inter alia, that issue of competency of streetcar operator was injected in the case by defendants and hence ordinances prohibiting inexperienced person from acting as "motorman, gripman or conductor" and defining such terms were properly admitted, and instruction concerning them was proper.

Affirmed.

1. Appeal and Error ⇐232(2)

In action for death of plaintiffs' daughter who was struck by city's streetcar wherein when plaintiffs offered in evidence ordinance prohibiting operation of streetcar by inexperienced person, defendants' counsel stated, "that's the section we discussed, to which we object as being applicable to this case", and there had been a discussion during noon recess concerning ordinances involved, and record failed to show that judge was present at the discussion or what the discussion was, the objection that ordinance was "inapplicable" was sufficient notwithstanding grounds of objection were not clear.

2. Street Railroads ⇐113(2), 118(2)

In action for death of pedestrian struck by city's streetcar, issue of competency of streetcar operator was injected in the case by defendants and hence ordinances prohibiting inexperienced person from acting as "motorman, gripman or conductor" and defining such terms were properly admitted, and instruction concerning them was proper.

3. Street Railroads ⇐113(5)

In action for death of pedestrian struck by city's streetcar, wherein streetcar operator testified that at time of accident his speed was approximately 5 miles per hour, and that at such speed if he took his foot off deadman's control streetcar would stop in about six to eight feet and with brake application only it would stop in 8–10 feet, and streetcar went 18 feet after hitting deceased, while complaint did not allege negligence in selection of operator, jury under issue presented in determining whether operator was negligent in operation of car, was entitled to know that because of lack of training required by ordinance, operator was presumed to be incompetent.

4. Statutes ⇐233

The rule that general language in a statute shall not be construed to apply to the government or its agencies, unless expressly included by name, does not apply if application of statute would not infringe upon sovereign governmental powers.

5. Street Railroads ⇐67

Ordinances relating to operation of street railroad were not inapplicable to municipal railway because it was not spe-

cifically mentioned in the ordinances, since interpreting ordinances to apply to city in its proprietary capacity would in nowise infringe its sovereign governmental powers, and fact that since 1944 when privately owned street railway went out of business, municipal railway had been the only one to which ordinances could apply, and ordinances had never been repealed, was strong evidence that ordinances were intended to apply to the municipal railway.

6. Street Railroads ⇐118(3)

In action for death of pedestrian struck by city's streetcar, evidence justified instruction giving provision of ordinance that motorman must always, by ringing bell or striking the gong on such car, give timely warning of approach to pedestrians and others notwithstanding no persons other than deceased were in immediate vicinity of crosswalk where accident occurred, where it was a reasonable assumption that had gong been seasonably sounded deceased would not have been struck.

7. Street Railroads ⇐73

The contention that fender on streetcar required by ordinance was archaic was a matter for board of supervisors to consider, not for the courts.

8. Street Railroads ⇐118(13)

In action for death of pedestrian struck by city's streetcar, instruction incorporating the "stop, look and listen rule" applicable to railroads that tracks were a warning of danger was properly rejected.

9. Death ⇐104(2)

In action for death of pedestrian struck by city's streetcar, court properly gave instruction to effect that there was a presumption that deceased used due care and was obeying the law.

10. Street Railroads ⇐117(17)

In action for death of pedestrian struck by city's streetcar, presumption that pedestrian exercised due care was itself evidence sufficient to create a conflict with evidence produced by city, so that issue of contributory negligence was properly submitted to jury.

11. Appeal and Error ⇐1004(1)
Death ⇐97

In wrongful death cases the awarding of damages is a matter committed to the discretion and sound judgment of jury, whose conclusion will not be disturbed on appeal unless sum is so disproportionate to injury proved as to justify view that it was given under influence of passion and prejudice, or so plainly and outrageously excessive as to suggest at first blush passion, prejudice or corruption, or so disproportionate to injuries suffered that result reached may be said to shock the conscience.

12. Death ⇐99(1)

In determining whether amount awarded for death is excessive, although each case must be determined on its own facts, a reviewing court may consider amounts awarded in similar cases.

13. Death ⇐99(3)

Award of $26,000 for death of 17-year-old girl who was killed on her second day at college, was not excessive.

Dion R. Holm, City Atty., Donald J. Kropp, Deputy City Atty., San Francisco, for appellants.

Appel, Liebermann & Leonard, Vladimir Vucinich, San Francisco, for respondents.

BRAY, Justice.

Defendants appeal from a judgment entered after jury verdict, awarding plaintiffs $26,000 for the wrongful death of their daughter as a result of being struck by defendants' streetcar.

Questions Presented

1. Admissibility of sections 51, 52, 21 and 62, Municipal Code.

2. Rejection of defendants' proposed instruction on tracks as a warning of danger.

3. Was deceased contributorily negligent as a matter of law?

4. Was the verdict excessive?

Facts

The accident occurred at the "K" line terminal owned by the San Francisco Municipal Railway adjacent to San Francisco City College. There the tracks form a loop of several hundred feet. There is a waiting station located there. The westerly section of the tracks parallel the college campus and is separated therefrom by a fence, 10 feet from the nearest rail. An asphalt pathway approximately 6 feet wide extends from the campus through a gate in the fence across the streetcar tracks to the terminal. Painted on the pathway is the word "Danger." The pathway is used for access to the terminal and on through to Ocean Avenue. The car was a one-man operated streetcar known as a streamliner. It overhangs the rails on each side 18–20 inches. The operator sits up front on the left hand side.

Lenore Dropo, the deceased, was in her second day at the college. Mrs. Edna Scholz testified that she was sitting in the right front seat of the car, that she saw Lenore outside the campus gate walking on the pathway looking straight ahead. "[S]he walked and walked and I hollered and that's it." Lenore took 7 or 8 steps before she was hit. No one else saw her until she was about a step and a half from clearing the tracks, where she was struck by the left front portion of the streetcar, which was then going 4–5 miles per hour. She was thrown 20 feet forward. Her body was found approximately one foot beyond the far rail. The car traveled 18 feet after the brakes were applied. The operator estimated that at 5 miles per hour the streetcar would stop within 8–10 feet after the application of the brakes. He testified that as he approached the pathway he saw no one in the vicinity; that he applied his brakes when he was a slight distance from the gate because he was approaching the gateway. He did not sound his gong. He looked both to his right and left within a few feet of the pathway. He first saw Lenore when "she just popped up" about 1½ feet from the right rail at which time the streetcar was already in the pathway. She was walking towards the tracks but looking away from the oncoming car. He put his brakes down to the floorboard. She was struck by the left front of the streetcar when she was a few inches from the far rail.

1. Municipal Code

During World War II the operator worked for the Market Street Railway for 2 years as an operator of a one-man streetcar. He had then received 7 days training for its operation. Since 1944 when the city took over that railway he worked as a conductor until two weeks before the accident. The "K" car and the cars of the Market Street Railway had different operating mechanisms, particularly different types of braking equipment. He had received three days of training with the Municipal Railway and had operated "K" cars for two weeks. Admitted in evidence were sections 51 and 52 of the Municipal Code. Section 51 provides: "Inexperienced platform men prohibited. It shall be unlawful for any person not having had previous experience to act as motorman, gripman or conductor on street railroad cars within the City and County of San Francisco, unless said person shall have had at least seven days' experience in such capacity in this City and County, under the instruction and guidance of a competent and experienced motorman, gripman or conductor, as the case may be * * *" Section 52 provides: "'Experienced' motormen, gripmen and conductor, defined. The term 'competent and experienced motorman, gripman, or conductor' shall be defined to mean one who has had seven days' experience as expressed in Section 51 of this article, and any person not having had such experience shall be deemed to be incompetent and inexperienced."

In its instructions the court read to the jury said sections 51 and 52 (as well as section 21 (requiring motormen to ring bell or sound gong) and section 62 (requiring cars to be equipped with fenders).) The court then said: "Conduct which is in violation of the ordinances of the City and County of San Francisco *respecting the*

ringing of streetcar bells or gongs, just read to you, constitutes in itself negligence. * * * *In this connection,* you may assume that a person of ordinary prudence will reasonably endeavor to obey the law * * To prove that a violation of an ordinance, *such as that charged in this case,* was excusable and justifiable to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation. * * * However, in this action a violation of law or of an ordinance or of *any of the ordinances or sections* is of no consequence unless it was a proximate cause of or contributed as a proximate cause to an injury found by you to have been sustained or suffered by the decedent." (Emphasis added.)

It is true that in these instructions the court, strictly speaking, only stated that a violation of the ordinance concerning bells and gongs would constitute negligence. However, a reading of them, particularly the italicized portions, would give the jury the impression that the court was referring to all the sections of the ordinance which it had read. Certainly violations of sections 51 and 52 were "charged in this case." At least, the court told the jury that to prove that the violations of sections 51 and 52 were justified defendant would have to show that the violations were due to causes beyond defendant's control. Therefore, we are required to determine whether the court erred in instructing concerning these sections.

[1, 2] Defendants objected to the introduction of these sections. The grounds of the objection, however, are not clear. When plaintiffs offered section 51 defendants' counsel stated, "that's the section we discussed, to which we object as being applicable to this case." When section 52 was offered defendants' counsel stated, "We have the objection, because that refers to 51." There had been a discussion during the noon recess concerning these sections. The record fails to show whether the judge was present at the discussion or what the discussion was. As defendants contend that under the rule of statutory construction general language in an ordinance does not apply to government or its agencies unless expressly included therein by name, the ordinance could not be held to apply to defendant city, the objection that the ordinance was "inapplicable" may have been meant to cover that contention or that the ordinance was not material to the question of negligent operation or both. We are inclined to the view that in the view of both court and counsel it covered both and therefore that it was sufficient. Pipoly v. Benson, 1942, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515, held that the failure to object to the admission of an invalid ordinance in evidence did not preclude objection upon appeal to an instruction based upon it. In Nosbonne v. Brill, 53 Cal.App.2d 436, 438–439, 128 P.2d 57, 58, the court stated, "each party is allowed, as a matter of law, an exception to every instruction. This last factor was also emphasized in Pipoly v. Benson, supra." However, in Hearn v. Gunther, 57 Cal.App.2d 82, 134 P.2d 3, the court held that failure to object to the admission in evidence of an ordinance did not bar the appellant from raising the invalidity of the ordinance on appeal, saying (57 Cal. App.2d at page 85, 134 P.2d at page 5): "* * * we are not precluded on appeal from reviewing the order of the court which erroneously construed the validity of the ordinance when it granted the nonsuit, where such order (granting a nonsuit) is deemed excepted to under section 647, supra. This was the effect of a portion of the decision in Pipoly v. Benson, supra."

It is very doubtful if the rule of the Pipoly case would apply to a *valid* ordinance, to the introduction of which in evidence no objection was made. However, we deem it unnecessary to determine that question in view of the facts (1) that we find the objection to the introduction sufficient in this case and (2) we further find that under the peculiar circumstances of this case, sections 51 and 52 were admissible for the reason that the issue of the competency of the operator was injected in the case by

defendants. In the opening statement defendants' counsel stated: "* * * that Mr. Brown was a capable operator, a very capable street car man; that he had received some of his training with the old Market Street Railway, and when the City and County of San Francisco took over the Market Street Railway, he went with the Muni." The operator was called under section 2055, Code of Civil Procedure, as the first witness. No objection was made to the examination by plaintiffs concerning his competency to drive defendant city's streetcar including the time of his training with defendant city. On direct examination defendants' counsel asked him how long he had operated Market Street Railway cars and his training period with that company. These facts bring the introduction of sections 51 and 52 and the instruction concerning them under the rule set forth in Megee v. Fasulis, 65 Cal.App.2d 94, at page 101, 150 P.2d 281 at page 285, where the court said concerning an instruction on intoxication: "This element of the case was placed in issue first by counsel for the defendant in his opening statement to the jury, and later was again alluded to by both parties. Defendant cannot complain of an issue which he assisted in placing in evidence. By so doing he made it a part of his defense of contributory negligence."

The competency of the motorman having been made an issue, sections 51 and 52 became relevant.

[3] The operator testified that at the time of the accident his speed was approximately 5 miles per hour as he started down the straight-a-way upon which the path is located; that at that speed if he took his foot off the deadman's control the streetcar would stop in "About six or seven or eight feet" and with brake application only it would stop in 8–10 feet. The streetcar went 18 feet after hitting the deceased. While the complaint did not allege negligence in the selection of the operator, the jury under the issue presented in determining whether the operator was negligent in the operation of the car, was entitled to know that because of lack of the training required by the ordinance, the operator was presumed to be incompetent. While, of course, there must be a causal connection between the violation and the injury (the court so instructed the jury), such connection is found here, in explanation of why the operator failed to see deceased before he did, to sound the gong, to approach a well used pathway under complete control and to stop the car in the distance he said he could stop it.

Inasmuch as the issue of the competency of the motorman was raised in the case by defendants and evidence on it introduced without objection, we deem it unnecessary to discuss cases like Corsetto v. Pacific Electric Ry., 136 Cal.App.2d 631, 289 P.2d 116, and Langford v. San Diego Elec. Ry. Co., 174 Cal. 729, 164 P. 398, which holds, as did the Corsetto case (136 Cal.App.2d at pages 634–635, 289 P.2d at page 118) that where the complaint contains no allegation as to negligence of the streetcar company in the training or employment of the motorman, "The great weight of authority supports the rule that in actions of this kind the competency of the person claimed to have acted negligently, or his reputation for care, is not a subject of inquiry." In none of those cases was such issue raised by the defendant nor evidence admitted without objection by the defendant. For the same reason, cases like Strandt v. Cannon, 1938, 29 Cal.App.2d 509, 85 P.2d 160 which hold erroneous instructions that the failure of an automobile driver to have a driver's license is prima facie evidence of incompetence, are not applicable here.

[4, 5] Defendants' contention that sections 51, 52, 21 and 62 do not apply to the Municipal Railway because it is not specifically mentioned in them is without merit. Defendants rely upon the rule expressed in Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 305, 202 P. 37, 19 A.L.R. 452, to the effect that a fundamental rule of construction requires that general language in a statute shall not be construed to apply to the government or its agencies unless expressly included by name. However, that rule does not apply if application of the

statute in question would not infringe upon sovereign governmental powers. The statutory construction rule "is founded upon the principle that statutory language should not be interpreted to apply to agencies of government, in the absence of a specific expression of legislative intent, where the result of such a construction would be to infringe sovereign governmental powers. [Citations.] Where, however, no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only." (Hoyt v. Board of Civil Service Com'rs, 21 Cal.2d 399, 402, 132 P.2d 804, 806; see also 45 Cal.Jur.2d p. 550 et seq., § 25, and 82 C.J.S. Statutes § 317, p. 554.) Obviously interpreting the ordinance to apply to defendant in its proprietary capacity in this particular respect, in nowise infringes its sovereign governmental powers. Moreover, the fact that since 1944 when the Market Street Railway went out of business the Municipal Railway has been the only one to which the ordinance could apply and the ordinance has never been repealed, is strong evidence that the ordinance was intended to apply to the Municipal Railway. In Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741, the construction rule was applied to the construction of the Labor Code, §§ 921–923, in a decision holding that because governmental bodies were not expressly mentioned in the Labor Code, its provisions requiring bargaining between employers and trade unions did not apply to the defendant city in its operating of local and intercity motor coach lines. Obviously, applying such a requirement to a municipality, even though it was acting in a proprietary capacity, would interfere with sovereign governmental powers. It was so held in that case. In stating the rule of construction the Nutter case said (74 Cal.App.2d at page 300, 168 P.2d at page 741) "general terms of a statute will not be construed as including government if the statute would operate to trench upon sovereign rights, injuriously affect the capacity to perform state functions or establish a right of action against the state." The construction we give the ordinance in nowise does any of these things (the right to sue the municipality for negligent operation of its streetcars is provided by statute). We have been cited to no case, and have found none, holding that the rule of construction applies to a municipality acting in its proprietary capacity where an ordinance, as here, is enacted for the safety of the public.

[6] Defendants' contention that the evidence did not justify the instruction giving section 21, "The motorman * * * must always, by ringing the bell or striking the gong on such car, give timely warning of the approach of such car to pedestrians * * * and others who may happen to be on or about to cross the track in front of such car" is likewise without merit. While it is true that no persons other than Lenore were in the immediate vicinity of the crosswalk, Lenore was. It is a reasonable assumption that had the gong been seasonably sounded Lenore would not have been struck.

[7] Defendants' contention that the fender required by section 62 is archaic is a matter for the board of supervisors to consider, not for the courts.

2. Instruction That Tracks Are a Warning of Danger

[8] Defendants took BAJI No. 203 which applies to railroads and not to street railroads and, as they say, "adapted it." They cite no authority to support their instruction. As adapted to street railroads it is erroneous. The stop, look and listen rule embodied in the instruction has been held not to apply to streetcar tracks. Carey v. Pacific Gas & Electric Co., 1925, 75 Cal. App. 129, 242 P. 97; Aungst v. Central California Trac. Co., 1931, 115 Cal.App. 113, 1 P.2d 56. The court properly rejected it.

3. Contributory Negligence as a Matter of Law

[9, 10] The court properly gave an instruction to the effect that there was a

presumption that deceased used due care and was obeying the law. No contention is made that the presumption was not applicable. "This presumption is itself evidence sufficient to create a conflict with the evidence produced by defendant, and requires that the issue of contributory negligence be submitted to the jury." Simon v. City & County of San Francisco, 1947, 79 Cal.App.2d 590, 598, 180 P.2d 393, 398. Thus, regardless of the state of the other evidence, there was a conflict on the issue of contributory negligence for the jury to resolve. Therefore we cannot say as a matter of law that Lenore was contributorily negligent.

4. Verdict

[11–13] Lenore was 17 years old. The jury awarded $26,000 for her wrongful death. Defendant contends that that amount is excessive. In wrongful death cases the awarding of damages is a matter committed to the discretion and sound judgment of the jury, whose conclusion will not be disturbed on appeal unless the sum is so disproportionate to the injury proved as to justify the view that it was given under the influence of passion and prejudice (Bechtold v. Bishop & Co., Inc., 1939, 16 Cal.2d 285, 294, 105 P.2d 984; "'"* * * so plainly and outrageously excessive as to suggest at first blush passion, prejudice or corruption * * *"'" (Arellano v. City of Burbank, 13 Cal.2d 248, 258, 89 P.2d 113, 119); "so disproportionate to the injuries suffered that the result reached may be said to shock the conscience * * *." (Daggett v. Atchison, T. & S. F. Ry., 48 Cal.2d 655, 666, 313 P.2d 557, 564). The Daggett case states, although each case must be determined on its own facts, a reviewing court may consider amounts awarded in similar cases. There it was held that it could not be said as a matter of law that a verdict of $50,000 for the loss of two minor children (ages 3 and 10) was so greatly excessive as to shock the conscience. Moreover, defendants do not contend that the instructions on damages were incorrect, nor do defendants contend that the verdict was so disproportionate as to shock the conscience or to show passion or prejudice. We cannot say that under the present day value of the dollar the verdict was excessive.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

167 Cal.App.2d 751

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Richard A. CHRISTENBERY, Defendant and Appellant.

Cr. 3530.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1959.

Prosecution for grand theft. The Superior Court, Marin County, Jordan L. Martinelli, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence that defendant, while employed by an automobile dealer, accepted money and automobile from complaining witness and that defendant represented to complaining witness that he would obtain and deliver new automobile with knowledge that he could not procure new automobile when viewed with evidence of similar fraudulent transaction with another, established fraudulent intention not to procure automobile, but that crime of interstate transportation of stolen and falsely made securities would not have been a felony if committed in California and was not an offense similar to crime of receiving property knowing it to be stolen and transporting it into California and therefore defendant had not been convicted of two previous felonies and was entitled to probation.

Judgment reversed solely to permit action upon application for probation.

1. False Pretenses ⇐7(5)

Proof of the elements of obtaining money or property by false pretenses will support a conviction of grand theft, and proof of the making of a promise without the present intent to perform it is sufficient to establish such false pretenses.

2. False Pretenses ⇐5, 49(2), 51

Intent to defraud, as element of obtaining property by false pretense, must be proved and mere failure to perform promise standing alone is not sufficient, and intent to defraud is a question of fact to be determined from all of the circumstances of the case.

3. False Pretenses ⇐49(2)

In prosecution for grand theft, evidence that defendant, while employed by an automobile dealer, accepted money and automobile from complaining witness and that defendant represented that he would obtain and deliver new automobile to witness with knowledge that he could not procure one, when viewed with evidence of similar fraudulent transaction with another, established fraudulent intention not to procure new automobile. West's Ann.Pen. Code, § 1110.

4. False Pretenses ⇐49(3)

In prosecution for grand theft, wherein complaining witness alleged that defendant, while employed by an automobile dealer, accepted her money and automobile and represented that he would obtain and deliver new automobile to her with knowledge that he could not procure new one, evidence of similar fraudulent transaction involving owner of another automobile was sufficient corroboration of complaining witness' testimony. West's Ann.Pen.Code, § 1110.

5. Criminal Law ⇐254, 553

In prosecution for grand theft on ground that defendant allegedly accepted money and automobile from complaining witness representing that he would obtain and deliver new automobile to witness with knowledge that he could not procure new automobile, wherein defendant produced receipt signed by witness allegedly acknowledging receipt of money, function of trial court was to resolve conflict between defendant's testimony and report of questioned-documents expert and fact that expert was employed by bureau of criminal investigation or office of Attorney General did not bind state or require the court to find in accordance with his opinion. West's Ann.Pen.Code, § 1110.

6. Receiving Stolen Goods ⇐1

Federal statute providing that whoever transports in interstate commerce any goods, or money of value of $5,000 or more, knowing the same to have been stolen, or taken by fraud shall be fined by not more than $10,000 or imprisoned not more than 10 years does not state an offense similar to the offense stated under state statute providing that every person who, in another state or country, steals or embezzles property of another or receives such property knowing it to have been stolen, and brings same into California, may be convicted and punished in the same manner as if such larceny or embezzlement had been committed in California. 18 U.S.C.A. § 2314; West's Ann.Pen.Code, §§ 497, 1203.

7. Larceny ⇐22

Under statute providing that every person who, in another state or country, steals or embezzles property of another, or receives such property knowing it to have been stolen or embezzled and brings same into California, may be convicted and punished in the same manner as if such larceny or embezzlement had been committed in California, offense defined is committed only when defendant receives property knowing it to have been stolen and thereafter transports same into California. West's Ann.Pen.Code, § 497.

8. Criminal Law ⇐982.4(2)

Statute prohibiting probation where defendants have been twice convicted of a felony is not to be extended to include conviction of offenses in other jurisdictions which do not include all the elements of

some felony known to California law. West's Ann.Pen.Code, § 1203.

9. Criminal Law ⇐982.4(2)

Where defendant had been convicted of grand theft and at trial thereof had admitted previous conviction of felony in California and had testified that he had been convicted in a federal court of interstate transportation of stolen securities, crime of interstate transportation of stolen securities would not have been a felony if committed in California and was not an offense similar to crime of receiving property knowing it to be stolen and transporting it into Cailifornia and therefore defendant had not been convicted of two previous felonies and was entitled to probation. 18 U.S.C.A. § 2314; West's Ann.Pen.Code, §§ 497, 1110, 1203.

Robert P. Praetzel, San Anselmo, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., William O. Weissich, Dist. Atty. of Marin County, Bruce B. Bales, Deputy Dist. Atty., San Rafael, for respondent.

DOOLING, Justice.

Appellant was convicted by the court sitting without a jury of grand theft.

The prosecution's evidence showed that appellant, who was then using the name of Taylor, was in 1957 employed by a San Rafael automobile dealer. The complaining witness, Marianne Muglia, met appellant and told him that she was interested in buying a new car. Appellant represented to her that he would obtain for her a 1957 Rambler sedan in exchange for her 1956 Rambler and $392 in cash. Appellant represented that he was obtaining the new car directly from the Wisconsin factory. On July 22, 1957, Miss Muglia gave appellant her check for $392 which he cashed the same day. Miss Muglia was leaving California for a vacation in New York State on August 4, 1957 and before leaving she inquired of appellant about the new car and appellant told her that it would be delivered to her in New York City on August 6. The car was not delivered in New York City and Miss Muglia went from New York City to Carthage, New York. While in Carthage she received by mail from her room-mate in California a power of attorney and bill of sale and the "pink slip" of her 1956 Rambler with a letter informing her that the execution of these papers was necessary to enable appellant to transfer her title to her 1956 Rambler in order to complete the deal. The same day that she received these papers appellant telephoned to her from California and told her that he needed these papers immediately. He stated in this conversation that he would have the new car delivered to her at the agency closest to Carthage in about two weeks. He explained his failure to have the 1957 Rambler delivered to her in New York City by saying that he had not finished negotiating the deal because he had not had the proper papers.

Before leaving for New York Miss Muglia had left her 1956 car with her room-mate in California with instructions not to deliver it to appellant until she instructed her to do so. Miss Muglia executed the documents sent to her, had them acknowledged by a notary and mailed them to her room-mate. Appellant obtained the executed documents and the 1956 Rambler from the room-mate. When the room-mate told appellant that Miss Muglia had instructed her not to deliver the old car to him until Miss Muglia had told her to do so, appellant told the room-mate that he had talked to Miss Muglia and that she understood that he had to have the old car and sell it in order to buy the new one. He further stated to the room-mate that he was going to New York City and that he would get the new car and drive it himself to Carthage and deliver it to Miss Muglia.

Appellant sold the old car for $1,200 to a dealer in San Francisco to whom he represented that he was selling it for his sis-

ter-in-law but requested that the check be drawn in his name. Appellant never delivered a new car to Miss Muglia, nor did he ever return to her any of the money that he received as a result of the transaction.

Appellant denied that he had ever promised to secure a 1957 Rambler for Miss Muglia on the terms to which she testified. His testimony was that he had only said that he would try to get her such a car and that it proved impossible to do so. He explained the receipt of the $392 check by testifying that a San Francisco dealer had told him that he probably could get a 1957 Rambler of the type desired by Miss Muglia and that he had gotten $450 from Miss Muglia ($392 by check and $58 in cash) to use as a deposit if the dealer did locate such a car. He further testified that in his telephone conversation with Miss Muglia in Carthage he had told her that he had found it impossible to find a 1957 Rambler of the type which she desired and that she had then authorized him to sell her 1956 Rambler for her. He testified further that he had, after Miss Muglia's return to California, repaid her $1,350 and promised to pay the balance by October 31, 1957. He produced an undated, typewritten receipt signed by Miss Muglia which acknowledged the receipt of $1,350 on account of $1,650, the purchase price of her 1956 Rambler, and recited that the balance was to be paid on October 31, 1957. She admitted her signature on this document but denied that the typewritten receipt was on it when she signed it, denied the receipt of $1,350 or any other sum and denied the other testimony of appellant inconsistent with her testimony. The written report of an expert on questioned documents was introduced by stipulation. It was his opinion that the receipt was prepared in its entirety before Miss Muglia signed it.

Evidence of a similar crime was introduced showing that in 1956 appellant had promised to procure a new automobile for a Mrs. Davidson in exchange for her 1953 Plymouth convertible. She delivered her Plymouth with power of attorney and signed pink slip to appellant and he sold it and thereafter failed to deliver either a new car as promised or the money from the sale of the old one.

[1] Proof of the elements of obtaining money or property by false pretences will support a conviction of grand theft, and proof of the making of a promise without the present intent to perform it is sufficient to establish such false pretences. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271.

Appellant, through counsel appointed by the court, argues however that several elements of this crime were not established in this case.

[2, 3] The intent to defraud must be proved and the mere failure to perform the promise standing alone is not sufficient. People v. Ashley, supra, 42 Cal.2d at page 263, 267 P.2d at page 282. However the intent to defraud, i.e. in this case the intention not to perform the promise at the time it was made, is a question of fact to be determined from all of the circumstances of the case. People v. Frankfort, 114 Cal. App.2d 680, 697, 251 P.2d 401. The whole course of conduct indulged in by appellant as testified by Miss Muglia and her room-mate could be looked to by the trial court in determining whether he made his original promise with the fraudulent intent not to perform it. He promised both Miss Muglia and her room-mate that he would deliver a car to Miss Muglia after, according to his own testimony, he knew that he could not procure one. The evidence of the similar fraudulent transaction with another is also evidence from which his fraudulent intent in this transaction could be inferred. Taking the evidence as a whole it amply supports the implied finding that when appellant first promised Miss Muglia to get her a new car he had no intention of doing so.

Her reliance upon his false promise in parting with her $392 check is equally supported, as is his intent to induce her to part with it as a result of his false promise.

Whether or not appellant could in fact have obtained a new Rambler is not determinative of the fraudulent nature of his original promise. If, as the court found, at the time he made the promise he had the fraudulent intent not to perform it, the possibility or impossibility of actual performance could not alter the fraudulent intent in making the promise with the present intent that it would not be performed. Nor is the fact that Miss Muglia first suggested the transaction inconsistent with the finding that appellant took advantage of her proposal to secure her money by a false promise.

[4] The complaining witness' testimony was sufficiently corroborated as required by section 1110, Penal Code. Apart from the other testimony the evidence of a similar fraudulent transaction involving the owner of another automobile in 1956 is sufficient for that purpose. People v. Ashley, supra, 42 Cal.2d at page 268, 267 P.2d at page 285.

[5] The trial court chose to believe Miss Muglia's testimony concerning the receipt which bore her signature and her testimony that appellant did not repay her $1,350. In this respect appellant's testimony and the report of the questioned-documents expert produced only a conflict of testimony which it was the court's function to resolve. The fact that this expert was employed in the Bureau of Criminal Investigation or the office of the Attorney General did not bind the people by his testimony or require the court to find in accordance with his opinion.

Appellant applied to the court for probation and the record makes it clear that while the judge was inclined to the view that the case was a proper one for probation he concluded that he had no power to grant probation because appellant had been twice convicted of a felony. Penal Code, § 1203. This section prohibits the granting of probation "to any defendant unless the court shall be satisfied that he has not been twice previously convicted of felony in this State nor twice previously convicted in any other place or places of public offenses which would have been felonies if committed in this State."

The previous conviction of one felony in this State is admitted. The appellant testified that in 1952 in Texas he was convicted in a Federal Court "of interstate transportation of stolen, forged, counterfeit and falsely made stocks, bonds and securities."

The question presented is whether this crime would have been a felony if committed in this State.

The Federal statute apparently involved reads in part as follows:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or * * *
>
> "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." U.S.C., Title 18, § 2314.

Respondent submits that this code section is comparable to section 497 of our Penal Code:

> "Every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this State."

It is plain that that portion of the Federal statute embraced in the second para-

graph above quoted, i. e., dealing with the transportation of "falsely made, forged, altered, or counterfeited securities" by no stretch of the imagination could be held to find a counterpart in section 497, Penal Code.

[6–9] If the appellant may be said to have admitted a conviction of violating the first paragraph (transporting goods, wares, merchandise, securities or money "knowing the same to have been stolen, converted or taken by fraud"), we are still satisfied that that paragraph does not state an offense similar to the offense stated in section 497 of our Penal Code.

The gist of the Federal offense is the *transportation* of goods, etc., "knowing the same to have been stolen." The gist of the offense described in section 497 is the *receiving* of property "knowing it to have been stolen" and the subsequent transportation of such property into this State, in which event the defendant "may be convicted and punished in the same manner as if such * * * *receiving,* had been committed in this State."

The Federal offense is committed if a person *transports* the property *knowing it to be stolen* even though he may have originally received it without knowing that it was stolen. But the offense defined in section 497 of our code is only committed if the defendant who afterwards transported it into this State first "receives such property knowing it to have been stolen."

Statutes of the character of the provision of section 1203, Penal Code, here under discussion are not to be extended to include conviction of offenses in other jurisdictions which do not include all of the elements of some felony known to our law. In re McVickers, 29 Cal.2d 264, 267, 176 P.2d 40 and cases cited.

The judgment is reversed solely to permit the trial court to act upon appellant's application for probation on its merits.

KAUFMAN, P. J., and DRAPER, J., concur.

167 Cal.App.2d 779

MERCANTILE ACCEPTANCE CORPORATION OF CALIFORNIA, a Delaware Corporation, Plaintiff, Cross-Defendant and Respondent,

v.

LILES BROTHERS MOTOR CO., INC., an Arkansas Corporation, et al., Defendants and Cross-Complainants,

Liles Brothers Motor Co., Inc., an Arkansas Corporation, Appellant.

Civ. 9501.

District Court of Appeal, Third District, California.

Feb. 10, 1959.

Finance company brought action against Arkansas used automobile dealer to compel Arkansas dealer to endorse certificates of ownership of used automobiles which Arkansas dealer had sold to California dealer, and to deliver certificates of title to finance company, which had discounted conditional sales contracts for California dealer, and for declaratory relief. The Arkansas dealer filed a cross-complaint seeking to quiet title to the automobiles. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment adverse to the Arkansas dealer, and the Arkansas dealer appealed. The District Court of Appeal, Schottky, J., held that evidence sustained Superior Court's finding that Arkansas dealer was estopped by its conduct from asserting any title to the automobiles.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

On appeal by appellant contending that findings of trial court were not supported by the evidence, District Court of Appeal was required to view evidence in light most favorable to respondent and was required to draw every inference, which could reasonably be drawn from the evidence, in respondent's favor.

2. Estoppel ⇐73

Owner, who clothes another with apparent title to property, and power of dis-

position thereof is estopped from afterward asserting his title against innocent third party, who has thereby been induced to deal with apparent owner in reference to such property.

3. Estoppel ⇐72

Statutory rule that where one of two innocent persons must suffer by act of third person, he, by whose negligence it happened, must be the sufferer applies even though there has been no compliance with section of the Vehicle Code dealing with prerequisites to transfer of title or interest in motor vehicle. West's Ann.Vehicle Code, § 186; West's Ann.Civ.Code, § 3543.

4. Estoppel ⇐52

Generally, four things are essential to application of doctrine of equitable estoppel: first, party to be estopped must be apprised of facts, second, he must intend that his conduct shall be acted on, or must so act that party asserting estoppel had right to believe it was so intended, third, other party must be ignorant of true state of facts, and fourth, he must rely upon conduct to his injury.

5. Estoppel ⇐53

Estoppel may arise although there was no designed fraud on part of person sought to be estopped.

6. Estoppel ⇐96

Negligence, that is careless and culpable conduct, is, as a matter of law, equivalent to an intent to deceive and will satisfy element of fraud necessary to an estoppel.

7. Estoppel ⇐72

Where one of two innocent persons must suffer, he who committed the mistake must bear the loss. West's Ann.Civ.Code, § 3543.

8. Estoppel ⇐119

The existence of an estoppel is a question of fact.

9. Estoppel ⇐118

In action by finance company against Arkansas used automobile dealer to compel Arkansas dealer to endorse certificates of ownership of used automobiles which Arkansas dealer had sold to California dealer, and to deliver certificates of title to finance company, which had discounted conditional sales contracts for California dealer, evidence sustained trial court's finding that Arkansas dealer was estopped by its conduct from asserting any title to the automobiles. West's Ann.Vehicle Code, § 186; West's Ann.Civ.Code, § 3543.

Albert L. Wagner, Sacramento, for appellant.

Oscar A. Kistle, Sacramento, for respondent.

SCHOTTKY, Justice.

Plaintiff above-named filed an action for declaratory relief and to compel defendant Liles Brothers Motor Co., Inc. to endorse the certificates of ownership of certain automobiles and to deliver said certificates to plaintiff. Defendant Liles Brothers filed a cross complaint seeking to quiet title to said automobiles. After a trial the court determined that Liles Brothers was estopped to assert its interest in said automobiles and found generally in accordance with the allegations of the complaint. Judgment was entered as prayed for, and Liles Brothers has appealed from said judgment.

Appellant's sole contention is that the findings are not supported by the evidence. Before discussing this contention, we shall give a brief summary of the evidence as shown by the record.

Liles Brothers operates a wholesale used-car lot in Memphis, Tennessee. In 1955, Barney Liles, an officer of Liles Brothers, met Lloyd A. Warn who was an official of Sacto Auto Wholesalers, Inc., hereinafter referred to as Sacto. Thereafter, during the year 1955 and the early part of 1956, Liles Brothers sold some fifteen automobiles to Sacto. In December, 1955, Warn purchased some ten automobiles from Liles Brothers in Memphis. Liles Brothers procured drivers to deliver the automobiles to Sacto at its lot in Sacramento. If at the time the cars left Tennessee, or shortly thereafter, Liles did not have the certificate of title, Liles Brothers sent the certificate

of title with bills of sale and invoices with a sight draft to a bank in Sacramento with instructions that the documents be delivered upon payment of the draft. Barney Liles testified, however, that when the cars left the lot they belonged to the purchaser.

Sacto conducted a retail and wholesale automobile sales business in Sacramento. Mercantile Acceptance Corporation discounted conditional sales contracts and floored new and used automobiles for Sacto. The relationship between the two concerns had been satisfactory until January, 1956.

Of the ten cars sold by Liles Brothers to Sacto five were sold by Sacto to various purchasers. Four of the purchasers executed conditional sales contracts. In the fifth instance, the purchaser agreed to pay the balance due on the automobile he purchased at the rate of $91.52 per month. These contracts were assigned to Mercantile. In four instances Sacto received the amount due them, and in the fifth case three existing debts of Sacto to Mercantile were cancelled. Mercantile did not receive any certificate of title to any of the cars at the time it discounted the contracts. The practice in the trade is to accept an assignment of a conditional sales contract without examining evidence of title. Mercantile did not have actual knowledge that Sacto did not have title to the automobiles. Other facts appearing in the record will be set forth in the course of this opinion.

There were five causes of action, similar in nature, and each relating to a different automobile. There were similar findings as to each of the causes of action. As to each cause of action, the court concluded that respondent was entitled to judgment declaring it to be the legal owner of the automobile involved, subject to the rights of the purchaser, and that appellant was estopped from asserting any right or title to said automobile and should be ordered to endorse and deliver to respondent the certificate of ownership of said automobile.

Appellant attacks the following finding as being without support in the evidence:

"[A]nd it is true that, at the time of said sale and said delivery, the defendant and cross-complainant Liles Brothers Motor Co. Inc. was informed that said automobile was being purchased by said defendants Sacto Auto Wholesalers Inc., Fred C. Parks, Lloyd A. Warn, and Mrs. Lloyd A. Warn for display and resale on premises of said defendants at 1958 Fulton Avenue, Sacramento, Sacramento County, California. That it is not true that it was agreed and understood that draft drawn by Liles Brothers Motor Co. Inc. upon Sacto Auto Wholesalers Inc. in connection with said sale and delivery was to be paid forthwith; that it is true that it was agreed that said draft was to be paid in the City of Sacramento, State of California, upon presentation or when said automobile was sold at the discretion of said Sacto Auto Wholesalers Inc., Fred C. Parks, Lloyd A. Warn and Mrs. Lloyd A. Warn;"

Appellant admits that it knew that Sacto was a used-car dealer and intended to sell the cars bought from appellant, but appellant denies that there was any evidence that appellant knew the cars were "being purchased * * * for display and resale on premises of said defendants at 1958 Fulton Avenue, Sacramento, Sacramento County, California." Appellant contends also that the only evidence given as to when the draft was to be paid was by appellant to the effect that the draft was to be paid forthwith upon presentation and that no evidence was adduced that there was to be any delay in payment. Appellant contends further that the record discloses no testimony or evidence that the draft was to be paid when the automobile was sold and no evidence that the discretion of the buyers was to be exercised concerning time of payment of the draft. He asserts that the testimony of Barney Liles is directly to the contrary and stands uncontradicted.

Appellant concedes that the general rule is that an owner of property who clothes another with apparent title is estopped from thereafter asserting his title against an innocent third party who has dealt with the

apparent owner in reference to such property, but appellant contends that respondent was not an innocent purchaser from an apparent owner and that respondent did not rely upon the fact that the automobiles were placed upon the lot of the used-car dealer. Appellant asserts that respondent relied upon the used-car dealers and not upon the fact that the automobiles were upon the used-car lot of Sacto. Appellant then contends that the evidence does not support the findings or the conclusion of the court that appellant is estopped from asserting title to said automobiles.

[1] There would be much merit in these contentions of appellant if the only construction that could be placed on the evidence was the one placed upon it by appellant. But unfortunately for appellant the evidence was conflicting, and we must view the evidence in the light most favorable to respondent and must draw every inference in its favor which can reasonably be drawn from the evidence.

The automobiles here involved were sold by appellant Liles Brothers to Sacto in Memphis. Appellant knew they were purchased for resale to the general public on the used-car lot of Sacto. Appellant selected drivers who were to deliver the automobiles to the used-car lot of Sacto, and Sacto secured insurance of the automobiles before they left Memphis. At one point in his testimony Barney Liles stated: "Q. Would you state generally in your own words what your means of operating is when you make these wholesale sales into California respectively? How do you transfer title? A. By draft. For instance I sold a guy five cars over the telephone in California yesterday and they are his cars when they leave here. The minute a car leaves I draw a draft on him and usually the draft beats the car there. I do that the day the car leaves the lot and they are his cars when they leave and he insured or insures them and I have nothing to do with that."

There were no instructions to the drivers not to deliver the automobiles to Sacto until the drafts were paid; in fact the drivers had no instructions except to deliver them to Sacto at its used-car lot. The drafts and accompanying papers were sent direct to the bank. The record shows that they frequently remained in the bank for several weeks before being paid, and in the meantime some of the cars would be sold to purchasers under conditional sales contracts which were purchased by respondent.

We believe that the following portion of the memorandum opinion of the trial judge is supported by the evidence and the law.

"* * * These automobiles were placed by Liles with Sacto., knowing that they were to be displayed by Sacto. and sold from the lot to the general public. The cars were delivered by a driver selected by Liles in Memphis. The drivers were to deliver the automobiles and no mention was made of any reservations or special instructions regarding the withholding of any such deliveries. Sometimes the necessary papers were forwarded by Liles to the Bank of America in Sacramento and sometimes the papers would arrive later, if Liles did not happen to have them at the time of delivery. The Bank was instructed to deliver the documents upon payment of the drafts. The drafts in the instant matters were in the Bank for some five or six weeks. The usual conditional sales contracts were made out by the buyers to cover unpaid balances. The plaintiff, Mercantile Acceptance Corporation, is in the business of financing automobile paper and did so in this case. As the contracts were assigned to the plaintiff, in all but one instance, the plaintiff paid Sacto. the unpaid balance to be financed. In the Teal contract, the plaintiff cancelled a pre-existing debt and paid the Motor Vehicle Department certain fees in addition.

"Plaintiff's opening brief sets out the general custom of financing of automobiles and points out that it has been the custom of the trade to accept the assignment of such conditional sales contracts without the certificate of title necessarily being presented at the same time. As will be pointed

out in the authorities, this Court does not feel that that is a compelling point.

[2] "It is a well settled law of this State that the owner of property who clothes another with the apparent title to it and the power of disposition thereof is estopped from afterward asserting his title against an innocent third party, who has thereby been induced to deal with the apparent owner in reference to such property. (See Pacific Finance Co[rp]. v. Hendley, 103 Cal.App. 335 [284 P. 736, 285 P. 1048; Id.] 119 Cal.App. 697 [7 P.2d 391]. See also Meadows v. Hampton, 55 Cal.App.2d 634, 636 [131 P.2d 591].)

"Section 3543 of the Civil Code provides: 'Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.'

[3] "This rule applies even though there has been no compliance with section 186 of the California Vehicle Code, since estoppel may even in that type of case still prevail against the seller. (Wargin v. Wargin, 29 Cal.2d 843, 845 [180 P.2d 349].)

"The titles retained by Liles in this case were for security purposes only and as is pointed out by plaintiff, this can be likened somewhat to the situation where trust receipts are used.

"There is no question but in the instant matter, Liles knew that Sacto. was to sell these cars to the general public. That was the business of Sacto. Liles, of course, knew that with the sale of an automobile, financing is generally required. Here financing was done by the plaintiff and Sacto. received full payment for the cars.

"The defendant, Liles, bases its defense upon the theory that the plaintiff corporation was negligent in dealing with Sacto.; that plaintiff should have known the precarious condition of Sacto. and should have had some foreknowledge of the defalcation of Parks and Warn. The testimony shows that plaintiff had done business with Sacto. for sometime and that up to January, 1956, no problem had arisen. Other matters were brought out concerning the conduct of Parks and Warn, but the Court sees little merit to that evidence.

"Liles places a great deal of emphasis upon the case of Metropolitan Finance Corp. [of California] v. Morf, 42 Cal. App.2d 756 [109 P.2d 969]. This case, however, can be distinguished easily from the case at bar, by reason of the fact that in the Morf case there was a certain reservation that the parties did not intend property in the cars to pass until the approval by Woods (who would be in the same position as Sacto. here) of the mechanical condition of the cars and the delivery of a properly endorsed certificate of ownership. In the instant matter there were no such reservations; the delivery was made with the authority to sell and an understanding that the cars would be sold at the first opportunity."

[4–8] As stated in Safway Steel Products, Inc. v. Lefever, 117 Cal.App.2d 489, at page 491, 256 P.2d 32, at page 33:

"* * * 'In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury.' 10 Cal.Jur. 627, sec. 14. An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. Benner v. Industrial Acc. Com. 26 Cal.2d 346, 349, 159 P.2d 24. Negligence, that is careless and culpable conduct, is, as a matter of law, equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel. Parke v. Franciscus, 194 Cal. 284, 297, 228 P. 435. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. McGee v. Stone, 9 Cal. 600, 607. The existence of an estoppel is a question of

fact. Pike v. Rhinehart, 112 Cal.App.2d 530, 533, 246 P.2d 963."

[9] We are convinced that the evidence supports the findings of the court and that its conclusions of law that appellant is estopped from asserting any title to said automobiles is supported by the applicable law.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

Adolph D. LAUX and Joyce H. Laux, Plaintiffs and Respondents,

v.

William J. FREED and Bertell F. Freed, Defendants and Appellants.

Civ. 9432.

District Court of Appeal, Third District, California.

Feb. 9, 1959.

Hearing Granted April 8, 1959.

Action by owner of northern parcel of land received on dissolution of partnership to determine extent of right of way over northern parcel granted to former partner who received the southern parcel and to enjoin the former partner from allowing deer hunters to pass over the right of way to hunt on the southern parcel. The Superior Court, Colusa County, Wright L. Callender, J., gave judgment that the right of way was for sole purpose of moving livestock, hay, and farming equipment, and enjoined the owner of the southern parcel from allowing deer hunters to use the right of way to hunt on the southern parcel and the owner of the southern parcel appealed. The District Court of Appeal, Peek, Acting P. J., held that parol evidence to show intent and purpose of the grant of right of way was properly admitted.

Affirmed.

1. Easements ⇐37

Extent of right of way is question of fact for jury. West's Ann.Code Civ.Proc. §§ 1856, 1860.

2. Easements ⇐12(1)

Extent of right and duty of respective owners toward each other is to be determined by language of grant, right-of-way easement, and all circumstances existing at time grant was made. West's Ann.Code Civ.Proc. §§ 1856, 1860.

3. Easements ⇐38

Nothing passes as incident to grant of right-of-way easement but that which is necessary for its reasonable and proper enjoyment. West's Ann.Code Civ.Proc. §§ 1856, 1860.

4. Easements ⇐38

What is necessary for reasonable and proper enjoyment of right-of-way easement granted and limitations imposed on use of land by proprietor depends on terms of grant and purposes for which it was made, nature and situation of land subject to the right of way, and manner in which the land has been used or occupied. West's Ann.Code Civ.Proc. §§ 1856, 1860.

5. Evidence ⇐461(2)

In action by owner of northern parcel of land received on dissolution of partnership to determine extent of right of way granted over northern parcel to southern parcel, and to enjoin former partner who received the southern parcel from allowing deer hunters to pass over the right of way to reach the southern parcel and hunt, parol evidence to show purpose and intent of grant of the right of way when the owners dissolved partnership and divided land was properly admitted. West's Ann.Code Civ.Proc. §§ 1856, 1860.

6. Easements ⇐61(9)

In action by owner of northern parcel of land received on dissolution of partnership, to determine extent of right of way

granted over northern parcel to southern parcel when the owners of land dissolved partnership and divided land into the two parcels, and to enjoin owner of southern parcel from allowing deer hunters to pass over the right of way to hunt on southern parcel, evidence supported finding that use of the right of way by the hunters to reach the southern parcel was unreasonable and not within contemplation of the grant.

Ralph W. Rutledge and Richard E. Patton, Colusa, for appellants.

Florence J. Westfall and Donald W. Littlejohn, Colusa, for respondents.

PEEK, Acting Presiding Justice.

Defendants appeal from that portion of the judgment which determined the extent of a grant of right of way by a deed to them from the plaintiffs, and which enjoined the use of the right of way other than as provided by the decree.

Plaintiff, Adolph D. Laux, and defendant, William J. Freed, operated the property involved as partners from 1943 until 1952. In 1952 the partnership was dissolved and the land divided into two parcels. A flip of a coin determined the parcel each partner would receive. Laux won the toss and chose the northerly portion, Freed taking the remaining or southerly half. As a part of the dissolution Freed was granted a right of way over a private road which crossed the parcel of Laux. The grant read:

> "For value received Adolph D. Laux and Joyce H. Laux, his wife, Grant to William J. Freed and Bertell F. Freed, his wife, as Joint Tenants, all that real property situate in the County of Colusa, State of California, described as follows: A right of way over a road as presently constructed along the East Branch of Sand Creek, in the East half of Section 18, and the Northeast quarter of Section 19, Township 13 North, Range 3 West, Mount Diablo Base and Meridian."

The trial court found that the right of way was granted for the sole purpose of moving livestock, hay, machinery and other farming equipment; that the leasing by defendants of their land for the use of deer hunters, with specific instructions to use the right of way and no other, had unreasonably increased the burden on the servient tenement and was a use not contemplated at the time the grant was made; that such use was an unauthorized change in the burden of said easement; and that access to defendants' property was not limited to the roadway but also could be gained by a county road. From such findings the court concluded that plaintiffs were entitled to judgment against defendants; that defendants should be enjoined and restrained from using or permitting the right of way granted to be used for commercial hunters; and that the use of the road should be limited to the purposes for which it was granted. Defendants now appeal from the judgment which was entered pursuant thereto.

The evidence shows that from the time plaintiffs and defendants acquired the property as partners they and their guests hunted both parcels. During the 1949 or 1950 deer season the parties as partners leased the hunting rights to one Lawrence. Although there is no direct evidence that the lessee used the premises for so-called "commercial hunting," the evidence is reasonably susceptible of such an inference; in other words, the testimony shows that when Laux was asked on cross-examination how many permits were sold by Lawrence, he replied he didn't know. The lease with Lawrence was not exclusive, and the partners and their friends continued to hunt both parcels. During the course of the trial the attorney for defendants sought to show that the number of hunters presently using the right of way was no greater than when the range was being operated by the partnership. Objections by plaintiffs' counsel that such evidence was immaterial were sustained by the trial court.

In 1952 the parties partitioned the property, and the right of way in question was granted. In 1956 both parties leased their respective lands for commercial hunting. The defendants leased theirs to one Steidlmayer who sold memberships entitling the holders to hunt defendants' land. The lessee specifically instructed the holders to use the road over plaintiffs' land.

Laux testified that prior to the execution of the grant there was a discussion in which it was stated that whoever got the back half of the range should have the right of way over the roadway in question for the purpose of caring for his cattle in winter, or for whatever was needed to care for his cattle and property; that defendants agreed to such an arrangement, and that this fact was mentioned by Laux to Freed on several occasions; that Freed said he wished the road for deer hunters; that Laux said it was not for that purpose; that he would not grant it for such a purpose; that after the agreement was made, Laux asked Freed if he could cross defendants' property to hunt on the range south of defendants' land; that Freed refused the request, stating: "You stay off of my place with your hunters and I will stay off of your place." These conversations were categorically denied by Freed, but he did testify that conversations concerning the right of way had taken place prior to the execution of the grant therefor.

The primary question raised by defendants is whether or not parol evidence may be introduced to show the intent and purpose of the parties in granting the right of way. Their argument is that oral testimony was improperly admitted since it varied the terms of the grant (citing Lewis v. Brown, 22 Cal.App. 38, 133 P. 331). In reply plaintiffs rely upon section 1856 of the Code of Civil Procedure which provides in part that "* * * circumstances under which the agreement was made or to which it relates, * * *" should not be excluded since under the section referred to therein, Code of Civil Procedure, section 1860, it is provided: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

[1–4] In accordance with such statutory mandate, our courts have held that "* * * the question [as to the extent of a right of way] has been uniformly regarded by the courts as one of fact, for the jury. The extent of the right and duty of the respective owners towards each other is to be determined by the language of the grant, and all the circumstances existing at the time the grant was made. 'Nothing passes as incident to such a grant but that which is necessary for its reasonable and proper enjoyment.' [Citation.] 'What is necessary for such reasonable and proper enjoyment of the way granted, and the limitations thereby imposed on the use of the land by the proprietor, depends upon the terms of the grant and the purposes for which it was made, the nature and situation of the property subject to the easement, and the manner in which it has been used and occupied.' [Citing cases.]" Smith v. Worn, 93 Cal. 206, 214–215, 28 P. 944, 946.

[5, 6] It would seem to follow that since the trial court, in order to understand the purposes and intent of the grant, properly admitted evidence for that purpose, and since such evidence was amply sufficient to support the determination of the court, such evidence was likewise sufficient to support the findings that defendants' use was unreasonable and not within the contemplation of the parties, and hence the remaining contentions which raise the same questions are, for the same reasons, invalid and need no further discussion.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

167 Cal.App.2d 645

Charles H. WOODMANSEE, Petitioner,

v.

Joseph M. LOWERY, as Auditor-Controller of the County of Los Angeles, Respondent.

Philip ERBSEN, Petitioner,

v.

Joseph M. LOWERY, as County Auditor of Los Angeles County, George J. Barbour, Clerk of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles; and County of Los Angeles, a political subdivision of the State of California, Respondents.

Nos. 23601, 23602.

District Court of Appeal, Second District, Division 3, California.

Feb. 5, 1959.

Rehearing Denied Feb. 25, 1959.

Hearing Denied April 1, 1959.

Mandamus proceedings directed to county auditor-controller of the County of Los Angeles. The District Court of Appeal held, inter alia, that where a portion of Malibu judicial district was annexed to Los Angeles judicial district, and the elected judge of justice court of the Malibu judicial district elected to succeed to existing vacancy in municipal court of Los Angeles judicial district, such judge was the lawful holder of the office of judge of municipal court under statute relating to succession of judges on annexation to city or district having municipal court, and hence no vacancy existed in office of judge of municipal court of Los Angeles judicial district, so that Governor had no power to appoint another as judge of such court.

Judgment in accordance with opinion.

1. Mandamus ⇐77(1), 172

While ordinarily mandate is not the appropriate remedy to determine title to public office, where two persons are purporting to hold the office, mandamus lies to determine which is the de facto officer, and, while legal title is not adjudicated, court examines the question of legal title, and person who has the best claim to legal title is held to be the de facto officer.

2. Judges ⇐8

The statute relating to succession of judges on annexation to city or district having municipal court implicitly recognizes that annexation of territory from a judicial district to another judicial district having a municipal court operates in whole or in part to supersede the court in judicial district from which the territory is annexed dependent upon whether the whole or only a part of such district is so annexed, and a court is partly superseded only in two instances: (1) where a portion of its jurisdiction over particular classes of cases theretofore vested in it is withdrawn and conferred upon another court and (2) where a portion of territory over which it previously exercised jurisdiction is taken from it and annexed to another judicial district in which there is an existing court having jurisdiction over the matters formerly within its jurisdiction. West's Ann.Gov.Code, § 71083.

3. Statutes ⇐206

If possible, effect should be given to statute as a whole and to its every word and clause so that no part will be useless or meaningless, and all parts should be construed together and harmonized so far as possible without doing violence to language or spirit.

4. Statutes ⇐212.4

In construing a statute, it will be presumed that every word, phrase and provision was intended to have some meaning and perform some useful office, and a construction implying that words were used in vain, or that they are surplusage will be avoided.

5. Judges ⇐8

Where amendment of statute relating to succession of judges on annexation to city or district having municipal court eliminated the condition to right to automatic succession, amendment suggested that Legislature intended to provide that right of automatic succession should obtain irrespective of extent of territory annexed and that it should not be limited, as formerly, to a situation where annexation

was so substantial in territorial extent or population as to require creation of a new judgeship in municipal court judicial district. West's Ann.Gov.Code, § 71083.

6. Statutes ⇐181(2), 190

While the rule is that where a statute is susceptible of two constructions, one consistent with reason and the other leading to absurd consequences, the former is to be adopted, it is equally true that where meaning of a statute is clear courts must follow the language used and give to it its plain meaning, whatever may be thought of wisdom, expediency or policy of the act, even if it appears probable that a different object was in the mind of Legislature.

7. Statutes ⇐205

Where the language permits only one construction, legislative intent must be gathered from the words and language employed, read as a whole, and intent not expressed in words of statute cannot be found to exist.

8. Statutes ⇐176, 212.6

Courts cannot speculate that Legislature meant something other than what it said, nor may courts rewrite a statute to make it express an intent not expressed therein.

9. Constitutional Law ⇐70(3)

It was not within province of appellate court to pass upon wisdom or expediency of statute relating to succession of judges on annexation to city or district having municipal court since that was a matter reserved to judgment of Legislature. West's Ann.Gov.Code, § 71083.

10. Constitutional Law ⇐70(1)

While it was within competency of Legislature to provide that right of a judge whose court had been partly superseded by annexation of a portion of his judicial district to a municipal court judicial district to succeed to a vacancy in the latter court only under those circumstances where territory annexed comprised a specified percentage of total area or of the population of judicial district from which the annexed portion was taken, it did not do so, and court could not, under guise of construction, read into the statute something which Legislature did not insert therein. West's Ann.Gov.Code, § 71083.

11. Officers ⇐56

Under constitutional provision that when any office shall become vacant and no mode is provided by the "constitution and law" for filling such vacancy, Governor shall have power to fill such vacancy, the quoted words mean "constitution or law" and the provision is without application to filling of a vacancy, the mode of filling which is provided by law, and hence when mode of filling a vacancy in office is provided by law other than by the appointment of the Governor the latter is without power to fill such vacancy by appointment. West's Ann.Const. art. 5, § 8.

See publication Words and Phrases, for other judicial constructions and definitions of "Constitution and Law".

12. Officers ⇐49

The statute relating to succession of judges on annexation to city or district having municipal court, as construed to automatically entitle a judge of justice court of Malibu judicial district part of which was annexed to Los Angeles judicial district to succeed to vacancy existing in municipal court of Los Angeles district occasioned by resignation of judge by virtue of such annexation, is not violative of constitutional provision authorizing Governor to fill vacancies since the Governor has no power to fill vacancy by appointment when mode of filling vacancy is provided by law. West's Ann.Gov.Code, § 71083; West's Ann.Const. art. 5, § 8; art. 6, § 11.

13. Judges ⇐8

Inasmuch as statute provides for automatic succession by judge of a court whose court has been partly superseded by annexation to a municipal court judicial district, and judge of justice court of Malibu judicial district, part of which was annexed to Los Angeles judicial district, having declared his election under statute to succeed to then existing vacancy in the

municipal court, no vacancy existed in the municipal court when the Governor thereafter undertook to appoint another as judge of such municipal court. West's Ann.Gov. Code, §§ 71081, 71083; West's Ann.Const. art. 5, § 8; art. 6, § 11.

14. Statutes ⇐223.2(1), 223.4

The statute relating to Governor's power to fill vacancies in office of judge of municipal court, and statute relating to succession of judges on annexation to city or district having a municipal court, must be considered together, and if it may be said that there is any conflict between the two, the latter statute being a specific one dealing with a particular situation must control the general. West's Ann.Gov.Code, §§ 71083, 71180.

15. Judges ⇐8

Where a portion of Malibu judicial district was annexed to Los Angeles judicial district and the elected judge of justice court of the Malibu judicial district elected to succeed to existing vacancy in municipal court of Los Angeles judicial district, such judge was the lawful holder of office of judge of municipal court under statute relating to succession of judges on annexation to city or district having municipal court, and hence no vacancy existed in office of judge of municipal court of Los Angeles judicial district, so that Governor had no power to appoint another as judge of such court. West's Ann.Gov.Code, §§ 71081, 71083; West's Ann.Const. art. 5, § 8; art. 6, § 11.

A. J. Blackman, Los Angeles, for petitioner Woodmansee.

Frank B. Belcher, Los Angeles, for petitioner Erbsen.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, and Donald K. Byrne, Deputy County Counsel, Los Angeles, for respondents.

PER CURIAM.

Each of the petitioners in the above entitled proceedings seeks a writ of mandate directed to the respondent county auditor-controller of the county of Los Angeles directing him to draw and pay the salary warrant of each of said petitioners as judge of the Municipal Court of the Los Angeles Judicial District, each claiming to be the lawful incumbent of the same judicial office in said court.

On and prior to the 28th day of October 1958 the petitioner Woodmansee was the duly qualified, elected and acting judge of the Justice Court of the Malibu Judicial District. On that date there was annexed to the Los Angeles Judicial District a portion of the territory formerly included in the Malibu Judicial District. The area of the Malibu Judicial District prior to the annexation comprised 106,993.90 acres while the portion thereof annexed to the city of Los Angeles consists of 38.95 acres. On October 29, 1958, a vacancy existed in the office of Judge of the Municipal Court of the Los Angeles Judicial District due to the resignation of Judge Clarke Stephens, and the petitioner Woodmansee, who is admittedly otherwise qualified to hold the office of judge of the municipal court, purporting to act pursuant to the provisions of section 71081 of the Government Code, elected to succeed to the then existing vacancy in said court by filing with the County Clerk of Los Angeles County his written statement of election so to do and taking the prescribed oath of office, following which he entered upon the discharge of his duties as judge of said municipal court. On November 28, 1958, Governor Knight issued to the petitioner Erbsen his commission as Judge of the Municipal Court of the Los Angeles Judicial District to the office formerly held by Judge Stephens, following which the petitioner Erbsen took the required oath of office and entered upon his duties as a judge of said municipal court.

[1] While ordinarily mandate is not the appropriate remedy to determine title to public office, where as here two persons are purporting to hold the office, mandamus lies to determine which is the de facto officer; and, while legal title is not adjudicat-

ed, the court examines the question of legal title, and the person who has the best claim to legal title is held to be the de facto officer. Klose v. Superior Court, 1950, 96 Cal.App.2d 913, 921, 217 P.2d 97.

The question presented is whether the petitioner Woodmansee was automatically entitled to succeed to the vacancy existing in the Municipal Court of the Los Angeles Judicial District occasioned by the resignation of Judge Stephens by virtue of the annexation to said judicial district of a portion of the territory formerly within the Malibu Judicial District. If so, no vacancy existed in the office of judge of the Municipal Court of the Los Angeles Judicial District on November 28, when Governor Knight undertook to appoint the petitioner Erbsen as a judge of said court.

The answer to our problem depends in the main upon the proper interpretation to be accorded to Government Code, section 71083 [1], which since its amendment in 1955 reads as follows:

"Whenever territory is annexed to a judicial district theretofore having a municipal court, a judge of a court partly or wholly superseded thereby shall, if eligible, succeed to the first vacant judgeship on such municipal court, whether such vacancy then exists or occurs within two years thereafter through the creation of a new judgeship or otherwise.

"Whenever the number of judges entitled to succeed as above provided exceeds the number of vacant judgeships on such municipal court, the order of their succession shall be determined as follows: by seniority as a judge within the territory annexed, and, in the case of successive annexations, within the territory annexed at the earlier date; and, in any remaining case, by lot between them."

[2] While somewhat awkwardly worded, the meaning of the above enactment is fairly apparent and in our view susceptible of only one interpretation. Implicitly, it recognizes, if it does not expressly so declare, that the annexation of territory from a judicial district to another judicial district having a municipal court operates in whole or in part to supersede the court in the judicial district from which the territory is annexed dependent upon whether the whole or only a part of such district is so annexed. A court may be said to be *partly* superseded only in two instances: (1) where a portion of its jurisdiction over particular classes of cases theretofore vested in it is withdrawn and conferred upon another court and (2) where a portion of the territory over which it previously exercised jurisdiction is taken from it and annexed to another judicial district in which there is an existing court having jurisdiction over the matters formerly within its jurisdiction. As the section deals only with the effect of the annexation of territory from one judicial district to another it is clear that when it speaks of a court being "partly superseded thereby" it can only refer to the latter. As applied to the case at hand it is clear that it involves the precise situation with which the Legislature undertook to deal, namely, the annexation of a part of the Malibu Judicial District to the city of Los Angeles which is a judicial district having a municipal court. The section then proceeds to provide in clear and unmistakable terms that in such event the judge of the court of the judicial district from which the territory was annexed "shall, if eligible, succeed to the first vacant judgeship on such municipal court, whether such vacancy then exists or occurs within two years thereafter through the creation of a new judgeship or otherwise."

While petitioner Erbsen concedes that section 71083 is susceptible of this construction, he argues that it is equally susceptible of the meaning "[t]hat the *quantum* of territory annexed must be such as to deprive the remaining territory in the judicial district of a court, and so, in turn, deprive the existing incumbent of such

1. All references hereafter to section numbers unless otherwise indicated are to the Government Code.

office" and leave him "a courtless Judge." The argument is not convincing. In the first place, in order to deprive an existing judicial district of a court by annexation of territory it is necessary to annex the entire judicial district for if any less than the whole of the judicial district is annexed the court continues to exist in the remaining territory and the only result is that its boundaries are changed so as to exclude the territory annexed.[2] Likewise, an incumbent judge of a judicial district from which territory is annexed may be deprived of his office by reason of the withdrawal of territory from his district by annexation only in the case where the entire territory of the judicial district is annexed to another, for otherwise he remains a judge of the court of the judicial district with boundaries limited to the remaining territory therein. Thus, petitioner Erbsen's argument is, in effect, that section 71083 has application only in those situations where an entire judicial district is annexed to a judicial district having a municipal court. Such a construction, however, does violence to the plain meaning of the language used for it gives no effect whatever to the word "partly."

[3, 4] It is a cardinal rule of statutory construction that "[w]henever possible, effect should be given to the statute as a whole, and to its every word and clause, so that no part or provision will be useless or meaningless. All the parts should be construed together and harmonized so far as possible without doing violence to the language or spirit. It will be presumed that every word, phrase, and provision was intended to have some meaning and perform some useful office, and a construction implying that words were used in vain, or that they are surplusage, will be avoided." (45 Cal.Jur.2d, p. 626, § 117.)

If the Legislature had intended, as petitioner Erbsen's argument suggests, that the section should have application only to those cases where the effect of annexation was to deprive the incumbent judge of a judicial district of his office, it is only reasonable to assume that it would have used appropriate language to this effect.

Webster's International Dictionary defines the word "supersede" variously as: "To take over"; "to take the place of, to supplant." There seems to be no room for argument that when a portion of a judicial district is annexed to another district the court in the latter takes the place of and supplants the court which formerly exercised jurisdiction over the annexed territory prior to the annexation. The fact that the court in the judicial district from which the annexed territory is taken continues to exist does not detract from the fact that it has been effectively superseded or supplanted in such annexed territory by the court of the judicial district to which it is annexed. In other words it has been "partly" superseded by another court.

Furthermore, petitioner Erbsen's argument in this regard is negatived when reference is had to the language of section 71083 prior to its amendment in 1955 at which time it read in part as follows:

"If there is annexed to a district or city in which a municipal court is established and functioning, territory in which another court inferior to the superior court is established, upon the annexation such other court ceases to exist in the territory annexed. *If an additional judicial office has been provided by law for the municipal court by reason of annexation of territory or increase in population, the incumbent judge of the court partly or wholly superseded shall, if qualified, automatically succeed to the additional judicial position in*

2. "If territory is annexed to a city or city and county pursuant to law, the boundaries of the judicial district which includes such city or city and county shall be, upon the effective date of the annexation, automatically changed to include the territory so annexed, and the boundaries of any judicial district which includes such annexed territory prior to the effective date of the annexation shall be, on such date, automatically changed to exclude such annexed territory." Gov. Code, § 71040.1.

the municipal court until the election or appointment and qualification of his successor." (Italics ours.)

[5] The italicized language makes clear that as originally enacted the right of a judge whose court was partly superseded by annexation of territory to an existing municipal court judicial district to automatically succeed to the office of judge of the municipal court did not arise except where "an additional judicial office has been provided by law for the municipal court *by reason of annexation* of territory or increase in population." (Italics ours.) As amended in 1955, this condition to the right to automatic succession was eliminated which suggests that by the amendment the Legislature intended to provide that the right of automatic succession should obtain irrespective of the extent of the territory annexed and that it should not be limited as formerly to a situation where the annexation was so substantial in territorial extent or population as to require the creation of a new judgeship in the municipal court judicial district. Moreover, by the amendment the right of automatic succession was extended "to the first vacant judgeship on such municipal court, whether such vacancy then exists or occurs within two years thereafter through the creation of a new judgeship *or otherwise.*" (Italics ours.)

[6–10] Petitioner Erbsen also contends that to construe the statute as we have is to render it absurd and unreasonable because the extent of the territory annexed represents such a small portion of the territory of the Malibu judicial district. While it is true that where a statute is susceptible to two constructions, one consistent with reason and the other leading to absurd consequences, the former is to be adopted, it is equally true that where the meaning of a statute is clear courts "must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature." (45 Cal.Jur.2d, p. 621, § 108.) Where "the language permits only one construction, the intent of the legislature in enacting a statute is to be gathered from the words and language employed, read as a whole. An intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intent not expressed therein." (Id. p. 636, § 128.) Thus it is not within our province to pass upon the wisdom or expediency of the legislation here concerned as this is a matter reserved to the judgment of the legislative branch of the government. While it was undoubtedly within the competency of the Legislature to provide that the right of a judge whose court had been partly superseded by the annexation of a portion of his judicial district to a municipal court judicial district to succeed to a vacancy in the latter court only under those circumstances where the territory annexed comprised a specified percentage of the total area or of the population of the judicial district from which the annexed portion was taken it did not do so and we may not under the guise of construction read into the statute something which the Legislature did not insert therein.

Petitioner Erbsen further contends that section 71083, if construed as we have, is violative of article V, section 8, of the California Constitution which reads as follows:

[11–13] "When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and law for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election by the people."

We find no merit in this contention. The words "constitution and law" as used in the foregoing provision mean "constitution *or* law." People ex rel. Mattison v. Nye, 1908, 9 Cal.App. 148, 159, 98 P. 241, 244.

And the section is without application to the filling of a vacancy the mode of filling which is provided by law. People ex rel. Wetherbee v. Cazneau, 1862, 20 Cal. 503, 508.[3] When the mode of filling a vacancy in an office is provided by law other than by the appointment of the governor the latter is without power to fill such vacancy by appointment. People ex rel. Madden v. Stratton, 1865, 28 Cal. 382, 390.[3]

Article VI, section 11, of our constitution relating to municipal courts, reads as follows:

"Except as such matters are otherwise provided in this article, the Legislature shall prescribe the manner in which, the time at which, and the terms for which the judges, officers and attaches of municipal courts and of justice courts shall be elected or appointed, the number, qualifications and compensation of the judges, officers and attaches of municipal courts, and provide for the manner in which the number, qualifications and compensation of the judges, officers and attaches of justice courts shall be fixed."

Pursuant to the power vested in it by the foregoing provision the Legislature enacted section 71083 providing for the manner of filling a vacancy in the office of judge of a municipal court under the circumstances therein set forth. Having so provided, the governor was without power under article V, section 8, to appoint to the vacancy. Moreover, inasmuch as section 71083 provides for automatic succession by the judge of a court whose court has been partly superseded by annexation to a municipal court judicial district, and petitioner having declared his election under section 71081, no vacancy existed in the municipal court when the governor undertook to appoint the petitioner Erbsen.

In People ex rel. Ryder v. Mizner, 1857, 7 Cal. 519, 523, the court said: "The only provision of the Constitution which seems to bear upon this case, is the eighth section of article fifth, 'When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election by the people.'

"Before this section can apply to this case, two things must be shown: First, that a vacancy existed. Second, that no mode of filling it was provided."

[14] What has just been said also serves to dispose, at least in part, of petitioner Erbsen's contention that the governor was entitled to appoint by reason of the provisions of section 71180, the pertinent parts of which are set forth in the margin.[4] Aside from the fact that this section by its terms appears to except from its operation the specific situation covered by section 71083, both sections are in any event to be considered together, and if it may be said that there is any conflict between the two, section 71083 being a specific statute dealing with a particular situation must control the general. (45 Cal.Jur.2d, p. 629, §§ 120, 121.)

[15] We, therefore, conclude that the petitioner Woodmansee is the lawful holder of the judicial office in question and that the petitioner Erbsen is without right thereto.

3. While these cases were decided under article V, section 8, of the Constitution of 1849, the language thereof is identical with the language of article V, section 8, as it appears in the present constitution.

4. "Any vacancy in the office of judge of a municipal court shall be filled by appointment by the Governor and any vacancy in the office of judge of a justice court shall be filled by appointment by the board of supervisors of the county in which the justice court is situated, but no vacancy shall be deemed to exist in any such office before the time fixed in Sections 71080, 71082, and 71083 for the selection of the judges of such court and the time fixed by law for their qualification." Gov.Code, § 71180.

The petition of the petitioner Erbsen is, therefore, denied.

Let a peremptory writ of mandate be issued as prayed for by the petitioner Woodmansee.

167 Cal.App.2d 786

Bernice CHANDLER and Lois Reynolds, Plaintiffs and Respondents,

v.

David VACCARO, Jr., David B. Vaccaro, David Vaccaro, T. Robert Vaccaro, Joseph B. Vaccaro and James M. Vaccaro, Mira Loma Turkey Ranch, Doe One, Doe Two, Doe Three, Doe Company, a corporation, and Doe and Roe, a partnership, Defendants and Appellants.

Civ. 23264.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1959.

Rehearing Denied March 6, 1959.

Hearing Denied April 8, 1959.

Action was brought against those operating turkey ranch by customers for injuries resulting from dog bites. The customers were nonsuited on their causes of action under the Dog Bite Statute, but jury returned verdict for damages on causes of action alleging liability at common law. The Superior Court of Los Angeles County, Eugene P. Fay, J., entered judgment, and those operating the turkey ranch appealed. The District Court of Appeal, Shinn, P. J., held that those who operated turkey ranch were not liable at common law for injuries inflicted on customers by three dogs kept on the premises, on ground that the dogs were vicious, where one of the dogs about five years before bit newspaper delivery boy on the leg as he rode by on his bicycle while that dog was nursing a litter of newly born pups, and thereafter two of the dogs sometimes chased newspaper delivery boy on his motorcycle and snapped at his rear tire, where dog which bit newspaper delivery boy was not nursing a litter of newly born pups at the time dogs attacked customers, and over a period of five years after one of the dogs bit newspaper delivery boy the dogs displayed no animosity toward people, although the dogs had mingled with thousands of people during that time.

Judgment reversed.

1. Animals ⇐68, 70

Conditions which impose common-law liability on those who own or harbor dogs must be such as reasonably to indicate probability of injury, due to disposition of dogs, and if a dog has been gentle and friendly in the past, there is no duty to fear that he may suddenly become vicious, and if, in the past, he has bitten a human, the owner must anticipate that the dog will do the same thing again under the same or similar conditions.

2. Animals ⇐68

If a bitch is likely to attack intruders when she is nursing pups, there is a duty at those times for owner to take precautions to avoid injury to humans.

3. Animals ⇐68

Until a dog has bitten or has attempted to bite someone, his actions must be regarded as playful and not vicious, and owner is under no common-law liability for injury caused by the dog.

4. Animals ⇐68

Those who operated turkey ranch were not liable at common law for injuries inflicted on customers by three dogs kept on the premises, on ground that the dogs were vicious, where one of the dogs about five years before bit newspaper delivery boy on the leg as he rode by on his bicycle while that dog was nursing a litter of newly-born pups, and thereafter two of the dogs sometimes chased newspaper delivery boy on his motorcycle and snapped at his rear tire, where dog which bit newspaper delivery boy was not nursing a litter of newly-born pups at the time dogs attacked customers, and over a period of five years after one of

the dogs bit newspaper delivery boy the dogs displayed no animosity toward people, although dogs had mingled with thousands of people during that time.

Jarrett & Morgan, Los Angeles, for appellants.

Perry & Bush, Redonds Beach, for respondents.

SHINN, Presiding Justice.

Action against David B. Vaccaro, James M. Vaccaro and Thomas R. Vaccaro to recover damages for personal injuries resulting from dog bite. Trial was to a jury. Although plaintiffs were nonsuited on their causes of action under the dog bite statute (Civil Code, § 3342), the jury awarded $7,500 damages to Mrs. Chandler and $750 damages to Mrs. Reynolds on their causes of action alleging liability at common law, based upon the responsibility of one who harbors a known vicious dog for injuries suffered by one who is on the premises as an invitee. Judgment was entered on the verdict and the Vaccaros appeal.

Appellants operated the Mira Loma Turkey Ranch as a partnership business on a 5-acre tract owned by their father, David Vaccaro, Jr. The elder Vaccaro resided on the premises and permitted his sons to use the remainder of the tract in return for the payment of property taxes; he was named as a defendant in the action but was not served with process.

On April 11, 1955, plaintiffs made an appointment to purchase a turkey at the ranch. The ladies drove to the premises around noon and parked in the parking lot. They walked up a pathway to the building where turkeys were sold, but as no one was present they returned to their automobile and waited. A few minutes later, Mrs. Reynolds left the car and proceeded to walk up the pathway toward the store. One dog was lying on the ground about 15 feet away from the path. This one suddenly ran toward her, snarling and barking; it jumped up on her, whereupon the other two dogs came from somewhere and joined in the attack. Mrs. Chandler rushed to the rescue of Mrs. Reynolds, who was screaming and trying to protect herself with her handbag. Mrs. Chandler was also attacked by the dogs. Upon hearing the commotion, appellants' father ran from the house and warded the dogs off. The ladies were taken to a physician for treatment; their clothes were torn and they were in an hysterical condition. Mrs. Chandler's injuries consisted of painful bites on her left arm and right breast, while her companion's back had been severely scratched.

The participants in the attack upon plaintiffs were three large animals, unclassified as to breed, named Poochie, Blackie and Brownie, who lived on the premises. Poochie was the female parent of the other two dogs; at the time of the assault she was between 12 and 14 years old. Appellants' father testified that he was the owner of the dogs and that he kept them as pets. They were not used as watchdogs. He and Mrs. Vaccaro fed them, looked after them and paid for their licenses. The dogs were kept around the house but they had the free run of the premises except for the turkey pens. Appellants gave similar testimony. The dogs belonged to their father and they neither cared for them nor used them as watchdogs.

The only previous incident which indicated that one of the dogs might be vicious was described by young Otto Barr. He started delivering papers to the elder Vaccaro in 1949 and made deliveries thereafter six days a week. He usually rode a motorcycle up a driveway to the front of the house. One evening at dusk, or a little later, his motorcycle being out of order, he came on a bicycle through the rear of the premises. Poochie was nursing a litter of newly born pups at a location some 400 or 450 feet to the rear of the house. As the boy came by on his bicycle Poochie ran out and bit him on the leg. The incident was known to the father and mother of appellants and also to James Vaccaro. After that occurrence the boy rode in on his motorcycle regularly and

encountered the dogs. As he would ride away two of the dogs would sometimes run behind him and snap at the rear tire. They never attempted to bite him.

Poochie had had 8 or 9 litters, which were given away as soon as they were weaned. While they were with her she guarded them against strangers. There was no expression of hostility toward anyone after the pups were taken away, nor did she make any objection to their being taken. Some two months before the injuries to plaintiffs, Poochie had given birth to another litter. All had been given away except Brownie. Blackie was from an earlier litter. During the five years between the Barr incident and plaintiffs' encounter with the dogs large numbers of customers came to buy turkeys. At holiday times there would be 1,500 and 2,000 customers, and Mrs. Chandler and Mrs. Reynolds had purchased turkeys at the ranch on numerous occasions without incident. At these times and at all other times the dogs would walk among the customers and visitors in friendly fashion, disturbing no one. And after the Barr incident, while Poochie was nursing her numerous litters, she had attacked no one. As described by David Vaccaro, she was regarded as "just a general dog."

To hold upon the evidence that prior to the attack upon plaintiffs Poochie had been a vicious animal and known to be vicious would not only be without precedent in law but contrary to common experience and good sense. It would impose a liability upon those who harbor dogs for any harm they do, upon the theory that the instinct of a female animal to guard her young from harm renders her a vicious and dangerous animal and imparts notice to the owner of her vicious character. It is not the desire to harm intruders that causes the animal to threaten or attack them; it is merely fear for the safety of her young and the desire to be let alone. Even the most gentle animals may suffer from such fear. And who with a mature mind and a mere scintilla of understanding of dogs or other animals would agree with the statement "This is a vicious dog; she would not let me handle her pups." The Vaccaro dogs suddenly became vicious; why no one knows. There was no provocation. Dogs, like humans, are unpredictable. Either, for no apparent reason, may suddenly go berserk.

The common-law liability did not extend to injuries inflicted by dogs that had previously been gentle and friendly. It was a common remark that the law allowed every dog his first bite, which was true of dogs of previous gentle disposition. But the injustice of this rule was recognized by our legislature when, by statutes 1931, p. 1095, ch. 503, liability was imposed upon owners for injuries inflicted by dogs that had previously exhibited no vicious tendencies. This law became section 3342, Civil Code in 1953.

[1, 2] The conditions which impose common-law liability upon those who own or harbor dogs must be such as to reasonably indicate the probability of injury, due to the disposition of the dogs. If a dog has been gentle and friendly in the past there is no duty to fear that he may suddenly become vicious. If, in the past, he has bitten a human the owner must anticipate that he will do the same thing again under the same or similar conditions. The question is one of the duty of the person who is responsible for the dog's actions. If a bitch is likely to attack intruders when she is nursing pups there is a duty at those times to take precautions to avoid injury to humans. Restatement Torts, section 518, comment g. It was a wise precaution to put Poochie and her pups 400 or more feet behind the house, where visitors would not disturb them. But when the pups had been weaned and sent away and Poochie had no further responsibility (and she had borne more than a fair share of responsibility as a parent), defendants had a right to anticipate that she and the young dogs would be as friendly with visitors as they had been in the past. An exhaustive search of the authorities which we have made has unearthed no case in which it was even contended, much less held, that a bitch may be

proven to be vicious solely by evidence that in chasing an intruder away from her nursing pups she bit him. The fact that young Barr was bitten under the circumstances related was wholly insufficient to prove that Poochie was vicious or to reasonably indicate that she was likely to resent the presence of visitors under different conditions.

[3] It is well-known that some dogs, untutored in behavior, make a sport of chasing cars or motorcycles with no intention of doing injury. Until the dog has bitten or attempted to bite someone his actions must be regarded as playful and not vicious. Otherwise, as the court stated in Melicker v. Sedlacek, 189 Iowa 946, 179 N.W. 197, 203, 11 A.L.R. 259, "nearly every farmer in Iowa owning a shepherd dog would be liable several times a year."

[4] The fact that two of the dogs sometimes chased Barr as he left on his motorcycle and snapped at the rear tire did not prove that they were vicious. He explained that the motor "would have a tendency to pop when I would lean on the hand throttle." If defendants had knowledge of these occurrences they were bound to know that two of the dogs would chase popping motorcycles. Whatever the game may have been, it evidently did not cause the boy to fear the dogs. They could have bitten him if they had wanted to. The fact that they didn't bite him is the best evidence that they were not interested in biting him. Motorcycles evidently excited them but that had nothing to do with their attitude toward people. Over a period of five years after the Barr incident the dogs displayed no animosity toward people, although they had mingled with thousands, including the plaintiffs. They behaved normally. They gave the defendants no reason to fear they might injure anyone. The uncontroverted evidence failed to establish that prior to plaintiffs' encounter with the dogs any of them had been vicious. Other contentions of appellants need not be considered.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

167 Cal.App.2d 773

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Orae Cornell FIELDS, Defendant and Appellant.

Cr. 6331.

District Court of Appeal, Second District, Division 1, California.

Feb. 10, 1959.

Defendant was convicted of unlawfully possessing heroin and from a judgment of the Superior Court of Los Angeles County, Walter R. Evans, J., the defendant appealed. The District Court of Appeal, Fourt, J., held that the evidence established that defendant gave his consent to search and seizure of heroin and hence was not entitled to complain thereof.

Judgment affirmed.

1. Searches and Seizures ⇐7(27)

Where police officers were looking for alleged burglary suspects and entered defendant's home and identified themselves and asked defendant if he had any "stuff" and the defendant said "no go ahead and look" and the officers thereupon discovered narcotics, search and seizure were lawful on the ground that defendant gave his consent thereto. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⇐736(1)

In determining the validity of a search and seizure, it is the province of the trial court to determine the fact as to whether defendant has consented to the search and seizure. West's Ann.Health & Safety Code, § 11500.

Orae Cornell Fields, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction on a charge of possessing heroin.

In an information filed in Los Angeles county the defendant was charged with violating section 11500, Health and Safety Code, in that on or about November 16, 1957, he possessed heroin. It was also alleged in the information that the defendant had previously been convicted of a violation of section 11500 of the Health and Safety Code on February 23, 1951, and had served a term in prison therefor, and that he had also been convicted of the crime of forgery on April 9, 1953, and had served a term in prison therefor.

The defendant pleaded not guilty and denied the prior convictions. A jury trial was waived and, by stipulation, the matter was submitted upon the testimony contained in the transcript of the proceedings at the preliminary hearing; each side reserving the right to present additional evidence.

The court found the defendant guilty and made no finding as to the prior convictions.

A résumé of the facts is as follows: Officers Hawkins and Miller of the Oxnard police department came to an office of the Los Angeles police department and requested assistance in picking up four or five suspects who were wanted for burglary in Oxnard. One of the suspects was the defendant, however, the officers from Oxnard had no warrant for his arrest. The Oxnard officers inquired of members of the Los Angeles police department if the defendant was known to the Los Angeles police department, or if the Los Angeles police knew him. Sergeant Stephenson of the Los Angeles police department gave officer Lucarelli, of the same department, the defendant's address. Also, a "mug" of the defendant was pulled from the Los Angeles police department files. The Oxnard policeman told officer Lucarelli that the men they were seeking had been identified in a series of "till taps" and that they wanted the defendant upon a charge of burglary, and for questioning and investigation. Officer Lucarelli testified, "My understanding of a till tap is that when two or three people are at the checkstand, one of them preoccupies the clerk after she has the drawer open and the other will grab whatever money there is and the other will take off.") There was another man with the Oxnard policemen, a civilian, who was not known to officer Lucarelli but was known to other officers in the Los Angeles police department. The man made some statements with reference to the burglary in Oxnard while he was in the presence of officer Lucarelli. Officer Lucarelli talked with the man and asked him if he knew about the defendant and whether the defendant was a user of narcotics, and the man stated that the defendant was a user of narcotics.

Lucarelli and Miller went to the house of the defendant about 2:00 o'clock a. m. on November 16, 1957. Officer Hawkins and the man above mentioned stayed in the car which was parked on the street. Lucarelli directed Miller to go to the back door of the house, and he, Lucarelli, then went to the front door. He did not turn the door knob or handle but knocked rather loudly, and in so knocking the door came open a small distance. The door was then pushed all the way open and officer Lucarelli said "Orae C. Fields, police officers." No one answered at first and the officer knocked and "hollered" out again. A male voice then answered, "Who is it?", and Lucarelli answered, "Police officers. Where are you at?" The male voice answered, "I am here in the bedroom." Officer Lucarelli turned on his flashlight and then entered the house and went to the bedroom, identified himself, and told the defendant that he was wanted for burglary and arrested him. The defendant was also asked "if he had any stuff." Officer Miller, previous to the occasion just described, had come around from the back of the house and was in the bedroom with officer Lucarelli and the defendant. The defendant was in bed with his wife.

The defendant was asked "if he had any stuff in the house," and he answered, "No, go ahead and look." Officer Lucarelli told defendant, in effect, that if they "found stuff in the house" when the defendant had

stated he did not have anything there, that the officers would have to arrest the people in the house as it would belong to somebody in that facility.

Officer Lucarelli, in the presence of the defendant then started to make a search of the bureau drawers and of the defendant's pants in the bedroom. There was a wallet in one of the dresser drawers containing a paper bindle enclosing a white powder, later identified and found to be heroin. The officer also found a medicine dropper and a hypodermic needle in the dresser, wrapped in white paper. The defendant was asked whether the heroin belonged to him and he said that it did, and he further stated that he had bought it earlier on Saturday for $10 and that his wife knew nothing about it. The defendant did not take the witness stand and testify in his own behalf, nor did he, through other witnesses, offer any explanation of the presence of the heroin or the hypodermic needle.

The defendant asserts that the evidence was obtained by an unlawful search and seizure.

[1] In our opinion the search of the defendant's bedroom, under the circumstances, was lawful. The defendant gave his consent. See People v. Michael, 45 Cal.2d 751, at page 754, 290 P.2d 852, at page 854, wherein the court said, with reference to a similar situation: "Under these circumstances, to hold as a matter of law that the evidence was produced in response to an unlawful assertion of authority would seriously hamper officers in the reasonable performance of their duties. Thus, it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority."

As heretofore indicated, the defendant did not take the witness stand to deny any of the statements of the officers; nor did he call his wife as a witness, although she was present and seemingly heard most of what was said in the bedroom. It is clear from the record, in our opinion, that consent to the search was given. The prosecution supplied the proof of the consent to the satisfaction of the trial court. People v. Gorg, 45 Cal.2d 776, 782, 291 P.2d 469; People v. Roberts, 47 Cal.2d 374, 377, 303 P.2d 721.

[2] In the first place, it is the province of the trial court to determine the fact as to whether or not consent was given. The trial judge determined in effect that in the light of all the circumstances, the consent was voluntary and was not in submission to an express or implied assertion of authority. See, People v. Michael, supra. As said in People v. Garnett, 148 Cal.App. 2d 280, at page 284, 306 P.2d 571, at page 574: "The fact that the officer having defendant in custody inquired for permission to search does not destroy its significance as a voluntary consent. (Citing case.) The officer premised appellant's consent upon the latter's assertion that he had done nothing unlawful." See also, People v. Lujan, 141 Cal.App.2d 143, 147, 296 P.2d 93; People v. Robinson, 149 Cal.App.2d 282, 284, 308 P.2d 461; People v. Galle, 153 Cal.App.2d 88, 90, 314 P.2d 58.

It was succinctly stated in People v. White, 159 Cal.App.2d 586, at page 592, 324 P.2d 296, at page 300:

"In urging this point defendant ignores the clear evidence in the record showing a free and voluntary consent on the part of the defendant to search his room; and the well-known rule that it is not necessary for the People to show that the search and seizure were reasonable as incident to a proper arrest when the search is made with defendant's consent. In People v. Burke [47 Cal.2d 45, 301 P.2d 241], supra, the defendant urged a similar point and the Supreme Court at page 49 of 47 Cal.2d, at page 243 of 301 P.2d, stated: 'It is not

necessary here, however, for the People to show that the search and seizure were reasonable as incident to proper arrest, for they showed that defendant freely consented to the search of his apartment which disclosed the evidence which defendant has since claimed was illegally obtained.' In that case, the officer said to the defendant, 'You don't mind then if we search your apartment do you?' and the defendant answered, 'No, go ahead.' Whether in a particular case consent was voluntarily given is a question of fact to be determined in the light of all the circumstances (People v. Gorg, 45 Cal.2d 776, 291 P.2d 469; People v. Michael, 45 Cal.2d 751, 290 P.2d 852)."

It was set forth in People v. Torres, 158 Cal.App.2d 213, at page 215, 322 P.2d 300, at page 302:

"A search of a house with the express, free and voluntary consent of a householder suspected of possessing narcotics is neither unreasonable nor unlawful. It follows that contraband found and seized in the course of such a search may lawfully and properly be received in evidence against the accused. (Citing cases.) It is true as pointed out in People v. Michael, supra, that one need not forcibly resist an officer's assertion of authority to search, but if he freely consents to a search, then neither the search nor the seizure of evidence found in the course thereof is unreasonable. As the court there stated (45 Cal.2d at page 753, 290 P.2d at page 854), 'Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.' To the same effect are People v. Lujan, 141 Cal.App.2d 143, 296 P.2d 93 and People v. Gorg, 45 Cal.2d 776, 291 P.2d 469. Since the question is one of fact primarily for the trial court's determination, the finding of that court, supported by substantial evidence, is binding upon an appellate court. (Citing cases.)"

In this case the prosecution introduced sufficient and proper evidence to establish without question that the defendant had previously been convicted of the two felonies charged as prior convictions in the information. The judge was fully informed of the facts with reference to the defendant's background, because at the time of hearing the defendant's application for probation (for which he was wholly ineligible) the judge remarked, "I've gotten word parole has been suspended and there has been an order to return this man to the State Prison at this time;" and further the judge said, "There doesn't seem to be much that can be done with this man, from the past record, counsel."

The defendant was then sentenced as a first offender. Had he been properly and legally sentenced, his minimum term under section 11712 of the Health and Safety Code would be not less than two years nor more than twenty years. In other words, the defendant in this case is now, by reason of the judge's failure to find as to the prior convictions (pursuant to Penal Code section 1158), permitted to serve a sentence which can be considerably less than that required and set forth in the statutes.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

167 Cal.App.2d 625

GREAT LAKES AIRLINES, INC., a corporation, Plaintiff,

Irving E. Hermann et al., Plaintiffs, Appellants and Cross-Respondents,

v.

P. D. SMITH et al., Defendants, Respondents and Cross-Appellants.

Civ. 23232.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1959.

Hearing Denied April 1, 1959.

Action wherein the Superior Court of Los Angeles County, Clarence M. Hanson, J., rendered judgment which, inter alia, de-

nied relief to plaintiffs under their third cause of action for damages resulting from an alleged breach of contract by defendants, and plaintiffs appealed from that portion of judgment. Defendants appealed from that portion of judgment granting plaintiffs relief under their second cause of action. The District Court of Appeal, Fox, P. J., held that, read in conjunction with lease paragraph providing for adjustment on account of number of airframe hours since last major airframe overhaul and reciting agreement of parties that airframe had had 42 hours service since last major airframe overhaul, quoted phrase, in subsequent paragraph, requiring lessors (defendants) to furnish lessees (plaintiffs) with all of aircraft records and providing that such records should be "accurate and complete", could be construed either as having reference to actuality or as having been understood to be synonymous with or equivalent to 42 hours; and held that it had been prejudicial error to exclude lessees' offer to prove by parol evidence what parties had meant by what they said.

That portion of judgment challenged on plaintiffs' appeal reversed, and that portion of judgment appealed by defendants affirmed.

1. Appeal and Error ⇐1056(1)
Evidence ⇐455

Read in conjunction with lease paragraph providing for adjustment of number of airframe hours since last major airframe overhaul and reciting agreement of parties that airframe had had 42 hours service since last major airframe overhaul, quoted phrase, in subsequent paragraph, requiring lessors to furnish lessees with all of aircraft records and providing that such records should be "accurate and complete", could be construed as having reference to actuality or as having been understood to be synonymous with or equivalent to 42 hours; and in lessees' action for breach of contract, it was prejudicial error to exclude lessees' offer to prove by parol evidence what parties had meant by what they said. West's Ann.Civ.Code, § 1641.

2. Sales ⇐416(1)

In buyers' action for breach of contract requiring sellers to furnish buyers with all records required to be kept by Civil Aeronautics Administration, buyers should have been permitted to show that sellers had failed to furnish available records with regard to airframe overhaul which took place outside of country and that because of their inability to prove that such overhaul had been made buyers had been required by Civil Aeronautics Administration rules to perform a major airframe overhaul sooner than would otherwise have been necessary. West's Ann.Civ.Code, § 1638.

3. Frauds, Statute of ⇐95(2)

Where provision relative to aircraft's presence was not part of option provision of lease, lessees' attorney did not enter into or modify contract when he waived such requirement; but even if he had, statute of frauds did not require his authority to be in writing, in view of provision that rent paid was to be applied toward purchase price in event of exercise of purchase option. West's Ann.Civ.Code, §§ 1624a, 1724; West's Ann.Code Civ.Proc. § 1973a.

Keatinge & Older, Charles H. Older, Los Angeles, for appellants and cross-respondents.

Youngblood & Gross, Beverly Hills, for respondents and cross-appellants.

FOX, Presiding Justice.

Plaintiffs [1] appeal from that portion of the judgment which denied relief to them under their third cause of action for damages resulting from an alleged breach of contract by defendants. The defendants

1. As Great Lakes Airlines, Inc., is not a party to this appeal, the term "plaintiffs" as used in the opinion refers to Irving E. Hermann and Ida Mae Hermann, co-partners doing business under the firm name and style of Nevada Aero Trades Company, a Nevada copartnership.

appeal from that portion of the judgment granting plaintiffs relief under their second cause of action.

On September 13, 1955, defendants leased a Douglas C–54B aircraft to the plaintiffs with an option to purchase the aircraft at any time after seven months from date of said lease, to and including September 12, 1959, for $630,000 on an installment basis. The court found that this option was exercised on April 14, 1956. Pursuant to applicable rules of the Civil Aeronautics Administration, plaintiffs were required to perform a major airframe overhaul on the subject aircraft during July and August of 1956, at an alleged expense of $56,514.59. Plaintiffs' third cause of action sought to recover by way of damages the funds expended in performing the above overhaul.

The pertinent provisions of paragraph 4 of the lease provide:

"Upon the termination of this lease or any extension thereof and the return of said aircraft to Lessor, there shall be an adjustment between Lessor and Lessee on account * * * of the number of airframe hours on said aircraft since last major airframe overhaul (major airframe overhaul to mean the ten-thousand (10,000) hour overhaul as now appearing in the United States Civil Aeronautics Administration Approved Master Copy of Great Lakes Airlines, Inc. DC–4 Maintenance Manual). In this connection it is agreed by and between Lessor and Lessee that as of the date hereof * * said airframe has forty-two (42) hours since last major airframe overhaul."

Paragraph 16(d) of the lease provides:

"At the time of the delivery of said aircraft to Lessee, Lessor shall furnish Lessee with all of the aircraft records pertaining to said aircraft as required to be kept by the Civil Aeronautics Administration, and said records shall be accurate and complete and shall contain all entries necessary to make said records accurate and complete as of the date and time of the delivery of said aircraft to Lessee."

In their third cause of action, as amended and supplemented, plaintiffs in substance alleged that defendant P. D. Smith had orally represented to plaintiffs that the subject aircraft had undergone a major airframe overhaul in Japan during 1955 and had been flown but 42 hours since that overhaul and that defendant Smith would deliver to plaintiffs all of the aircraft and maintenance records pertaining to said major airframe overhaul necessary to substantiate that a major overhaul had been performed and that the airframe had been "zeroed" and "zero-timed" in Japan during 1955. That defendants refused to deliver said records and that, pursuant to Civil Aeronautics Administration rules, plaintiffs were required to perform a major airframe overhaul on the aircraft some 6,648 hours sooner than would have been necessary had defendants furnished records as they were obligated to do pursuant to paragraph 16(d) of the lease and in accordance with the oral representations of Smith.

As grounds for a reversal, plaintiffs argue that the trial court erred in holding the parol evidence rule a bar to the introduction into evidence of certain offers of proof made by plaintiffs. An examination of the record and of applicable authorities fully supports plaintiffs' contentions.

A careful reading of the record reveals that plaintiffs were apparently predicating liability upon two different theories: One theory was that in truth and in fact the airframe had in excess of 42 hours, that defendant Smith represented it had but 42 and would deliver records to that effect, and 16(d) should be read to require defendants to deliver documents reflecting "represented" rather than "actual" maintenance records. In support of this theory, plaintiffs offered testimony to the effect that Smith made certain representations to plaintiffs' agents. The court held this testimony inadmissible by virtue of the parol evidence rule. The rationale for this ruling was that the trial judge took the position that the parties, in paragraph 4, had "stipulated" that the airframe had only 42 hours and parol evidence could not be received to vary this stipulation. The court stated: "That is an agreement right in the contract, a

stipulation, so I think we cannot have evidence that varies it. It is for that reason I am of the opinion that granted all statements that you expect * * * to show were made, the court can, nevertheless, not consider them. So, under those circumstances * * * you had better make an offer of proof unless you want to offer it on the theory of an ambiguity."

Plaintiffs thereupon offered to prove (1) that Smith made representations to plaintiffs and their agents, servants and employees, in the course of negotiations leading up to and preceding the execution of the lease, that the airframe had only 42 hours since its last major airframe overhaul and that it had been zeroed while in Tokyo a short time prior to that and was zero-timed; (2) that Smith represented he had or would obtain and deliver to plaintiffs records substantiating the above representations; (3) that the airframe actually had 8,148 hours and not 42; and (4) that as a result of the fact that this airframe had at that time 8,148 hours of use after its last major overhaul, the plaintiffs in this action were required to major overhaul the airframe during the months of July and August of 1956, and that the total cost of such major overhaul of the airframe alone amounted to $56,514.59.

Defendants' objections to the above offer of proof on the basis of incompetency, irrelevancy, immateriality, and the parol evidence rule were sustained, particularly on the ground of the parol evidence rule, even though the court had previously indicated the offers would be accepted on the basis of ambiguity.

[1] We are of the opinion that the contract, or at least paragraph 16(d) thereof, is ambiguous and that parol evidence should have been received by the court to ascertain exactly what the parties meant by what they said.

If paragraph 16(d) were to be read in a vacuum, it is reasonably clear that the reference therein to "accurate and complete" records pertains to records acceptable to and in conformity with Civil Aeronautics Administration standards and requirements, records which reflect actual hours on the airframe. However, this is not necessarily the case when paragraph 16(d) is read in conjunction with paragraph 4, and it is well established that the sense and meaning of a written contract is to be gathered from the whole of the instrument and individual provisions should not be read in isolation. (See Civil Code, § 1641.)

The 42 hour provision in paragraph 4, by its terms, become operative if the option to purchase was not exercised by the plaintiffs and, as the option was in fact exercised, this provision would appear to have no direct application to the case at bar. However, this provision does furnish a key to the factual foundation upon which the parties, or at least the plaintiffs, believed they were dealing.

It is reasonable to assume that plaintiffs believed that the 42 hour provision was related factually to the number of hours since the last major overhaul and that it was not just an arbitrary figure. That this is a reasonable assumption is readily apparent from the substantial amount of money which might be involved in the event the option was not exercised and the plaintiffs had to pay defendants $7.50 for each hour on the airframe in excess of 42 hours since its last major airframe overhaul as is provided for in paragraph 4. It is apparent from the length and detail of the lease that the parties were conscious of the large amount of money involved and were attempting to protect their own financial interests, and it would be unrealistic to believe that the parties would stipulate to a fictitious or arbitrary figure without some relationship to reality, or at least what the parties or one of them believed represented the actual situation at the time the lease was executed. The fact that the Civil Aeronautics Administration's requirements for overhauls are based on actual hours lends further support to the idea that the reference to 42 hours had a basis in fact.

This being the case, the intention of the parties as expressed in 16(d) is not free

from doubt. Two reasonable interpretations present themselves: first, that "accurate and complete" refers to actuality, whatever that may prove to be; or, secondly, that "accurate and complete" was understood to be synonymous with or equivalent to 42 hours, in view of the foregoing discussion relative to paragraph 4. While it is true that the language of a contract is to govern its interpretation (Civ.Code, § 1638), our Supreme Court has held parol evidence admissible to aid in the interpretation of an ambiguous contract or writing. Chastain v. Belmont, 43 Cal.2d 45, 51, 271 P.2d 498. In Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 524, 297 P.2d 428, 431, the court quoted from Barham v. Barham, 33 Cal.2d 416, at page 422, 202 P.2d 289, at page 293, as follows: "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties (citation), not to show that 'the parties meant something other *than* what they said' but to show 'what they meant *by* what they said,' (citation)." In addition, the Beneficial case, supra, 46 Cal.2d at page 527, 297 P.2d at page 433, specifically stated that in such a situation evidence of the preliminary negotiations was admissible.

On the basis of the foregoing analysis of the lease and the authorities to which reference has been made, prejudicial error resulted from the exclusion of plaintiffs' offers of proof as to the true meaning of 16(d).

Defendants argue that the plaintiffs refused to offer evidence on the theory of ambiguity and, therefore, they are in no position to raise the question on appeal. The record, however, discloses without doubt that plaintiffs made an offer on the basis of ambiguity. The following abstract from the record is illustrative:

"The Court: * * * So, under those circumstances * * * you had better make an offer of proof unless you want to offer it on the theory of any ambiguity.

"Counsel: Well, of course, I am not limiting the nature of my offer at all, your Honor, I am offering it in general.

"The Court: Then I will state you are offering it on the basis of ambiguity, I will receive it on that basis but not otherwise.

"Counsel: Then, your Honor, I will offer it on the basis of ambiguity.

"The Court: All right, then."

At this juncture the plaintiffs made the offers of proof to which previous reference has been made and, as already noted, the court nevertheless sustained defendants' objections thereto.

[2] Plaintiffs' other theory apparently was that the airframe was overhauled in Tokyo in 1955, records made thereof, and that had defendants furnished plaintiffs with those records as they were required to do by paragraph 16(d), plaintiffs would not have had to overhaul the airplane when they were required to do so by the Civil Aeronautics Administration. In this regard, plaintiffs' counsel stated to the court: "We have already offered to prove that the defendant Smith did not, prior to the time that we majored this aircraft, furnish us the records which he undertook to furnish us by paragraph 16(d). I offer to prove—I believe at one time he did furnish us certain records on October 17, 1956 after the major overhaul was performed—but as part of my offer of proof I at this time offer in evidence and ask that it be marked for identification, a letter from P. D. Smith, Inc. by P. D. Smith, President, addressed to Nevada Aero Trades Company bearing date October 17, 1956, reading as follows: 'Re Lease of Aircraft No. N37473. Dear Sir, this letter is to notify you that on October 12, 1956, at 2:45 p. m. P. D. Smith, Inc. in accordance with the authority contained in your letter of September 25, 1956, delivered to Mr. H. S. Richards, who is Vice President, Great Lakes Airlines, Inc., at Burbank, California, certain air-

craft records pertaining to that certain Douglas C-54B type aircraft, manufacturer's Serial 10513, Civil Aeronautics Administration N37473 as follows: (1) Document entitled "Air-frame periodic inspection" (JAM Co, Tokyo) consisting of 19 pages and certified by Frank L. McClasky, A&E No. 9684; (2) Document entitled "11,000-hour overhaul" consisting of 14 pages including the cover page, and certified by Frank L. McClasky A&E No. 9684. These records have just recently become available to the undersigned and those have been delivered to your representative. Very truly yours, P. D. Smith, Inc. by P. D. Smith.'

"As a part of the same offer of proof, and I would like to have it marked for identification at this time, I offer the two documents which are referred to in the letter as being transmitted with it. In addition, your Honor, I yesterday offered to prove that we had performed this major overhaul during the months of July and August, 1956, at a total cost of $56,514.59. I now want to supplement that offer of proof by an additional offer of proof to the effect that had the records which were supplied to us on October 17, 1956, after our major overhaul was complete, had those records been supplied to us in accordance with the requirements of 16(d) at the time the plane was delivered to us, we would have saved all of the cost of this overhaul with the exception of approximately $1500.00, or, in other words, that had these records been supplied to us we could have eliminated all of this major overhaul at the time it was performed except for a portion relating to one of the landing gears, the cost of which would have been approximately $1500.00, and that as part of our offer of proof, the plaintiffs in the absence of these records were required to perform the overhaul at the time they did and could not further defer it." The above documents were marked for identification but not received in evidence, the trial judge again sustaining defendants' objection based on the parol evidence rule.

It is difficult to conceive how the above in any manner tended to add to, vary or contradict paragraph 16(d). As noted, 16(d) required defendants to furnish to plaintiffs (when the aircraft was delivered) all aircraft records pertaining to the aircraft as required to be kept by the Civil Aeronautics Administration. These Tokyo records were not furnished to plaintiffs when the aircraft was delivered to them, and under sections 18.20 and 18.21 of Part 18 of the Civil Air Regulations such records were required to be maintained. Therefore, a failure to deliver these records clearly constituted a breach of 16(d) and they should have been admitted in evidence. The parol evidence rule was in no way applicable. Whether they would have actually shown the number of air hours or other data pertinent to establishing damages by the breach is not involved in this appeal. Paragraph 16(d) warranted lessor would furnish these records, and paragraph 16(g) provided that lessor would pay lessee any and all damages, costs, and expenses suffered by lessee as a result of a breach of any warranty. Plaintiffs certainly should have been permitted to establish the breach of warranty contained in 16(d).

By their second cause of action, plaintiffs sought a declaration that they validly exercised the option to purchase the aircraft either on April 14 or 18, 1956, and that certain moneys paid to the defendants should be applied toward the purchase price of the airplane. The trial court found that the option was properly exercised on April 14, 1956, and the defendants appeal.

Paragraph 15 of the lease provides:

"Option: Lessor hereby expressly grants to Lessee an absolute option to purchase said aircraft at any time after seven (7) months following the date of this agreement, and said option shall continue to and including September 12, 1959, on the following terms: Purchase price to be the sum of Six Hundred Thousand Dollars ($600,000.00) in cash with the first seven months' rent hereunder to apply against

the purchase price, or the sum of Six Hundred Thirty Thousand Dollars ($630,000.00) with the first seven months' rent hereunder to apply against the purchase price and the balance payable in thirty-five (35) equal monthly installments commencing on the date said option is exercised. If said option to purchase is exercised and Lessee elects to pay on the aforesaid installment method, then the sale of said aircraft hall be effected by means of a Conditional Sales Agreement, a copy of which is marked Appendix "C", is attached hereto and made a part hereof, and the execution and delivery by Lessee to Lessor of a promissory note for the balance of the purchase price after applying the first seven (7) months' rent to the purchase price, a copy of which note is marked Appendix "D" and attached hereto and made a part hereof. Lessee shall give to Lessor at least ten (10) days' written notice of its intention to exercise said option.

"In the event Lessee elects to exercise its option to purchase said aircraft under the provisions of this paragraph fifteen (15) and elects to pay on the aforesaid installment method, Lessee shall concurrently with the giving of said written notice to Lessor of Lessee's election to exercise said option, deliver to Lessor two (2) copies of the Conditional Sale Agreement and two (2) copies of the Promissory Note attached hereto as Appendices "C" and "D" signed by Lessee. Lessor shall, at the time of delivery of said documents to him, deliver to Lessee two (2) copies of said Conditional Sale Agreement signed by Lessor. Both Lessee's and Lessor's copies of the Conditional Sale Agreement shall be duly executed and acknowledged by said parties in a form acceptable to the United States Civil Aeronautics Administration for recording purposes. If Lessor fails to deliver to Lessee the copies of said Conditional Sale Agreement as specified above, Lessee may retain possession of said aircraft in accordance with Lessee's rights under said option and Lessee shall be relieved of the obligation of making any payments to Lessor as provided hereunder or as provided in said Conditional Sale Agreement, until Lessor has delivered to Lessee the signed and acknowledged copies of said Conditional Sale Agreement.

"Lessee shall have the right to exercise the option to purchase granted herein and to execute said Conditional Sale Agreement and Promissory Note at any place desired by Lessee. Delivery of said aircraft hereunder shall be made from Lessor to Lessee at any place in the continental United States designated by Lessee, and the cost of delivery of said aircraft to such designated place of delivery shall be borne by Lessee."

On or about March 31, 1956, plaintiffs notified defendants that they intended to exercise the above option and would take delivery at Cape May County Airport, Wildwood, N. J., on April 13, 1956. Accompanying the above notice were four copies of a Conditional Sale Agreement in the form provided for in the lease, together with a promissory note in the principal amount of $507,500. The notice also provided that "the Conditional Sale of said aircraft and the delivery of such Conditional Sale Agreement and said Promissory Note to you shall be effective upon but not before the delivery of said aircraft to Nevada Aero Trades Company at Wildwood, New Jersey, on April 13, pursuant to the terms of said Conditional Sale Agreement."

On April 12, 1956, Charles Older, attorney for plaintiffs, informed defendants that the aircraft had been delayed and would not arrive at Wildwood until April 14. On April 14, Richard Keatinge, another attorney for plaintiffs, met the defendants' representative Smith at Wildwood. Due to weather conditions, the aircraft was not then present, but Keatinge nevertheless tendered to Smith a check for $14,500 and the lease and receipt, and demanded from Smith the two executed copies of the Conditional Sale Agreement. Keatinge told Smith that the condition requiring the aircraft to be present was waived. Keatinge's authority to waive this provision was not in writing. Smith re-

fused the tender and remarked that he would do nothing until the aircraft arrived. Plaintiffs' agent, Senko, and Smith met at Wildwood on April 18, at which time the aircraft had arrived and the tender renewed, yet Smith again refused the tender without stating any particular objections thereto. Senko had written authority to act for plaintiffs.

It is defendants' position that the presence of the aircraft was a condition precedent to the operation and effectiveness of the exercise of option, and that as personal property in excess of $500 was involved, the agreement was within the statute of frauds and plaintiffs' agent's authority to make same must have been in writing and, as it was not, the defendants were justified in refusing to accept the agent's waiver for the plaintiffs would not be bound by it.

[3] Section 2309 of the Civil Code only requires an agent's authority to be in writing when the contract itself is required to be in writing. We are of the opinion that Keatinge did not purport to enter into or modify a contract. The provision relative to the aircraft's presence was not part of the option provision of the lease. Furthermore, assuming, arguendo, that he did enter into or modify a contract, it is clear under the provisions of section 1973a, Code of Civil Procedure, and sections 1624a and 1724 of the Civil Code, that the instant transaction relative to the purchase of the aircraft was not required to be in writing. These sections are identical and provide that a contract for the sale of goods of the value of five hundred dollars or more must be in writing. It is further provided, however, that a writing is not required if the buyer shall make part payment. In the instant case, plaintiffs not only executed and delivered the promissory note to the defendants, but the rent that actually had been paid for the first seven months was to be applied toward the purchase price, under the terms of the lease and option agreement, and this is sufficient part payment to take this phase of the transaction out of the statute of frauds. It therefore follows that the delivery aspect here in question was not within the statute of frauds. Hence, the agent's authority relative thereto need not have been in writing.

That portion of the judgment from which plaintiffs appeal is reversed; that portion of the judgment from which defendants appeal is affirmed.

ASHBURN and HERNDON, JJ., concur.

167 Cal.App.2d 636

Vaughn A. TURNER, Plaintiff and Appellant,

v.

Clifford H. TURNER, and Marcella E. Turner, formerly known as Marcella E. Gilbert, Defendants and Respondents.

Civ. 23403.

District Court of Appeal, Second District, Division 3, California.

Feb. 5, 1959.

Suit to have written consent of parent to marriage of minor under age of 18 years cancelled on ground of fraud and to have marriage annulled. From a judgment of the Superior Court of Los Angeles County, Beach Vasey, J., denying the relief sought, an appeal was taken. The District Court of Appeal, Vallée, J., held that since false representations, that plaintiff's son and the other defendant had already been married in Mexico and that plaintiff's son was the father of the other defendant's unborn child, had been made with intent to induce plaintiff to sign consent to marriage and had been relied upon by him in giving his consent and since he had been ignorant of falsity of such representations and reasonably believed them to be true, he was entitled to have con-

sent canceled, on ground of fraud, and to have marriage annulled.

Reversed.

1. Marriage ⇐58(7)

Where false representations, that plaintiff's son and the other defendant had already been married in Mexico and that plaintiff's son was the father of the other defendant's unborn child, were made with intent to induce plaintiff to sign consent to marriage and were relied upon by him in giving his consent, and he had been ignorant of falsity of such representations and had reasonably believed them to be true, he was entitled to have consent canceled, on ground of fraud, and to have marriage annulled. West's Ann.Civ.Code, §§ 56, 69.

2. Contracts ⇐94(1)

Fraud vitiates all transactions into which it enters.

3. Contracts ⇐94(1)

Free consent is an indispensable element of every transaction, and there is no real or free consent when it is obtained through fraud. West's Ann.Civ.Code, § 1567.

4. Marriage ⇐19

Free consent of parent to marriage of male under age of 18 years is essential to very existence of nonvoidable marriage. West's Ann.Civ.Code, §§ 56, 69.

5. Marriage ⇐19

Where parent's consent to marriage was obtained by fraud, consent was not absolutely void, but was voidable; and marriage was likewise voidable. West's Ann.Civ.Code, §§ 56, 69.

6. Cancellation of Instruments ⇐4, 47

Remedy afforded by Civil Code section, authorizing adjudication of invalidity and order for cancellation of written instrument, includes fraud; and if facts are proved, a case is established. West's Ann. Civ.Code, §§ 1566, 3412.

7. Cancellation of Instruments ⇐8

The "injury" referred to in Civil Code section, providing for adjudications of invalidity and for ordering cancellation of written instruments, is not limited to pecuniary loss, and it may be alteration of one's position to his prejudice; and to be entitled to relief under that section, it is not necessary to allege or prove any pecuniary loss so long as record indicates there was injury or prejudice resulting from fraud. West's Ann.Civ.Code, §§ 1566, 3412.

See publication Words and Phrases, for other judicial constructions and definitions of "Injury".

8. Marriage ⇐25(2)

Purpose of statute providing that the marriage license shall not be issued to a person under age without consent of parent is to permit parent to exercise control and discipline over child until marriage, and to that end prevent him, if possible, from contracting an ill-advised marriage. West's Ann.Civ.Code, §§ 56, 69.

9. Parent and Child ⇐2(1)

The right of a fit and proper parent to his child's custody is somewhat in the nature of a property right, and is paramount, in a sense, to the child's theoretical welfare and best interests. West's Ann. Civ.Code, §§ 197, 204, 213.

10. Guardian and Ward ⇐4

Parents are natural guardians of their child and are responsible to the state for child's well-being.

11. Parent and Child ⇐2(1)

Parent has authority to control child, and to administer restraint and punishment in order to compel obedience to reasonable and necessary directions.

12. Marriage ⇐58(1)

A marriage entered into by a male under age of 18 years without written consent of one of his parents is subject to annulment at instance of parents. West's Ann.Civ.Code, § 82, subd. 1; § 83, subd. 1.

13. Marriage ⇐19, 56

Civil Code section requiring written consent of parent to marriage of male under age of 18 years and Civil Code sections providing for annulment of marriages express policy strong enough to overcome any public interest there may be in upholding validity of marriages. West's Ann.Civ.Code, §§ 56, 82–85.

14. Bastards ⇐1

Annulment of marriage, even on ground that husband's father's consent had been obtained by false representation that husband was father of wife's unborn child, would not bastardize child born to wife. West's Ann.Civ.Code, §§ 56, 82–85.

15. Marriage ⇐60(2)

Where fraud was consummated on October 8, 1957, complaint, to cancel written consent of parent to marriage of minor and to have marriage annulled, was timely filed on January 23, 1958.

Baird, Mooney & Baird and LeRoy C. Labarre, Long Beach, for appellant.

No appearance for respondents.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in a suit to have the written consent of the parent to the marriage of a minor under the age of 18 years canceled on the ground of fraud and to have the marriage annulled.

The facts are undisputed. Plaintiff Vaughn A. Turner is the father of defendant Clifford H. Turner. Clifford was born on December 29, 1939. Clifford and Marcella E. Gilbert sought the consent of plaintiff to their marriage. They represented to him that they had "got" married in Tijuana, that they had to get married because Marcella was pregnant, and that "Clifford was the father." On October 8, 1957 plaintiff gave his written consent to the marriage of Clifford to Marcella. The representation that Clifford and Marcella had been married in Tijuana was false. Marcella was pregnant. The representation that Clifford was the father of the unborn child was false. Marcella had been pregnant about 7 months at the time Clifford first met her. He did not have intercourse with her prior to the marriage. Clifford knew at the time he made the representations to his father that they were not true. Plaintiff relied on the false representations in giving his consent to the marriage. He would not have given his consent had he known the representations were false. The written consent was filed with the county clerk of the County of Los Angeles and he issued a license.

Clifford and Marcella were married on October 15, 1957. Thus Clifford was under the age of 18 years at the time of the marriage. A child was born to Marcella on December 23, 1957. The birth certificate gives the name of the child as "Kathleen Martha Belden," the name of the father as "James Taylor Belden," Marcella's name as "Marcella E. Belden," and it was signed "Marcella E. Belden."

The complaint prayed for judgment declaring: that Clifford is not the father of the child born December 23, 1957; that the written consent of plaintiff to the marriage is null and void; and that the marriage is null and void. The defendants Clifford and Marcella defaulted. The court found that the consent of the father should not be canceled and that plaintiff is not entitled to an annulment of the marriage. The judgment was merely that plaintiff is not entitled to annul the marriage of defendants and that a decree of annulment is denied. Plaintiff appeals.

[1] Plaintiff contends that on the undisputed facts he was entitled to the relief prayed for. We have concluded his contention must be sustained.

A male under the age of 18 years is incapable of contracting a binding marriage without the written consent of one of his parents and court approval. Civil Code, section 56, provides that any male under the age of 18 years, with the consent in writing of one of his parents, where such written consent is filed with the clerk issu-

ing the license, "and where, after such showing as the superior court may require an order of said superior court is made, granting permission to said person to marry, *is capable of consenting to and consummating marriage.*" (Emphasis ours.) Civil Code, section 69, provides that the license to marry must show the ages of the parties and "If the male is under the age of 21 years, or the female is under the age of 18 years, and such person has not been previously married, no license may be issued by the county clerk unless both parties are capable of consenting to and consummating marriage as provided for in Section 56 of this code and such consent or consents must be filed by the clerk, and he must state such facts in the license."

We have a clear case of fraud: the representations were as to material facts; they were false and known to be false by the parties making them; they were made with the intent to induce plaintiff to sign the consent to the marriage; they were relied on by plaintiff; plaintiff was misled and deceived and induced to act by them; in acting, plaintiff was ignorant of the falsity of the representations and reasonably believed them to be true. 23 Cal.Jur.2d 27, § 11.

[2–4] Fraud vitiates all transactions into which it enters. Atchison T. & S. F. Ry. Co. v. West, 176 Cal. 148, 152, 167 P. 868; Millar v. Millar, 175 Cal. 797, 801–804, 167 P. 394, L.R.A.1918B. Free consent is an indispensable element of every transaction. There is no real or free consent when it is obtained through fraud; consent, clouded by fraud, is not legal consent. Civ.Code, § 1567; Butler v. Collins, 12 Cal. 457, 463. Free consent of a parent to the marriage of a male under the age of 18 years is essential to the very existence of a nonvoidable marriage.

In re Barents, 99 Cal.App.2d 748, at page 750, 222 P.2d 488, at page 490, says:

> "Responsive to the need for legislative action our Legislature has from the earliest years of statehood provided a statutory plan whereunder adoptions could be carried out. A fundamental requisite has always been the consent of the parent or parents entitled to the custody of the child and charged with the duties of caring for it. As was said by the Supreme Court in Matter of Cozza, 163 Cal. 514, 522, 126 P. 161, 164, Ann.Cas.1914A, 214: '* * * Consent lies at the foundation of statutes of adoption, and under our law this consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, unless the conditions or exceptions exist specially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or, for the exceptional causes expressly enumerated is dispensed with, the court has no jurisdiction in the matter.'
>
> "The state in its position of *parens patriae* is of course charged with a continuing interest in the welfare of children within its borders and our State has surrounded the matter of their custody and care, including their adoption, with many protective statutory laws. With regard to adoption, the statutory scheme is complete and detailed and the requisite of consent has been carefully preserved and is general, except where statutorily defined exceptions exist."

(Also see Arnold v. Howell, 98 Cal.App.2d 202, 206, 219 P.2d 854.) The same reasoning applies to the statutory requirement of the written consent of one of the parents to the marriage of a minor. It follows that the consent given by plaintiff was not free and voluntary; it was not the consent required by section 56. Consequently, Clifford was married without the consent of his parent.

[5] A consent which is not free is nevertheless not absolutely void; it is voidable and may be rescinded by the party giving the consent. Civ.Code, § 1566. Since the consent to the marriage was obtained by fraud, the marriage is voidable. Estate of Gregorson, 160 Cal. 21, 25–26, 116 P. 60,

L.R.A.1916C, 697; Easterly v. Cook, 140 Cal.App. 115, 121, 35 P.2d 164; People v. Souleotes, 26 Cal.App. 309, 310–311, 146 P. 903.

[6, 7] The written consent given by plaintiff may be canceled. Civil Code, section 3412, provides:

> "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

The remedy thus afforded manifestly includes fraud; and if the facts are proved, a case is established. Hironymous v. Hiatt, 52 Cal.App. 727, 731, 199 P. 850. The injury referred to in section 3412 is not limited to pecuniary loss; it may be the alteration of one's position to his prejudice. It is not necessary to allege or prove any pecuniary loss so long as the record indicates there was injury or prejudice resulting from the fraud. 9 Cal.Jur.2d 545, § 15. It is sufficient to show that the plaintiff is in a worse position than he otherwise would have been. Costello v. Roer, 77 Cal.App.2d 174, 179, 175 P.2d 65. In Vulcan Fire Ins. Co. v. Jorgensen, 33 Cal.App. 763, 767, 166 P. 835, 837, it was held that misrepresentations that a certain bank president was to be connected with plaintiff company "are sufficient to entitle the subscriber to rescind, without proof of pecuniary damage suffered." The court observed that this rule "is well settled." This language was quoted with approval in Munson v. Fishburn, 183 Cal. 206, 218, 190 P. 808.

[8–11] That plaintiff altered his position to his prejudice by giving his consent to the marriage is patent. The purpose of a statute providing that a marriage license shall not be issued to a person under age without the consent of a parent is to permit the parent to exercise control and discipline over a child until marriage and to that end prevent him, if possible, from contracting an ill-advised marriage. Lundstrom v. Mample, 205 Minn. 91, 285 N.W. 83, 84. The father and mother of a legitimate unmarried minor child are entitled to its custody, services, and earnings. Civ.Code, § 197. The right of a fit and proper parent to his child's custody is somewhat in the nature of a property right, and is paramount, in a sense, to the child's theoretical welfare and best interests. Shea v. Shea, 100 Cal.App.2d 60, 65, 223 P.2d 32. A parent entitled to the custody of a child has a right to change his residence. Civ.Code, § 213. The parents are the natural guardians of their child, and are responsible to the state for the child's well-being. 37 Cal.Jur.2d 145, § 7. The parent has authority to control the child, and to administer restraint and punishment, in order to compel obedience to reasonable and necessary directions. People v. Curtiss, 116 Cal.App.Supp. 771, 300 P. 801. The authority of a parent ceases on the marriage of a child. Civ.Code, § 204.

[12] A marriage entered into by a male under the age of 18 years without the written consent of one of his parents is subject to annulment at the instance of his parent. West v. West, 62 Cal.App. 541, 542–543, 217 P. 567; West v. West, 68 Cal.App. 258, 228 P. 1115; 16 Cal.Jur.2d 639, § 335. See Matter of Guardianship of Ambrose, 170 Cal. 160, 163, 149 P. 43. Civil Code, section 82, provides:

> "A marriage may be annulled for any of the following causes, existing at the time of the marriage:
>
> "One. That the party in whose behalf it is sought to have the marriage annulled was without the capability of consenting thereto as provided for in Section 56 of this code; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife."

The facts do not bring the case within this exception. Subdivision One of section 82 obviously was designed for the protection of parents. Section 83 provides:

> "An action to obtain a decree of nullity of marriage, for causes mentioned

in the preceding section, must be commenced within the periods and by the parties, as follows:

"One. For causes mentioned in subdivision one: by the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such non-aged male or female, at any time before such married minor has arrived at the age of legal consent."

Vaughan v. Gideon, 56 Cal.App.2d 158, 132 P.2d 529, is squarely in point. It was an action for annulment of a marriage brought by the father of a minor. The minor, 15 years of age, was married without the knowledge or consent of her parents. A child was born of the union about seven months after the marriage. The court stated (56 Cal.App.2d at page 161, 132 P.2d at page 531):

"Section 82 of our Civil Code, so far as material here, provides that a marriage may be annulled when the party in whose behalf it is sought was under the age of legal consent and when it was contracted without the consent of the parents. Section 83 of that code gives a parent the right to commence such an action when it is based upon that ground. The right to commence and maintain such an action would seem to carry with it a right to the relief thus provided for where the complaint is sufficient and the necessary facts are established without conflict. That is the precise situation here. * * * [56 Cal.App.2d at page 162, 132 P.2d at page 531.] When the facts contemplated by these statutes are established without contradiction, and when the evidence woud not sustain a finding of other or different material facts, if one was made, there would appear to be little room for the exercise of discretion upon the part of the trial court. Under the circumstances which here appear, it was an abuse of any possible discretion to deny all relief.

"It would appear from the record that the trial court denied any relief to the appellant largely, if not entirely, because the minor in question had sworn falsely in securing the marriage license in Arizona. * * * In the amicus curiae brief this circumstance is relied on as showing that this minor did not come into court with clean hands, which is urged as a sufficient reason for denying any relief in this case. However, this action is one brought by the father of the minor, as permitted by the statute, and while this minor admitted on the stand that she had sworn falsely in securing the marriage license this fact neither reflects upon the appellant nor affects *his separate and distinct right* to ask for and receive the remedy given him by these statutes.

"Every material fact required by these statutes was alleged and established by the evidence, there was absolutely no evidence to the contrary, and no valid reason appears for refusing the relief prayed for." (Emphasis ours.)

[13, 14] Sections 56, 82, and 83 define and establish the rights of the parties. The policy they express is strong enough to overcome any public interest there may be in upholding the validity of marriages. Sirois v. Sirois, 94 N.H. 215, 50 A.2d 88, 89. To permit a parent to be defrauded into giving his consent would be to deprive him of the control of the marital status of his child which the law has specifically given to him. The annulment of the marriage will not bastardize the child born to Marcella. A judgment of nullity of marriage does not affect the legitimacy of a child born before the judgment. Civ.Code, §§ 84, 85.

[15] There is no question of laches involved. The fraud was consummated on October 8, 1957; the complaint was filed January 23, 1958.

It was error for the trial court to arbitrarily refuse on the undisputed facts to grant the relief prayed for. Putman v.

Putman, 116 Cal.App.2d 841, 842, 254 P.2d 589; Dobson v. Dobson, 86 Cal.App.2d 13, 14, 193 P.2d 794.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

TUSTIN HEIGHTS ASSOCIATION, T. Cecil Ostrander, and F. N. Clark, Petitioners and Appellants,

v.

BOARD OF SUPERVISORS OF COUNTY OF ORANGE et al., Respondents.*

Civ. 5917.

District Court of Appeal, Fourth District, California.

Feb. 6, 1959.

Rehearing Granted March 6, 1959.

Action by property owners for writ of mandate requiring county board of supervisors to vacate and set aside order granting conditional permit for building of school allegedly contrary to applicable zoning ordinance. From adverse judgment of Superior Court of Orange County, Raymond Thompson, J., property owners appealed. The District Court of Appeal, Stone, J. pro tem., held that under county zoning ordinance permitting issuances of conditional use permits for certain buildings including schools and colleges upon approval of plans by planning commission and under ordinance authorizing board of supervisors to grant variances, such ordinances could not be said to be interdependent and ordinance respecting granting of variance could not be held applicable to ordinance respecting issuance of conditional use permits.

Reversed.

1. Counties ⇐21½, 55

County zoning ordinance permitting the issuance of conditional permits by board of supervisors for certain buildings including schools after the plans have been approved by planning commission, standing alone, required approval of planning commission as to particular uses covered and such ordinance could not be construed with another ordinance authorizing the granting of variance permits by board of supervisors since ordinances did not complement each other and were not interchangeable, and hence could not be construed together to permit granting of conditional use permits by board of supervisors without approval of plans by planning commission.

2. Counties ⇐21½

Where county zoning ordinance provided for granting of conditional permits by board of supervisors for construction of schools when plans had been approved by planning commission and application for construction of school had been submitted to planning commission which recommended to board of supervisors that they deny permit, and board subsequently authorized applicant to amend application without referring same to planning commission, and another county zoning ordinance provided that applications for conditional permits or variance permits were to be made to planning commission, board of supervisors was required to refer matter again to planning commission.

3. Constitutional Law ⇐84
Counties ⇐21½

County zoning ordinance allowing issuance of conditional permits for construction of schools after plans have been approved by the planning commission is not unconstitutional as constituting an interference with the right to free exercise of religion and education. West's Ann.Const. art. 1, § 4; U.S.C.A.Const. Amends. 1, 14.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, Milford W. Dahl, and

* Opinion vacated 339 P.2d 914.

H. Roger Howell, Santa Ana, for appellants.

Joel E. Ogle, County Counsel, and Adrian Kuyper, Asst. County Counsel, Santa Ana, for respondents Board of Supervisors of County of Orange and C. W. Donohue, Superintendent of Building and Safety for County of Orange.

Blodget, Gilbert & Cochran, Santa Ana, and Arthur M. Bradley, Santa Ana, of counsel, for respondent, The Roman Catholic Archbishop of Los Angeles.

STONE, Justice pro tem.

The respondent Board of Supervisors enacted a land use plan for Orange County entitled "The Districting Ordinance". The respondent, The Roman Catholic Archbishop of Los Angeles, petitioned the Orange County Planning Commission to permit the establishment of a church and elementary parochial school in the 100–E4 Small Estates District. After hearings, the Planning Commission recommended denial of the application on the grounds that (1) the site was not large enough to take care of students under customary state standards and also provide adequate parking space; (2) that "Material detriment or injury to the neighborhood will result from issuance of this permit."

After disapproval by the Planning Commission, the matter was submitted to the Board of Supervisors, and the Board held a hearing on May 22, 1957. On that date the Board of Supervisors heard the evidence submitted and closed the hearing with a motion to reach a decision on the application on Wednesday, May 29, 1957.

On May 29, 1957, the Board of Supervisors met, and without reopening the hearings the applicant proposed to amend the application by changing the location and number of the access roads, the size, type, number and location of the buildings, the size and location of the parking area, the size and location of the playground area and by the addition of a second parcel of real property. No formal amended application was filed either with the Planning Commission or the Board of Supervisors. The matter was continued to June 5, 1957, on which date the Board of Supervisors, without reopening the hearing, allowed the respondent applicant to file an amended plot plan and verbally amend the original application to conform to the amended plot plan. Neither the amended plot plan nor the amended application was referred to the Planning Commission. The Board of Supervisors authorized the issuance of the conditional permit on the basis of the proposed amended application and the amended plot plan.

The petitioners, T. Cecil Ostrander and F. N. Clark, are residents and property owners residing in the County of Orange and in the immediate vicinity of the property to which the conditional permit in controversy applies. Both of said petitioners, T. Cecil Ostrander and F. N. Clark, are members of the Board of Directors of petitioner, Tustin Heights Association, which is an unincorporated association. Its members are residents and property owners in the area in which the property in question is located, which is within the 100–E4 Small Estates District. Petitioners filed their petition on the basis of a representative suit on behalf of the members of the Association. They sought a writ of mandate requiring the Board of Supervisors, collectively and individually, to vacate and set aside the order of the Board of Supervisors granting the conditional permit. The petition further requested that a writ of mandate issue against C. W. Donohue, Orange County Building Superintendent of Building and Safety, to refrain from in any manner issuing a construction permit for the construction of the church and school requested in the conditional permit, and if a permit had been issued that it be revoked and rendered null and void.

This is an appeal by the petitioners, Tustin Heights Association, by Cecil Ostrander and F. N. Clark, individually and on behalf of the members of said association, from the judgment on demurrer after the

demurrer of the respondents to the second amended petition was sustained without leave to amend.

This action is concerned with four sections of the zoning ordinance pertaining to the area in which the respondent, The Roman Catholic Bishop of Los Angeles, proposed to establish a church and an elementary parochial school. Section 9.2 E4 entitled "Small Estates" District Regulations, provides, insofar as pertinent, as follows:

"A. Uses Permitted: * * *

"7. The following additional uses, subject to the issuance of Conditional Permits therefor, as prescribed in Section 19: * * *

"b. Churches, museums and libraries.

"c. Schools and colleges."

Thus conditional permits for the use of churches and schools may be issued pursuant to the ordinance, but only under the conditions provided by section 19. The applicable subsections of section 19 provide:

"Section 19. Conditional Permits and Variance Permits.

"A. Conditional Permits:

"The Board of Supervisors, after receipt of the report and the recommendation of the Planning Commission as hereinafter in this section provided shall have the power to authorize the issuance of conditional permits by the Building Inspector for specified types of uses and building in the foregoing Districts, as provided in the use regulations of such districts, under conditions which will preserve the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood. Minimum conditions therefor are specifically as follows, * *.

"7. Churches, museums and libraries, upon condition that the location and building and plot plans be approved by the Planning Commission.

"8. Schools, colleges, public playgrounds and athletic fields upon the following conditions:

"a. An area adequate in the judgment of the Planning Commission be provided to reduce possibility of injury to adjoining residential properties.

"b. Building and plot plans be approved by the Planning Commission.

"c. The location of the school site be approved by the Planning Commission."

This section standing alone requires the approval of the Planning Commission as to the particular uses covered by subdivisions 7 and 8 of section 19–A. Such approval is specifically made a "minimum condition" by the wording of division A of section 19. The trial court held that subdivision 19–A should not be interpreted independently but should be construed with section 19–B in determining whether the Board of Supervisors has the authority to grant a conditional permit without the approval of the Planning Commission as required by subdivisions 7 and 8 of section 19–A. Section 19–B, which the trial court held to be controlling, reads as follows:

"B. Variance permits:

"The Board of Supervisors, after receipt of the report and recommendation of the Planning Commission as hereinafter in this section provided, shall have the power to grant variances to the height, yard, area and use regulations of this ordinance and authorize the issuance of Variance Permits therefor by the Building Inspector, in cases where practical difficulty, unnecessary hardships or results inconsistent with the general purpose and intent of this ordinance occur through strict application of such regulations and under such conditions as said Board may deem necessary to assure that the General purpose and intent of this ordinance will be observed, public safety and welfare secured, and substantial justice done."

Subsection B clearly vests in the Board of Supervisors the authority to grant a variance when the conditions enumerated therein are shown to exist. There is nothing in Section 19–B requiring a favorable recommendation by the Planning Commission as a prerequisite to granting a variance.

[1] If section 19–B can be said to be applicable to section 19–A then the recommendation of the Planning Commission referred to in 19–A is unnecessary. However, section 19–A concerns Conditional Permits and 19–B concerns Variances and they do not complement one another nor are they interchangeable. The regulations and restrictions concerning each type of zoning are separately stated in the ordinance. No provision of the ordinance has been pointed out by either party specifically making sections 19–A and 19–B interdependent and our review of the ordinance has disclosed none. From our examination of the whole ordinance these sections do not appear to be interdependent. The distinction between a conditional permit and a variance is noted in Essick v. City of Los Angeles, 34 Cal.2d 614, at page 623, 213 P.2d 492, at page 498, wherein the court said:

"Aside from the difference in language between the variance provisions of the charter and the conditional use provisions of the Zoning Plan, which indicates the difference in character of the purposes sought to be accomplished, the case of Johnston v. Board of Supervisors (1947), supra, 31 Cal. 2d 66, 73, 187 P.2d 686, recognizes that a 'use permit' and a 'variance' are not the same and at least suggests that the granting of the latter involves a 'broader power' than does the granting of a use permit. Also, Wheeler v. Gregg (1949), supra, 90 Cal.App.2d 348 [363], 203 P.2d 37, makes the distinction with respect to the same Los Angeles ordinance which we are considering here. (See also, Thomson v. Tafel (1949), 309 Ky. 753, 218 S.W. 2d 977, 981; Illinois Bell Telephone Co. v. Fox (1949), 402 Ill. 617, 85 N. E.2d 43, 50.)"

The respondents argue that the Board of Supervisors has the power to issue a conditional permit regardless of the recommendation of the Planning Commission and without referring the amended petition back to the Planning Commission because ultimate authority rests in the Board. In essence their argument is that the powers delegated to the Planning Commission are advisory in nature and simply amount to a delegation of authority to an inferior body by a superior body, and that the superior body is the final repository of power in that area of government. Thus they contend the board is not limited to the power to approve or refuse to approve the recommendation of the Planning Commission but has the power to make an independent decision. This proposition was advanced cogently and forcefully in the dissenting opinion in Johnston v. Board of Supervisors, supra, but that theory was rejected by the majority of the court.

[2] Even though Section 19–A concerning conditional permits and 19–B concerning variances were to be construed together, the demurrer in this case should not have been sustained without leave to amend. The Planning Commission recommended to the Board of Supervisors that they deny the permit. Thereafter, on May 22, 1957, the Board of Supervisors held a public meeting and the matter was taken under submission. On May 29, 1957, respondent church amended the application by changing the locations of roads, adding additional property to the site, changing the number and locations of the buildings and the size and location of the parking area and of the playground area. The matter was continued to June 5, 1957, at which time the board made its minute order approving the granting of the permit in accordance with the amended application. The amended application was not referred to the Planning Commission after the amendments were made. Section 19–C of the ordinance specifies the procedure to be followed when an application for *either* a

conditional permit or a variance is amended and reads as follows:

"C. Procedure—Conditional Permits and Variance Permits:

"Application for a Conditional Permit or a Variance Permit shall be made to the Planning Commission. The Planning Commission shall prescribe the form, content and manner of preparing and submitting any application provided for in this section * * *.

"9. The Board of Supervisors after receipt of the report and recommendation of the Planning Commission may grant amendment of any Conditional Permit or Variance Permit and authorize the issuance of an Amended Conditional Permit or Amended Variance Permit by the County Building Inspector under the following provisions: * * *.

"e. That the application for such amendment shall be subject to the same requirements as to filing of plot plans and related information as was required in filing application for the original permit."

Thus when an application, whether it be for a conditional permit or a variance, is amended, the application as amended must be referred to the Planning Commission in accordance with 19–C 9–e. An allegation raising the question of procedure as an issue is properly pleaded in the petition. Thus the question of whether or not the board complied with the procedure specified in the ordinance is an issue regardless of whether or not the Board of Supervisors has the authority to grant either a conditional permit or a variance contrary to the recommendation of the Planning Commission. The Board of Supervisors is bound by the provisions of its own ordinance (Johnston v. Board of Supervisors, 31 Cal. 2d 66, at page 76, 187 P.2d 686, at page 692).

[3] Counsel for the respondent, The Roman Catholic Archbishop of Los Angeles, argues that the zoning ordinance violates Article I, Section 4 of the California Constitution and the First and Fourteenth Amendments to the United States Constitution in that it is an interference with the right to the free exercise of religion and education. These arguments were presented in the case of Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal.App.2d 656, 203 P.2d 823, construing a zoning ordinance which prohibited the building of a church in an area zoned for single family dwellings. In answer to the contention that the zoning ordinance interfered with religious worship the court held that the enactment of zoning ordinances is a valid exercise of the police power of the state, the purpose of which is to promote the public health, safety, morals and general welfare. The court specifically held that zoning ordinances do not offend the constitutional right of freedom of religious worship in the following language at page 660 of 90 Cal.App.2d, at page 825 of 203 P.2d:

"We find no merit in plaintiff's contention that the application of the ordinance to the plaintiff results in an unwarranted restriction of religious worship. The petitioner is not a congregation, but holds its property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the State, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose."

The judgment is reversed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.

167 Cal.App.2d 758

Lionel Hayes UHLMANN, Jr., and Frank L. Hatch, as Executor of the Estate of John Burke, Deceased (substituted as party plaintiff in place and stead of John Burke), Plaintiffs and Appellants,

v.

NORTH WHITTIER HIGHLANDS, INC., and Herbert Shapiro, Doe Corporation, Roe Corporation, Doe One, Doe Two, Doe Three, Doe Four and Doe Five, Defendants.

North Whittier Highlands, Inc., Respondent.

Civ. 23410.

District Court of Appeal, Second District, Division 1, California.

Feb. 10, 1959.

Hearing Denied April 8, 1959.

Action by broker against corporate landowner and its president to recover commissions under oral contract whereby broker was employed to obtain certain grocery store as tenant for market to be constructed on corporation's property on terms and conditions satisfactory to corporation. From adverse judgment of the Superior Court of Los Angeles County, Joseph L. Call, J., broker appealed. The District Court of Appeal, Lillie, J., held that there was substantial evidence to sustain finding that there had been no meeting of the minds between corporation and grocery store which had negotiated for construction of a grocery store that was admittedly beyond the financial capacity of corporation, and that corporation had not done anything to frustrate or prevent performance of contract by broker.

Affirmed.

1. Appeal and Error ⇐931(1)

On appeal, evidence would be construed most strongly in favor of respondent.

2. Brokers ⇐40

Right of broker to recover commission must be measured by terms of his contract and broker may by special agreement make his commission dependent upon a contingency or happening of a condition precedent, and unless such contingency occurs or such condition happens, he has no right of recovery.

3. Brokers ⇐49(1)

For broker to recover commission, there must be a substantial observance of the terms of the contract.

4. Brokers ⇐86(1)

In action to recover broker's commission based on oral contract by which landowners employed broker to obtain certain grocery store as tenant for a market to be constructed on owner's property, on terms and conditions satisfactory to owner, where testimony disclosed that broker conducted negotiations between owner and grocery store relative to terms and conditions of lease, and grocery store submitted a counterproposal conditioned on owner's acceptance of its terms which modified owner's prior proposal, but owner refused to accept such terms, broker failed to sustain burden of showing that it had obtained grocery store as a tenant on terms or conditions satisfactory to owner.

5. Brokers ⇐52

Before broker is entitled to compensation, negotiations which he is authorized to make must be concluded or conducted to state where, as to all material or essential terms of sale, there is a meeting of minds or an agreement between principal and customer produced by him, but if principal and customer are unable to come to terms, broker cannot recover.

6. Brokers ⇐49(2)

Acceptance of owner's offer to lease must be unconditional in order that broker be entitled to a commission for procuring a tenant.

7. Brokers ⇐84(1)

Where broker sought to recover commission based upon oral contract with landowner to obtain grocery store as tenant for market to be constructed on owner's property on terms and conditions satisfactory to owner, in order to recover, broker had burden of proving he fully executed contract and nothing remained to be done but to pay the commission or in absence of such

showing, that complete performance was prevented by owner.

8. Brokers ⇐86(1)

In action to recover brokerage commission from landowner based upon oral contract whereby broker was employed by landowner to obtain designated grocery store as tenant for a market to be constructed on owner's property on terms and conditions satisfactory to owner, where testimony showed that the financial ability of owner prevented construction of market as desired by grocery store, there was substantial evidence to support finding that owner did not frustrate and prevent broker's performance of contract.

9. Appeal and Error ⇐989, 1010(1), 1011(1)

In reviewing evidence on appeal, it is not function of court to weigh it, determine credibility of witnesses or to resolve factual conflicts, and if there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court, appellate court is bound thereby.

10. Appeal and Error ⇐927(3), 989

In reviewing contention that trial court erred in granting defendant's motion for nonsuit, appellate court views evidence in light most favorable to plaintiff, disregards that which is unfavorable and draws every reasonable inference therefrom in plaintiff's favor.

11. Brokers ⇐84(1)

Where broker sued president of corporation individually for commission allegedly due on contract to procure tenant for building contemplated to be erected on corporation's property, burden was upon broker to prove that president acted in his individual capacity.

12. Brokers ⇐86(1)

In broker's action to recover commissions from corporate landowner and its president under oral contract between broker and president by which broker was employed to obtain tenant for market to be constructed on corporation's property on terms and conditions satisfactory to corporation, there was substantial evidence to support finding that corporate president acted as officer of corporation and not individually in negotiations with broker and in his discussions on behalf of corporation.

Max Fink, Cyrus Levinthal, Emmet G. Lavery, Jr., Los Angeles, for appellants.

Fleming, Robbins & Tinsman, C. S. Tinsman, Clay Robbins, Los Angeles, for respondent.

LILLIE, Justice.

This is an appeal from a judgment in defendant's favor arising out of an action to recover a broker's commission based upon full performance of an oral contract; or, in the alternative, the reasonable value of services rendered on the theory that full performance was prevented by defendants.

On pre-trial, the parties entered into a written stipulation wherein they agreed, among other things, that plaintiff Burke (a licensed real estate broker) was employed in March, 1955, by defendant North Whittier Highlands, Inc. to obtain Shopping Bag Food Stores as a lessee for a market to be constructed on defendant's property "on terms and conditions satisfactory to the defendant, North Whittier Highlands, Inc."; that defendant Shapiro, its president (a licensed contractor), handled the negotiations and discussions on behalf of the corporation; that it was understood between the corporation and Burke that if a lease with Shopping Bag Food Stores was obtained "on terms and conditions satisfactory to North Whittier Highlands, Inc." it would be obligated to pay a broker's commission for securing the same.

At the conclusion of plaintiffs' case, the trial court granted a nonsuit as to defendant Shapiro and, after further admission of evidence, rendered judgment for North Whittier Highlands, Inc. It found there was no meeting of the minds on the terms of a lease or type of building to be constructed; no lease was entered into or executed between defendant and Shopping

Bag Food Stores; plaintiffs did not perform their undertaking to procure Shopping Bag Food Stores as a lessee for the market to be constructed on terms and conditions satisfactory to defendant; plaintiffs earned no commission; and defendant did not prevent or frustrate performance by plaintiffs and did not, without cause, fail to consummate and withdraw from the lease arrangement.

[1] Although there is sharp conflict on many points raised in the testimony, in construing the evidence most strongly in favor of respondent (Crisci v. Sorci, 115 Cal.App.2d 76, 251 P.2d 383; Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 280 P.2d 187), the following is a fair summary of the facts pertinent to the issues raised herein.

In March, 1955, North Whittier Highlands, Inc., (hereinafter referred to as defendant) under an oral contract, employed Burke, now deceased, to obtain Shopping Bag Food Stores as a lessee for a market to be constructed by defendant on certain of its real property on "terms and conditions satisfactory to the defendant, North Whittier Highlands, Inc.," on a lease on "terms and conditions satisfactory" to defendant. Shortly thereafter, with defendant's consent, and at the insistence of Mr. Hayden, President of Shopping Bag, Burke associated plaintiff Uhlmann to assist him in the negotiations. Uhlmann was familiar with Shopping Bag's needs, having already conferred with Hayden and taken him to inspect the location, and having discussed the "kind of deal" Shopping Bag would make with defendant. Hayden offered $26,400 minimum rental on a building to be constructed by defendant and told Uhlmann this was "absolute top."

Following negotiations between plaintiffs and Hayden, defendant, on March 30, 1955, submitted to Shopping Bag a written offer (Exhibit 5) for the lease of a building to be constructed by defendant, which offer referred to defendant's pending zoning application. Hayden rejected it as wholly unsatisfactory and admonished Uhlmann for bringing it to him.

On April 14, 1955, defendant submitted a second written offer of lease (Exhibit 2) based on its proposal to construct a market costing an estimated $275,000. This, too, was unsatisfactory to Shopping Bag.

However, on April 18, 1955, Shopping Bag, by letter, submitted to defendant *its* proposal (Exhibit 3) consisting of a counteroffer, setting forth the terms and conditions upon which it would be willing to enter into a lease, and proposing that defendant either accept it according to "the terms and conditions" therein, reducing the same to a formal lease within 60 days, or use the letter as Shopping Bag's acceptance of defendant's offer of April 14 "as modified" by its terms and conditions. Defendant protested the terms as not acceptable and, in an attempt to resolve defendant's objections, Uhlmann arranged a conference at Shopping Bag's offices on May 5, 1955, at which Burke, Uhlmann, Shapiro, Hayden and a Mr. Holland were present.

The evidence is in conflict as to what occurred at this meeting, but viewing it in the light most favorable to respondent, it is clear that a discussion of defendant's finances took place. Hayden insisted that defendant build a market, similar to Shopping Bag's new Palmdale store, of brick construction with a unit for refrigeration, air-conditioning and heat, and other features not in the contemplation of defendant's plans. Shapiro advised those present that defendant had only $50,000 or $60,000 of its own cash to invest in a building. Based on the $26,400 minimum rental previously fixed by Shopping Bag, Hayden told him defendant could expect a loan of between $210,000 and $215,000, but that a larger loan was not possible. Knowing that the $26,400 was the most he could expect as minimum rental from Shopping Bag, Shapiro made it clear that the maximum of $60,000 cash, together with the $215,000 loan, making a total of $275,000, was defendant's limit for construction of the market. He stated he believed the cost of the building on which Hayden insisted would exceed the $275,000 limit and defendant could go no further with the deal until the

cost of such building could be obtained. Hayden said he would authorize Shopping Bag's contractor, Mr. Hahn, to disclose the cost figures to defendant.

On May 11, 1955, Hahn advised Shapiro that the building would cost in excess of $300,000, of which Shapiro shortly thereafter informed Uhlmann. Defendant, before March 30, and on May 5, having fully presented the facts concerning its financial ability, plaintiffs then knew defendant could not execute a lease which would bind it to construct a building at such a cost.

At this point, the record is silent concerning any effort on the part of plaintiffs to influence Shopping Bag to reduce its demands or waive any of its requirements; nor does the evidence disclose that plaintiffs in any way sought to aid their principal by requesting Shopping Bag to increase the minimum rental or by working out a new proposal.

Negotiations having failed to materialize an agreement, defendant opened them with Fitzsimmons Thriftimart Markets, and on June 16, 1955, executed a formal lease on a building to be constructed by defendant on the same property.

Appellants contend there is no substantial evidence to support the trial court's finding that there was never a meeting of minds between defendant and Shopping Bag, and the counteroffer of April 18 was not accepted. They argue that although a formal lease was not executed, an agreement to lease and construct a building arose out of defendant's use of a copy of Shopping Bag's counteroffer of April 18 for zoning purposes.

[2–4] Considering for the moment plaintiffs' oral contract of employment, before any obligation to pay a commission could arise, plaintiffs must obtain Shopping Bag as a lessee on "terms and conditions satisfactory" to defendant, for a market to be constructed on "terms and conditions satisfactory" to defendant. (Statement on Pre-Trial.) As stated in Ridgway v. Chase, 122 Cal.App.2d 840, at page 847, 265 P.2d 603, at page 607: "(t)he right of a broker to recover a commission must be measured by the terms of his contract. (Citations.) A broker may, by special agreement, make his commission dependent upon a contingency or the happening of a condition precedent, and unless such contingency occurs or such condition happens, he has no right of recovery. Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 157, 245 P.2d 650." As to performance, the courts require substantial observance of the terms of the contract (Cochran v. Ellsworth, 126 Cal.App.2d 429, 272 P.2d 904). Said the court therein at page 439 of 126 Cal.App. 2d, at page 910 of 272 P.2d: "(W)hen a condition precedent is adopted by the parties to a contract, the court will exact a substantial if not a strict observance of the provisions before finding liability. Peterson v. Montgomery Holding Co., 89 Cal. App.2d 890, 894, 202 P.2d 365." McKenzie v. Scottish Union & National Ins. Co., 112 Cal. 548, 556, 44 P. 922. Therefore, before plaintiffs can recover a commission they must prove they obtained Shopping Bag as a lessee on terms and conditions satisfactory to defendant, for a market to be constructed on terms and conditions satisfactory to defendant. That plaintiffs have failed to sustain their burden of proving these contingencies occurred to entitle them to a lease commission, is clear from the record before us.

Shopping Bag's proposal of April 18 constituted a counteroffer. It was conditional on defendant's acceptance of its terms and did not constitute Shopping Bag's unqualified acceptance of defendant's offer of April 14, which it had already rejected. For any agreement to arise out of the counteroffer, by its very terms, either defendant had to accept the terms and conditions set forth therein, or use it as Shopping Bag's acceptance of defendant's offer of April 14 "as modified" by the terms of the counteroffer. In any event, defendant had to agree to Shopping Bag's conditions.

[5] It is generally recognized that "(B)efore a broker is entitled to compensation, the negotiations which he is author-

ized to make must be concluded or conducted to the state where, as to all material or essential terms of the sale, there is a meeting of the minds or an agreement between the principal and the customer produced by him; but if the principal and the customer are unable to come to terms, the broker cannot recover. (Citations.)" Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 307, 266 P.2d 856, 861.

[6] The record amply supports the finding that the parties were unable to and did not come to terms. Negotiations were never concluded or conducted to a point where any of the essential terms of the counteroffer, which varied materially from those proposed by defendant on April 14, were agreed upon. These terms were basic, going to the very foundation of Shopping Bag's proposed agreement, relating to the proposed building, its rental, cost, construction, specifications, and so on. Certainly those proposed by defendant, based upon a $275,000 building were never unconditionally accepted by Shopping Bag; nor were those proposed by Shopping Bag accepted by defendant. "The acceptance of the owner's offer to lease must be unconditional to entitle a broker to a commission." Jacobs v. Schneider, 152 Cal.App.2d 452, 457, 313 P.2d 142, 145; Edwards v. Billow, 31 Cal.2d 350, 188 P.2d 748.

In consideration of the terms of the employment contract, it is obvious that the cases holding that where a broker produces a person who is ready, willing and able to consummate a lease, he has earned his commission, are not in point. Nor is Mann v. Mueller, 140 Cal.App.2d 481, 295 P.2d 421, relied upon by plaintiffs, where the essential provisions had been agreed to and only the formal lease had to be prepared.

Conceding that no formal written lease was ever executed, plaintiffs claim that in presenting to the Planning Commission a letter written by defendant, dated May 5, 1955, enclosing a photostatic copy of the counteroffer of April 18, and advising the Commission it had entered into a lease with Shopping Bag, defendant "used" the counteroffer in a manner constituting an acceptance of its terms. We find no substantial support for this contention either in the record before us or in the law of this state.

The evidence shows that for some time defendant had pending before the Planning Commission its request for additional C–4 zoning. In its original offer of March 30, defendant sought Shopping Bag's cooperation in the matter, which it rejected. On May 5, after the conference, "in an effort to get additional zoning for parking" (Appellants' Opening Brief, page 4) and for the purpose of showing a demand for a shopping center in the area so additional commercial zoning could be obtained, defendant wrote a letter directed to Robert Groman, Chairman (Exhibit 7), informing the Commission that since its case was originally heard by it "an agreement has been reached with Shopping Bag Market Stores, on the terms of a lease * * *" and enclosing a photostatic copy of Shopping Bag's "letter of acceptance to our proposal to lease."

In arguing that the letter not only declares an agreement to lease was entered into, but that defendant's use of the photostatic copy of the counteroffer constituted its acceptance thereof, appellants lose sight of the substantial evidence in the record showing defendant's lack of intention and ability to be bound by the terms of the counteroffer. Plaintiff Burke, himself, personally presented defendant's letter to the Commission. He could not have helped but know the sole reason for its presentation—to favorably influence the Commission's action; and that the negotiating parties were nowhere near a meeting of the minds, having immediately before, on the same day, attended the conference of May 5. Plaintiffs were familiar with Shopping Bag's operations and long before April 14 knew what "kind of a deal" it would make with defendant. They knew their principal's financial ability—its source and limits under the $26,400 minimum rental Shopping Bag had offered. If any doubt existed in this matter, it was made abundantly clear to all parties at the May 5 conference that

defendant simply could not accede to Shopping Bag's demand to build a market in excess of $275,000. Defendant having already declared its financial position and limitation to a $275,000 construction, it is a reasonable inference from this, and other evidence, that both plaintiffs and defendant knew from Hayden's conversation the cost would be in excess of $275,000 and defendant could not and would not be able to meet his terms; yet it delayed rejecting them until it was certain the costs were not around the $275,000 figure. Between May 5 and May 11, when defendant finally determined the cost would exceed $300,000, all parties knew the terms were still under discussion.

As to the "use" contemplated by Shopping Bag to constitute an acceptance, the counteroffer provided: "* * * that the terms and conditions proposed herein be reduced to a formal lease within 60 days from the date of this letter. Otherwise, you may use this letter as our acceptance of your proposal of April 14, 1955, as modified herein." It is clear from this writing that the "use" as an acceptance was intended to apply only between the parties, not between defendant and a stranger; that the "use" for zoning purposes was not within the consideration of Shopping Bag since zoning was a collateral matter to the counteroffer, Shopping Bag having already rejected defendant's request to aid it in its zoning program; that defendant could, if it so desired, consider the letter as Shopping Bag's acceptance of defendant's April 14 offer as modified therein and not, as contended by plaintiffs, defendant's acceptance of the counteroffer; that however the term "use" might be construed, and the ultimate agreement might arise, the *only* "deal" Shopping Bag would make was one incorporating its own terms. Defendant's dissatisfaction with, refusal to accept, and inability to comply with Shopping Bag's terms are supported by substantial evidence. Nor have plaintiffs pointed out any place in the record wherein Hayden, or anyone else, on behalf of Shopping Bag, seeks to be bound by any "acceptance" of defendant. The "use" was never communicated by defendant to Shopping Bag and the parties at no time conducted themselves toward each other as ever having agreed. As between the two corporations, there is no claim that any agreement to lease or lease exists. Certainly no one on behalf of Shopping Bag so testified.

On May 25, 1955, defendant wrote another letter to Groman (Exhibit 9) in part stating: "We want to affirm that this is not a speculative deal in any manner whatever. We have a lease with a national super mar ket, a chain, for a 30,000 square foot market. We will invest $300,000 in this market. * * *" The trial court obviously believed the testimony of Shapiro that the "lease with a major super market" referred not to one with Shopping Bag, but with Thriftimart, with which defendant then had "a complete meeting of the minds on all terms and conditions." Nothing in the letter refers to Shopping Bag, and in view of his testimony and other evidence in the record, we cannot accept the plaintiffs' construction of the word "affirm" as a reaffirmation that an agreement had been reached with Shopping Bag. It means no more than that defendant wanted to positively state to the Commission that the deal it had (with Thriftimart) was not speculative. It could not refer to a nonexistent lease with Shopping Bag on a building to be constructed at a cost of $343,000. There is no more in the record to infer Shopping Bag reduced its demand to $300,000, than that it reduced it to the $275,000 defendant could afford. This letter, too, was written, as admitted by appellants "as a part of the defendant's continued program to obtain zoning for additional parking facilities."

Appellants claim that the only evidence Shopping Bag's proposed market would cost in excess of $300,000 came into the record by way of Shapiro's testimony concerning a conversation with Hahn, which constituted inadmissible hearsay. They argue Hahn was not called as a witness and the evidence of cost rested solely upon his veracity and competency. In the first

place, it was Hayden, President of Shopping Bag, who on May 5, in the presence of both plaintiffs, authorized Hahn, its contractor, to talk to Shapiro concerning the cost, after which Shapiro related it to Uhlmann. Secondly, whether Hahn was correct in his estimate of over $300,000, and the figure is factually true, is not the important factor here involved—but that the figure, accurately or not, was actually given. This goes to the question of defendant's intent and good faith which has been repeatedly questioned by plaintiffs. Hahn was present in Los Angeles at the time of trial and if plaintiffs doubted that a conversation took place, or that the $300,000 plus figure was given, plaintiffs could have called him as a witness since he was as available to them as to the defendant. They chose not to do so.

Plaintiffs cite Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495 and Standard Iron Works v. Globe Jewelry & Loan Inc., 164 Cal.App.2d 108, 330 P.2d 271, for the proposition that the conduct of an offeree may constitute an acceptance of an offer resulting in a binding contract. In the case at bar we are faced not only with circumstances entirely incompatible with conduct of acceptance, but with an action between one party and a third in which the original negotiating parties themselves do not seek to be bound.

[7] The trial court's finding that there was no meeting of the minds and the counteroffer was not accepted is amply supported by substantial evidence in the record before us. Plaintiffs had the burden of proving they fully executed their contract and that nothing remained to be done but to pay the commission; or in the absence of such showing, that complete performance was prevented by defendant. Plaintiffs did not sustain their burden of proof on the issue of full performance and having failed to perform their undertaking to procure Shopping Bag as a lessee under the terms of their contract, they are not entitled to a commission (Jacobs v. Schneider, 152 Cal.App.2d 452, 313 P.2d 142).

This brings us to appellants' second contention that plaintiffs' complete performance of the contract was prevented by defendant and that the trial court's finding to the contrary is without evidentiary support. They refer to the rule and cases in support thereof, that even though a broker's commission is absolutely dependent upon the consummation of a transaction, the principal may not defeat the broker's right thereto by acting in bad faith and preventing the completion of the transaction.

[8] In the instant case, this issue is primarily factual and we are concerned only with the question whether the court's finding that defendant did not frustrate and prevent plaintiffs' performance of the contract is supported by substantial evidence. We hold that it is.

Plaintiffs argue that under the counteroffer of April 18, 1955, Shopping Bag gave defendant 60 days within which to accept its terms, and before the 60-day period expired, defendant negotiated with Thriftimart and executed a lease on the same property on June 16, 1955, without the knowledge of plaintiffs or Shopping Bag, thereby preventing plaintiffs' negotiation of the lease.

Of course, the 60-day period mentioned could not concern defendant unless it intended to accept the counteroffer, and, since it did not, it could not prevent defendant's negotiations with someone else. Free to deal with another, defendant had no duty to inform plaintiffs who, as defendant's agents, and closely associated with Shopping Bag, must have known nothing further was pending between them. Nowhere in the record is there any showing that had defendant not executed a lease with Thriftimart, Shopping Bag would have acceded to the terms of defendant's offer resulting in a lease, or that plaintiffs could have presented, or did offer, to defendant a Shopping Bag lease which would have been satisfactory to it.

The evidence shows that negotiations between Shopping Bag and defendant failed,

not because of any wilful fault or prevention on the part of defendant, but because Shopping Bag's proposed lease and market were not on "terms and conditions satisfactory" to defendant. Because of the counteroffer, defendant was no longer under any obligation to proceed further under its offer of April 14, nor was it obliged to continue discussion with Shopping Bag under its counteroffer after it was obvious to all it could not, and would not, accept its terms.

Unless it can be said that defendant wilfully prevented plaintiffs' performance of the contract merely by failing to come to terms and by being unable to meet Shopping Bag's demands to construct, through an outside contractor, a brick building with special heating and cooling unit and other features, in excess of $78,000 over the amount to which all parties knew defendant was limited, we fail to perceive in what way defendant could be guilty of any fault actionable under the law. Failure of negotiations in which there is merely an inability to agree on terms, cannot constitute the kind of "fault" or "bad faith" or "unfair and dishonest dealing" expressed by our courts in the cases cited by appellants. We briefly list appellants "illustrations of bad faith" on the part of defendant: (1) after using the counteroffer for zoning purposes, defendant now contends it never accepted Shopping Bag's counteroffer and no negotiations were pending after their meeting of May 5; (2) by letter of May 12, Uhlmann submitted to defendant a form of lease used by Shopping Bag for its consideration; that neither defendant nor its counsel examined it and Shapiro led him, after "repeated inquiries" to believe otherwise; (3) following May 5, plaintiffs continued to act for defendant by attempting to secure ice cream concessions and a coffee shop for the balance of defendant's proposed shopping center and continued their efforts to obtain additional zoning; and (4) defendant did not attempt to withdraw from Shopping Bag's negotiations until its letter of June 27, 1955.

[9] We again refer to the rule that in reviewing the evidence on appeal, it is not the function of this court to weigh it, determine the credibility of the witnesses or resolve factual conflicts. If there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court, we are bound thereby (Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886.)

Although plaintiffs claim they continued to act for defendant in connection with its shopping center and zoning application, nothing in the record discloses that plaintiffs ever did anything after May 11 *in furtherance of the proposed lease.* Plaintiff, with knowledge that the $26,400 minimum rental fixed by Shopping Bag prevented defendant from obtaining a loan in excess of $215,000, made no effort to influence Shopping Bag to increase the amount in order to expedite a larger loan, to approve the terms proposed by defendant, or to waive the conditions demanded by it in its counteroffer; nor is there any evidence plaintiffs thereafter attempted to obtain Shopping Bag's consent to accept the type of building defendant could afford to construct, or advised defendant that they could negotiate a satisfactory lease with Shopping Bag. If plaintiffs knew they could negotiate a lease with Shopping Bag on terms and conditions favorable to defendant after May 11, they did not communicate such fact to their principal. Plaintiffs' alleged activities in attempting to secure ice cream concessions and a coffee shop for defendant's proposed shopping center, and additional zoning, do not appear to have been in furtherance of the lease negotiations with Shopping Bag, particularly in view of the basic reason for their failure to agree.

As to the lease plaintiffs submitted to defendant on May 12, the trial court was justified in believing the testimony of Shapiro, who denied Uhlmann made inquiries of him concerning it during May, 1955. Reasonable inferences from Uhl-

mann's letter of June 13, 1955, would seem to bear this out. In any event, we fail to see the materiality of this matter for the lease was no more than an incompleted "Standard Form" generally used by Shopping Bag. It contained none of the terms and conditions discussed by either party. As to the June 27 letter to Shopping Bag, from all of the circumstances it could constitute little more than an act of courtesy. We are convinced that defendant's negotiations ended May 11 only because the parties could not come to terms, and no further efforts, particularly on the part of plaintiffs were made toward renewing the same.

Appellants repeatedly charge defendant with bad faith, misdealing and surreptitious conduct. We note from the record that plaintiff Uhlmann, who was familiar with Shopping Bag's operations and dealt with it considerably before March 30, 1955, and who was associated with Burke at the request of Shopping Bag, is now employed by Shopping Bag Food Stores as the officer in charge of real estate. At all times, Uhlmann knew the "kind of deal" Shopping Bag would make and that the cost of the building it demanded would exceed $300,000, yet in preparing the draft of its offer of April 14 for defendant, he omitted entirely any reference to his principal $275,000 limitation, which he well knew was the basis of the offer. Despite Uhlmann's failure to include it, defendant did so and Shopping Bag refused to accept the offer. It is apparent that plaintiffs, with full knowledge their principal could not meet such demands, were willing to obligate it to a contract in excess of its ability to perform. Prior to March 30, Uhlmann and Hayden had conferred considerably concerning the terms of a lease Shopping Bag would offer defendant—in fact, when Uhlmann submitted defendant's offer of March 30, Hayden admonished him for bothering him with it when he (Uhlmann) knew he was "not going to accept it," and had already been told the only "kind of deal" Shopping Bag would make. Facts as to defendant's financial ability were fully presented to both plaintiffs prior to March 30 and during the May 5 conference. In any event, it is unrealistic to even suggest that having undertaken to represent defendant they would not have known the financial position of their principal at all times. In view of Uhlmann's connection and prior dealings with Shopping Bag, it is inconceivable to us that he did not at all times know exactly what it demanded, and how much the building it wanted would cost. Perhaps he realized long before the negotiating parties that they would never be able to agree. The trial court undoubtedly took the matter of the relationship of the parties, as well as plaintiff Uhlmann's good faith, into consideration in determining the credibility of the witnesses and weighing the evidence.

[10] Appellants finally contend that the trial court erred in granting Shapiro's motion for nonsuit. In this connection we view the evidence in a light most favorable to plaintiffs, disregard that which is unfavorable and draw every reasonable inference therefrom in plaintiffs' favor. Having done so, we find no error.

[11, 12] Plaintiffs argue that Burke, having been hired by Shapiro pursuant to an oral contract and no proof having been offered that he was not acting on his own behalf, as well as on behalf of the corporate defendant, it may reasonably be inferred the agreement was with Shapiro individually. Since Herbert Shapiro was sued individually, the burden was upon plaintiffs to prove he acted in that capacity. This they did not do. Plaintiffs stipulated on pretrial "that Herbert Shapiro is the president of North Whittier Highlands, Inc., and handled the negotiations and discussions on behalf of said corporation." This, of course, would not preclude proof he also acted individually, but we are unable to find in the record any evidence offered in support of their allegation. Nor have appellants pointed out any evidence to substantiate their claim of error. In fact, their own Statement of Facts points to the contrary. It mentions no employment by

Shapiro, but declares that plaintiff Burke was employed by North Whittier Highlands, Inc., as does their stipulation of facts on pre-trial "(T)hat plaintiff Burke was employed during the month of March, 1955, *by defendant* North Whittier Highlands, Inc. * * *" and "it was understood between the *corporation* and said broker * * * *it* would be obligated. * * *" (Emphasis added.) The so-called lease plaintiffs claim they sent to Shapiro as an individual on May 12, and which he did not submit to the corporation, was merely the "Standard Form" of lease generally used by Shopping Bag, unsigned, containing none of the terms and conditions discussed between defendant and Shopping Bag; and addressed to Shapiro, not individually, but as president of the corporation.

Although plaintiffs declare the judgment of dismissal on motion for nonsuit was "wholly unsupported by the evidence" they have failed to demonstrate in what way the evidence would sustain a judgment against Herbert Shapiro individually.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

167 Cal.App.2d 616

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert JUSTICE, Defendant and Appellant.

Cr. 6103.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1959.

Hearing Denied April 1, 1959.

Defendant was convicted on two counts of selling heroin. The Superior Court of Los Angeles County, Herbert V. Walker, J., rendered judgment, and defendant appealed. The District Court of Appeal, Lillie, J., held that where defendant failed to point out the alleged conflict between testimony of sheriff's undercover operator and that given at preliminary hearing, and in what manner evidence was not substantial to support the judgment, and what particular evidence was insufficient to sustain verdict, it would be assumed that there was sufficient substantial evidence to support conviction.

Affirmed.

1. Criminal Law ⇐1144(13)

Where appellant contended that reporter's transcript of trial court proceeding was replete with contradictions, changed testimony and explanations thereof and that state's witness' testimony varied considerably from that given at preliminary hearing but neither appellant's statement of facts nor his argument made specific references to record either by page or line, and appellant failed to point out alleged conflict in testimony, or in what manner evidence was not substantial to support judgment or insufficient to sustain verdict, it would be assumed that there was sufficient substantial evidence to support conviction. West's Ann.Rules on Appeal, rule 15(a).

2. Poisons ⇐9

Evidence sustained conviction of selling heroin. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⇐1141(2)

Appellant is under an affirmative duty to show error, and it is not proper to attempt to shift burden upon court or respondent who is under no duty to assume burden of demonstrating that judgment is supported, in absence of proper attack upon it. West's Ann.Rules on Appeal, rule 15(a).

4. Poisons ⇐9

In prosecution for selling heroin to a sheriff's undercover operator, undercover operator's testimony with respect to transactions was not inherently improbable or apparently false and was competent. West's Ann.Health & Safety Code, § 11500.

5. Criminal Law ⇐260(11)

It is function of trial court, not reviewing court, to resolve inconsistencies

and contradictions in testimony, and trier of fact may believe and accept portion of testimony of witness and disbelieve remainder, but on appeal that portion which supports judgment must be accepted, not that portion which would defeat or tend to defeat the judgment.

6. Criminal Law ⇐1115(1)

Where appellant contended that refusal of sheriff's undercover operator to name his informant at preliminary hearing deprived appellant of his constitutional rights, but record of proceedings of preliminary hearing was not before reviewing court, alleged error in preliminary hearing could not be considered.

7. Criminal Law ⇐1115(1)

Where transcript of testimony received at preliminary hearing is not made part of record in Superior Court, any alleged error in preliminary hearing cannot be considered on appeal.

8. Criminal Law ⇐1114(1)

Fact that defendant interjected point not represented by record into appeal by way of opening brief did not change rule that such matters could not be considered by reviewing court on suggestion of counsel in their briefs.

9. Criminal Law ⇐1166(1)

Where name of informant was disclosed by people at defendant's trial and defendant himself voluntarily revealed in his own testimony that he knew informant and was with him on date on which defendant allegedly sold heroin and there was no showing that defendant planned or wanted to call informant as a witness or tried or was unable to locate him, alleged refusal of sheriff's undercover operator to name informant at preliminary hearing was not prejudicial. West's Ann.Health & Safety Code, § 11500.

10. Criminal Law ⇐1166½(4)

Where it was obvious that the first of two off-the-record discussions held by court and counsel involved defendant's own counsel's request to exclude from courtroom all witnesses who would testify and second referred to court's suggestion that a recess be taken, fact that defendant was not present during discussions did not require reversal.

11. Criminal Law ⇐1035(3)

Where two off-the-record discussions between court and counsel were held so that jury did not hear them, defendant's attorney was present at all times and participated in both conversations, neither defendant nor his counsel at any time objected to them in trial court, and conversations did not relate to issue of guilt, conversations were not prejudicial to defendant.

12. Criminal Law ⇐1163(2)

It was for defendant to show any prejudice resulting to him from off-the-record discussions held between court and counsel.

Claude Vibart Worrell, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was convicted of two counts of selling heroin to Joseph A. Brown in violation of Section 11500, Health and Safety Code, and sentenced to the state prison. He appeals therefrom, contending that the evidence is insufficient to support the judgment; Brown's testimony was "untrustworthy" and "perjurious" and therefore "not competent"; at the preliminary hearing the court denied him the right to learn the name of the informant; and two unreported conferences at the bench deprived him of due process of law.

[1] Although, in connection with the first two contentions, he declares the reporter's transcript to be "replete with contradictions, changed testimony and explanations thereof" and that Brown's testimony varied considerably from that given at the preliminary hearing, appellant seeks to avoid his responsibility of supporting his allegations with references to the record, by stating without further argument "(t)hese instances are so numerous that

only a complete reading of Brown's testimony would satisfy the appellant (sic) contentions, hence no referrals to specific pages of the Reporter's Transcript." Of course, such a method of proceeding on appeal is wholly inadequate for not only has appellant failed to comply with Rule 15(a), Rules on Appeal, requiring "(T)he statement of any matter in the record shall be supported by appropriate reference to the record," but he has ignored the general rule that the burden is upon appellant to point out any alleged error. As stated by the court in People v. Goodall, 104 Cal.App.2d 242, at page 249, 231 P.2d 119, at page 123: "It is the duty of the defendants to show error, and that means defendants are under an affirmative duty in that respect. It is not proper to attempt to shift that burden upon the court or respondent. People v. Shafer, 101 Cal.App. 2d 54, [60] 224 P.2d 778; People v. Daniels, 85 Cal.App.2d 182, 185, 192 P.2d 788." In neither his so-called "Statement of Fact," nor his argument supporting his first two contentions has appellant made any specific reference to the record either by page or line. He has failed to point out the alleged conflict in the testimony upon which he relies; in what manner the evidence was not substantial to support the judgment; and in what particular the evidence was insufficient to sustain the verdict. In the absence of any such showing, we must assume there is sufficient substantial evidence to support the conviction on both counts. "His failure to specify the prejudicial feature of the evidence must be taken to mean that there is none. (People v. Britton, 6 Cal.2d 10, 13 (56 P.2d 491); People v. Hermes, 73 Cal.App.2d 947, 950 (168 P.2d 44).)" People v. Shafer, 101 Cal.App.2d 54, 61, 224 P.2d 778, 782.

[2] Although it would appear from appellant's own "Statement of Fact" that there is ample evidence to sustain the conviction, we nevertheless have carefully examined the record and, in particular, the testimony of Joseph A. Brown, and viewing the evidence in the light most favorable to respondent, we find more than sufficient substantial evidence to support the jury's verdict.

In connection with Count 1, on September 26, 1956, Joseph A. Brown, a sheriff's undercover operator, had a conversation concerning a narcotics purchase with one Hattie Jackson in the vicinity of a cafe on 103rd street. Thereafter, he left the location and returned 3½ hours later where he saw Hattie and the defendant drive by in an automobile driven by the latter. Defendant stopped the car and Hattie walked over to Brown, who was standing on the sidewalk, where they again discussed a purchase of narcotics. Brown gave her $14 to give to defendant for a $15 paper of heroin. During this time defendant drove around the block and when he returned, Hattie got back into the car and drove away with him, leaving Brown standing on the corner. Less than ten minutes later, they returned in the car and stopped near Brown, who walked over to the driver's side. Hattie introduced him to the defendant saying, "This is Robert, he is a connection." Defendant then, saying he would sell Brown this time but in the future it would cost him $15, handed a paper of white powder, later identified by a forensic chemist to be heroin, to Hattie, who handed it to Brown. Hattie then got out of the car and stood with Brown in the street where they again engaged in a conversation. Defendant drove away.

Sheriff's deputy Stameisen kept Brown under surveillance on that day and saw him with Hattie. Fifteen minutes later he saw them standing next to an old model brown Chevrolet talking to defendant who was seated in the car.

As to Count 2, on December 11, 1956, Brown and an informant, Willis Tucker, were seated in an automobile. At 3:30 p. m., Brown saw defendant on foot. They got out of their car and walked over to him. Defendant asked him who he was and Brown responded that his name was "Buba." Defendant admonished Tucker he should know better than to bring strangers to him for he did not do business with strangers. Defendant told Brown to give

his money to Tucker, and he gave him $20. Then defendant and Tucker walked down the street alone and Brown saw Tucker hand defendant the money. They stopped walking, talked, and then defendant made a motion to his mouth and passed an object therefrom to Tucker, who made a motion toward his mouth, and left the defendant. He walked back to Brown and took from his mouth two balloons, containing what was later identified as heroin, and handed them to him.

Sheriff's deputy Caraway, who kept Brown under surveillance on this day, watched him in the company of defendant and another male negro.

On December 13, 1956, by prearrangement with defendant, Brown met him and a third party. Defendant drove them in his car around Watts for about 5 minutes during which defendant asked Brown his identity, where he lived, whom he knew who sold narcotics, and to show him the needle marks he was supposed to have. Brown was evasive and defendant told him he believed him to be the "heat" (police), and pushing an open knife blade, 3 or 4 inches long, against his side, threatened that if he was, he would "cut him damn guts out." Brown convinced him he was not the "heat" and after telling him that all he wanted to do was buy dope and not get killed, he got out of defendant's automobile and walked away.

On his defense, defendant testified he managed an auto wrecking yard and had owned no brown Chevrolet. He denied knowing Hattie, seeing Brown on September 26, 1956, or that he handled narcotics at any time. He admitted knowing Willis Tucker since Jr. High School, and said he saw him on December 11 with Brown. At one time in his testimony he said he had not seen Tucker for two or three years prior, but at another place therein, he said he had seen him 7 or 8 weeks before. He admitted Tucker asked him where he could buy some dope, but he said he did not know; and that he walked down the street with him but did not receive money from him, or sell or give him narcotics. Defendant testified he saw Brown on December 13 and rode with him and one Price, but not through prearrangement; that they talked about narcotics, but he told them he had no connection with them; that he pulled the knife because, after swearing and arguing, Brown put his hands in his pocket, and he was afraid that he, like all narcotic addicts, was desperate.

[3–5] As the alleged incompetency of Brown's testimony, appellant's contention that it "could be considered perjurious and appellant so contends that it is. This testimony so taints the trail (sic) as to render the same void," constitutes his entire argument on that point, with the exception of the citation of "Alcorta v. Texas (1957) 354 U.S. —"* which has no application. No so-called contradictions, inconsistencies or variations in Brown's testimony have been called to our attention. We again refer appellant to the general rule set forth in People v. Daniels, 85 Cal.App.2d 182, at page 185, 192 P.2d 788, at page 789: "* * * it is the duty of the appellant to show error, and that means he is under an affirmative duty in that respect. It is not proper to attempt to shift the burden upon the respondent, and the latter is under no duty to assume the burden of demonstrating that the judgments are supported in the absence of a proper attack upon them. * * *" However, having carefully examined Joseph Brown's testimony, we find nothing inherently improbable or apparently false about it and perceive no reason why it was not competent. As was said in People v. Thomas, 103 Cal.App.2d 669, at page 672, 229 P.2d 836, at page 838: "It was the function of the trial court, not this court, to resolve inconsistencies and contradictions, if any, in the testimony of Bennett. The trier of fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment." To the same effect is People v. Shaheen, 120 Cal.App.2d 629, 261 P.2d 752.

* Correct citation is 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9.

[6, 7] It is further contended "that the refusal of witness Brown to name his informant at the preliminary hearing * * * deprived the appellant of his constitutional rights." In support of this claim, appellant cites extensively from the District Court of Appeal opinion in Priestly v. Superior Court, Cal.App., 319 P.2d 796, since affirmed by the Supreme Court in 50 Cal.2d 812, 330 P.2d 39, and for the first time makes reference to a page and line of a reporter's transcript. However, the reporter's transcript to which he now refers is not a part of the record before this court. None of the proceedings on the preliminary hearing is before us and in the absence of a reporter's transcript thereof, we find no support for his contention in the record on appeal. We do not know whether defendant requested the name of the informant at the preliminary hearing; whether it was disclosed; if not, for what reason; what, if anything, was the court's ruling thereon if a request was made, or how or in what manner prejudice resulted. It is obvious, therefore, De Losa v. Superior Court, 166 Cal.App.2d 1, 332 P.2d 390, cited by appellant, is not in point. It is well settled that where the transcript of the testimony received at the preliminary hearing is not made a part of the record in the Superior Court, any alleged error in the preliminary hearing cannot be considered on appeal. In People v. McKinney, 152 Cal.App.2d 332, at page 335, 313 P.2d 163, at page 165, the court stated: "However, neither the check stubs nor preliminary transcript was made part of the record in the trial court and, therefore, may not be considered by this court. People v. Gormley, 64 Cal.App.2d 336, 338, 148 P.2d 687."

[8] The fact that defendant now injects the point, not represented by the record, into this appeal by way of an opening brief, does not change the rule that such matters cannot be considered by this court on the suggestion of counsel in their briefs. In People v. Hernandez, 150 Cal.App.2d 398, 309 P.2d 969, the appellant set forth in his brief certain portions of the proceedings taken before the grand jury, not a part of the appeal record, to show that an interpreter was not necessary and one was sworn. Said the court at page 400 of 150 Cal.App.2d, at page 970 of 309 P.2d: "Of course, this would not be a proper or sufficient record or showing in respect to the points raised. (Citations.)" And again at page 402 of 150 Cal.App.2d, at page 972 of 309 P.2d: "Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs."

[9] As to any claimed prejudice resulting to defendant, it is interesting to note from the record before us that not only was informant's name, Willis Tucker, disclosed by the People at the trial, but defendant himself voluntarily revealed in his own testimony that he well knew Tucker, had gone to Jr. High School with him, had kept up this acquaintance since, had seen him 7 or 8 weeks before his arrest and was with him on December 11. Nor is there any showing in the record that defendant planned or wanted to call Tucker as a witness or tried or was unable to locate him. Under these circumstances, we fail to see how any such alleged error could be prejudicial. People v. Lazzara, 131 Cal.App.2d 663, 281 P.2d 4.

Appellant's last contention "(T)hat 'in the course' of the Superior Court trial proceedings two stages of the procedures was (sic) held off the record, therefore, the petitioner or petit jury does not know what was said between the judge, district attorney, and defense counsel, which deprived him of a fair and impartial trial in violation of rights guaranteed to him by the due process and equal protection of the laws clauses of Section I of the Fourteenth Amendment and Article 6 Section 2 [sic], both of the Constitution of the United States," citing in support thereof People v. Southack, 109 A.C.A. 745, 241 P.2d 558, and People v. Berling, 115 Cal. App.2d 255, 251 P.2d 1017, is likewise without merit. He argues that when the "two violations occurred the Superior Court 'Lost Jurisdiction'" and "was without authority or power of any law to accept the verdict of the Petit Jury or to render the

void Judgment or to issue the invalid commitment under which the petitioner is illegally imprisoned."

The defendant's reference to the opinion in People v. Southack, supra, appears to have been taken from 109 A.C.A. 745 at page 747, 241 P.2d 558. This opinion is no longer the law, having been superseded by one of the Supreme Court (39 Cal.2d 578, 248 P.2d 12). The Supreme Court therein did not consider the point which resulted in that portion of the opinion of the District Court of Appeal cited by appellant in his brief. It is not controlling here; nor is People v. Berling, 115 Cal. App.2d 255, 251 P.2d 1017, which relates to an entirely different factual situation.

[10] The two discussions in question, not having been reported, are not a part of the record before us, but having reviewed the transcript at the points at which these conversations took place, it is obvious from the court's remarks following them that the first, after the opening statements to the jury and before any evidence was taken, wherein defendant's own counsel sought to approach the bench, involved his request to exclude from the courtroom all witnesses who would testify, which request was granted. The second discussion, wherein the trial judge himself asked counsel to approach the bench, obviously referred to the court's suggestion that a recess be taken. Any argument that because of these discussions at the bench defendant was not present during all steps of the trial, is wholly without merit. In People v. Baker, 164 Cal.App.2d 99, 330 P.2d 240, a similar contention was made and rejected. The conversation at the bench in that case involved the right of a witness to refuse to answer a question. Said the court at page 104 of 164 Cal.App.2d, at page 243 of 330 P.2d: "No objection was made by appellant or his counsel at the time that anything was being said out of the hearing of appellant. His own counsel took part in the conversation at the bench. Therefore, this record does not disclose a situation where in any practical sense appellant was not present at all times during the trial."

[11, 12] As to any prejudice arising out of these two off-the-record discussions, the jury did not hear them, therefore it could not possibly have been influenced by them; defendant's attorney who was at all times present asked for one conference and participated in both conversations; and neither defendant nor his counsel at any time objected to them in the trial court. In addition, the conversations did not relate to the issue of guilt. Furthermore, it is for the appellant to show any prejudice resulting to him. People v. Isby, 30 Cal.2d 879, 186 P.2d 405; People v. Baker, 164 Cal.App.2d 99, 330 P.2d 240. This he has failed to do.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

167 Cal.App.2d 673

CREDIT BUREAUS OF MERCED COUNTY, INC., a Corporation, Plaintiff and Respondent,

v.

Russell C. SHIPMAN and Donald E. Davis et al., Defendants,

Donald E. Davis, Appellant.

CREDIT BUREAUS OF MERCED COUNTY, INC., a Corporation, Plaintiff and Respondent,

v.

SHIPMAN & DAVIS LUMBER COMPANY et al., Defendants,

Donald E. Davis, Appellant.

Civ. 9496.

District Court of Appeal, Third District, California.

Feb. 6, 1959.

Action by assignee of creditors of a partnership to recover, among other things,

for items of indebtedness incurred in transaction after dissolution of partnership. From adverse judgment of the Superior Court, Merced County, R. R. Sischo, J., retiring partner appealed. The District Court of Appeal, Schottky, J., held that evidence supported implied finding that the firm had previously extended credit to partnership and did not have knowledge of dissolution of partnership.

Judgment affirmed.

1. Partnership ⇐236

Where partnership was dissolved on September 20 and sum paid to a creditor on November 17 did not cover charges for demurrage on oxygen or acetylene cylinders furnished by creditor or charges for cylinders which were either lost or not returned, items of demurrage represented a continuing liability which originated prior to dissolution and retiring partner was not relieved of liability for such items without consent of creditor.

2. Partnership ⇐292

Where charge for repairs for partnership was incurred after date of dissolution of partnership, retiring partner would not be liable if creditor had notice of dissolution.

3. Partnership ⇐296(3)

In action by assignee of creditors of partnership, which was dissolved on September 20, to recover for repairs made on November 3, evidence was sufficient to support finding that company making repairs did not have notice of dissolution of partnership at time repairs were made.

4. Partnership ⇐296(3)

Burden is on retiring partner relying on dissolution of a partnership to avoid liability to prove notice of such dissolution.

5. Partnership ⇐292

In action by assignee of creditors of partnership to recover certain sums allegedly owing to creditors, retiring partner could not rely upon statute providing for publication of notice of dissolution of partnership to avoid liability to firms having prior credit dealings with partnership. West's Ann.Corp.Code, § 15035.5.

6. Partnership ⇐290

Actual notice of dissolution of partnership is necessary as to firms having prior credit dealings with partnership in order to enable a retiring partner to escape liability for obligations incurred after dissolution of partnership. West's Ann.Corp Code, § 15035.5.

7. Partnership ⇐292

While publication of notice of dissolution of partnership may be evidence from which actual knowledge on part of a creditor can be inferred, publication alone does not compel a finding of actual knowledge, and a retiring partner is not justified in placing sole reliance upon publication of notice of dissolution to avoid liability for debts incurred after dissolution of partnership. West's Ann.Corp.Code, § 15035.5.

8. Appeal and Error ⇐1011(1)

In action by assignee of creditors of partnership to recover for items of indebtedness incurred after dissolution of partnership in transaction with a firm having prior credit dealings with partnership, reviewing court was bound by trial court's finding based on conflicting evidence that firm doing business with partnership did not have notice of dissolution of partnership. West's Ann.Corp.Code, §§ 15035, 15036(2).

9. Partnership ⇐296(3)

In action by assignee of creditors of a partnership to recover, among other things, for items of indebtedness incurred by a firm in transaction after dissolution of partnership, evidence supported implied finding that firm had previously extended credit to partnership and did not have knowledge of dissolution of partnership. West's Ann.Corp.Code, §§ 15035, 15036(2).

10. Novation ⇐13

In action by assignee of creditors of partnership to recover unpaid balance due on a calculator on which entity succeeding partnership had made payments by check, whether there was a novation presented a question of fact.

11. Partnership ⇐289

Where payments on balance owing on a calculator purchased by partnership were made by check by succeeding entity after dissolution of partnership, checks themselves did not compel a finding of actual knowledge on part of creditor that partnership had been dissolved. West's Ann. Corp.Code, § 15036(2, 3).

12. Partnership ⇐236

Fact that creditor of partnership accepted delayed payments on balance owing on calculator sold to partnership, which was subsequently dissolved, did not compel a finding that creditor had consented to a material alteration in nature or time of payment of obligation such as to relieve a retiring partner from any liability to creditor. West's Ann.Corp.Code, § 15036(3).

13. Partnership ⇐296(1)

In action by assignee of creditors of partnership to recover for certain items of indebtedness allegedly owing by partnership, which had a contract with one creditor providing for attorney's fees if suit was brought, allowance of an attorney's fee of $100 was not excessive.

14. Appeal and Error ⇐984(5)

Reviewing court will not disturb award of attorney's fees in absence of a manifest abuse of discretion.

Thomas J. Kane, Jr., Merced, for appellant.

Samuel K. Brantley, Jr., Merced, for respondent.

SCHOTTKY, Justice.

Donald E. Davis has appealed from the judgment entered in the above-entitled actions which were consolidated for trial. By the judgment Davis was held liable for a debt incurred by a partnership of which he was a member and attorney's fees, and for two other debts, one of which was incurred in the name of the partnership after the entity was dissolved.

[1] Donald Davis and Russell Shipman formed a partnership in 1954 under the name of Shipman & Davis Lumber Company. On September 20, 1955, the partnership was dissolved by written agreement. A notice of dissolution was published in a newspaper of general circulation in the county where the business was conducted, and an affidavit of publication was filed with the county clerk. No actual notice of dissolution was given to firms which had extended credit to the partnership at the time of dissolution. By the agreement Shipman, who was to continue the business, was to pay all the debts of the entity. Shipman continued the business as a sole proprietorship for a short time until a successor corporation, Shipman Lumber Servaes Co., was formed. In March, 1955, the partnership had purchased a calculator from the Valley Typewriter Company. The contract of sale provided that the unpaid balance of $457.20 would be paid in twelve installments of $38.10. At the time of dissolution the sum of $255.40 was owing to the Laird Welding & Manufacturing Company. The sum of $255.40 was paid to Laird Welding & Manufacturing Works on November 17, 1955, but this amount did not include the item of $54.48 for repairs made on November 3, 1955, but which was not entered on the books of the Laird Welding & Manufacturing Works until after the payment on November 17th, nor did it cover charges for demurrage on oxygen or acetylene cylinders furnished by Laird Welding & Manufacturing Works, or charges for cylinders which were either lost or not returned, said charges amounting to $135.33.

Commencing in 1956, Merced Hardware & Implement Company, a firm which had previously done business with the partnership, sold merchandise on credit to the successors. The charge for this merchandise, amounting to $538.38, was entered on the books of Merced Hardware & Implement Company in the name of Shipman & Davis Lumber Company.

At the time of dissolution eight payments were due on the calculator. Five were made prior to the institution of this suit. A check in the amount of $76.20

drawn by Shipman Lumber Servaes Co. on June 20, 1956, was accepted by Valley Typewriter Company as was a check of $38.10 dated October 26, 1956, which was also drawn by Shipman Lumber Servaes Co.

The accounts were assigned to the above-named plaintiff, and two separate actions were brought against Davis and Shipman and the partnership. Shipman failed to answer and a default was entered against him. Davis filed an answer denying any indebtedness to plaintiff. The two actions were consolidated for trial; and the court found that plaintiff was entitled to recover from defendant Davis the sum of $189.81 on the Laird account, the sum of $538.38 on the Merced Hardware account, and the sum of $114.30 plus $100 attorney's fees on the Valley Typewriter account. The court also found that neither plaintiff nor plaintiff's assignors had notice of dissolution of said partnership until after their accounts had been incurred, and that neither plaintiff nor plaintiff's assignors agreed to discharge any of the defendants named herein from liability. In accordance with said findings, judgment for $842.49 principal and attorney's fees in the sum of $100 was entered in favor of plaintiff and defendant has appealed from said judgment.

Appellant makes a vigorous attack upon the judgment. He contends (1) that he has no legal responsibility as to any existing liabilities on the date of dissolution of the partnership; (2) that he is not liable on any obligations which were obligations incurred after the date of dissolution by defendant and appellant's ex-partner or any other successor entity; and (3) that the allowance of any attorney's fees was error and that the amount of attorney's fees allowed was an abuse of discretion.

[2–7] Appellant argues first that at the time of the suit he was not liable for the debts sued upon. He contends that no liability exists as to Laird Welding & Manufacturing Works because the amount which was due at the time of dissolution was subsequently paid, and, therefore, no liability existed at the time of suit. However, as hereinbefore noted, the payment of $255.40 to Laird Welding & Manufacturing Works on November 17, 1955, did not include the item of $54.48 for repairs made on November 3, 1955, nor the charge for demurrage. The items of demurrage represented a continuing liability which originated prior to the dissolution, and appellant as the retiring partner would not be relieved from liability for them unless the creditor consented. As to the repair item incurred on November 3, 1955, which was after the date of the dissolution, appellant would not be liable therefor if Laird Welding & Manufacturing Works had notice of the dissolution. While the evidence is conflicting as to whether the Welding Works had notice of the dissolution at the time the repairs were made, it is sufficient to support the finding of the court that the company did not have notice. The burden is on a defendant relying on dissolution to prove notice of dissolution. Epley v. Hiller, 128 Cal.App.2d 100, 274 P.2d 696. Appellant cannot rely on the provisions of section 15035.5 of the Corporations Code to show actual knowledge. This section provides for publication of notice of dissolution of a partnership. However, as to firms having prior credit dealings with the partnership, actual notice of dissolution is necessary. While publication may be evidence from which actual knowledge could be inferred, publication alone would not compel a finding of actual knowledge. A retiring partner is not justified in placing sole reliance upon the publication of notice of dissolution, but should assure himself that existing creditors who have extended credit to the partnership receive actual notice of such dissolution.

[8, 9] As to the Merced Hardware account it is clear that the debt for the items sued upon were all incurred after February, 1956. Appellant contends that he is not liable for these items of debt because they were incurred after the dissolution of the partnership. Respondent in reply points out that section 15035 of the Corporations Code provides that after a dissolution a partner can bind the partnership "By any

transaction which would bind the partnership if dissolution had not taken place, provided, the other party to the transaction: I. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution." Here again the evidence is conflicting as to whether Merced Hardware & Implement Company had notice of dissolution of the partnership, and we are bound by the court's finding that it did not. There is also evidence that Merced Hardware & Implement Company had previously extended credit to the partnership. The credit reference on the contract of the Shipman & Davis Lumber Company with Valley Typewriter Company, dated March 15, 1955, and signed by Russell C. Shipman, lists Merced Hardware Company; and the items in dispute were charged to Shipman & Davis Lumber Company on the books of Merced Hardware & Implement Company. The evidence supports the implied finding that Merced Hardware & Implement Company had previously extended credit to Shipman & Davis Lumber Company.

[10, 11] As to the Valley Typewriter Company account, the record shows that five payments were made on this account after the date of the dissolution of the partnership. Two checks in favor of Valley Typewriter Company, both signed by Shipman Lumber Servaes Co., one dated June 20, 1956, for $76.20 and one dated October 26, 1956, for $38.10. Appellant contends that this is overwhelming evidence of a novation and conclusive proof that he was discharged from the obligation under subdivision 2 of section 15036 of the Corporations Code which reads: "(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business." We are unable to agree with this contention. Whether or not there was a novation was a question of fact and conflicting inferences can be drawn from the evidence. The manager of Valley Typewriter Company testified that he had no actual knowledge of the dissolution of the partnership. The checks themselves would not necessarily compel a finding of actual knowledge since the inference appellant seeks to draw is dispelled by the testimony that the creditor had no knowledge. There can be no novation where the creditor testified he had no knowledge of dissolution and such testimony is believed by the trier of the fact.

[12] Appellant also argues that he is entitled to a reversal of the judgment as to the Valley Typewriter account under the following provision of section 15036 of the Corporations Code: "(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations." But here again knowledge of the dissolution of the partnership is required, and the court found upon sufficient evidence that none of the creditors here involved had notice or knowledge of the dissolution of the partnership. Furthermore, the fact that the Valley Typewriter Company accepted delayed payments under the contract does not compel a finding in accordance with appellant's argument that the creditor had consented to a material alteration in the nature or time of payment of the obligation.

[13, 14] Appellant also contends that the allowance of any attorney's fee of $100 was improper, and if proper, the allowance was excessive. The Valley Typewriter Company contract provided for attorney's fees if suit was brought. In this case the action was vigorously contested. An appellate court will not disturb an award of attorney's fees of a trial court in the absence of a manifest abuse of discretion. Biaggi v. Sawyer, 75 Cal.App.2d 105, 170 P.2d 678; State ex rel. State Pub-

lic Works Board v. Westover Co., 140 Cal. App.2d 447, 295 P.2d 96. In view of the record in the instant case, we cannot say the amount allowed by the court was excessive.

No other points require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

167 Cal.App.2d 437

Wiley Wilson BALTHROP, Plaintiff and Respondent,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation; Coast Santa Fe Lines; Thomas H. Archibald; J. M. Smith; E. H. Baxter; G. H. Nunn and Robert T. Cyr, Defendants and Appellants.

Civ. 9482.

District Court of Appeal, Third District, California.

Jan. 29, 1959.

Rehearing Denied Feb. 24, 1959.

Hearing Denied March 25, 1959.

Action by automobile driver against railroad for injuries sustained in railroad crossing collision. The Superior Court, Stanislaus County, David F. Bush, J., rendered judgment for automobile driver, and railroad appealed. The Third District of Appeal, Schottky, J., held that admission of letters from public utilities commission to railroad containing recitations to effect that crossing was deemed dangerous and that there should be an automatic signal installed at crossing was improper where there was no evidence in record to indicate what the traffic conditions at the crossing were.

Reversed.

1. Negligence ⇐136(9)

Contributory negligence is not established as a matter of law unless only reasonable hypothesis is that such negligence exists and that reasonable men could have drawn that conclusion and none other, and where there are different inferences that may be drawn, one for and one against, the one against will be followed.

2. Railroads ⇐350(16)

In action arising out of railroad crossing collision in which train struck automobile of plaintiff, who testified that he looked and listened before crossing track on foggy night, question whether plaintiff was guilty of contributory negligence was for jury.

3. Railroads ⇐347(6)

In action arising out of railroad crossing collision of automobile and train, letters of Public Utilities Commission to railroad stating that there should be an automatic signal installed at crossing was not admissible to show that railroad had notice of increased traffic conditions in absence of showing as to traffic conditions at crossing.

4. Trial ⇐252(1)

Generally, it is error for trial court to instruct upon matters which have no support in evidence.

5. Appeal and Error ⇐1066

Ordinarily it is not prejudicial or reversible error for trial court to instruct upon matters which have no support in evidence.

6. Appeal and Error ⇐1066

In action arising out of railroad crossing collision of automobile and train, wherein there was strong evidence upon which a finding of contributory negligence on part of automobile driver could be based, instruction that railroad's duty to warn was not necessarily fulfilled by complying with Public Utilities Commission's regulations which had been read required reversal where in fact no regulations of Commission were received in evidence or read to jury at any time.

7. Negligence ⇐71, 72

One who is without negligence on his part and who is suddenly confronted with unexpected imminent danger is not required to exercise same amount of care as one who acts after careful deliberation, and where one is confronted with an immediate choice between alternative courses of conduct, he is not necessarily negligent if he makes what turns out to be a wrong choice if he took one of courses a reasonable man would have taken.

8. Railroads ⇐351(2)

In action by automobile driver for injuries sustained in railroad crossing accident, wherein there was testimony that automobile driver either could have accelerated and passed in front of train if he had not slowed automobile by applying his brakes or that he could have stopped before he would have been on track, but that because of low visibility he misjudged his position in relation to tracks and applied his brakes and then tried to accelerate but could not clear tracks in time to prevent collision, instruction on doctrine of imminent peril was proper.

9. Railroads ⇐351(4)
Trial ⇐243

In action by automobile driver against railroad for injuries sustained in railroad crossing collision, instruction that railroad did not have exclusive right to travel over portion of public road covered by its tracks and instruction that railroad train had right of way were not inconsistent and were not improper.

Robert W. Walker, Wm. F. Brooks, Henry M. Moffat, Los Angeles, Rutherford, Jacobs, Cavalero & Dietrich, Stockton, Cardozo, Trimbur & Nickerson, Modesto, for defendants-appellants.

Hawkins & Hawkins, Modesto, Hansen, McCormick, Barstow & Sheppard, Fresno, for plaintiff-respondent.

SCHOTTKY, Justice.

This is an appeal by defendants from a judgment in the sum of $75,000 entered upon a jury verdict in an action which arose out of a railroad crossing accident in which plaintiff's car was struck by defendants' train. The first trial of this action resulted in a verdict in favor of defendants, but a new trial was granted by the trial court, and this court affirmed the order granting a new trial. 142 Cal.App. 2d 823, 299 P.2d 341.

As grounds for a reversal of the judgment appellants urge: (1) that the evidence establishes that respondent was contributorily negligent as a matter of law, (2) that the court committed prejudicial error in admitting certain evidence, (3) that the court committed prejudicial error in giving certain instructions to the jury, and (4) that the court committed prejudicial error in refusing to give certain instructions.

The accident here involved occurred in Stanislaus County about 12:55 a. m., February 3, 1953, at a point where Claus Road crosses the tracks of the railroad. Claus Road runs in a generally northeast and southwest direction. The railroad line runs in a northwest to southeast direction, or in railroad language west and east. The track is on an embankment. The crossing is unobstructed. The southern approach to the crossing was protected at the time of the accident by a standard cross-arm sign at the track, an advance disc type sign along the right-hand or easterly side of the road, and a pavement warning sign some 390 feet south of the crossing. The night was foggy according to all the witnesses. Visibility was estimated to be from zero to 40 or 50 feet for unlighted objects and 25 to 200 feet for lighted objects. Balthrop, the respondent herein, attended an evening class at Modesto Junior College. At the conclusion of the class he offered to drive a Mrs. Barringer, a co-worker at the Norris-Thermador plant, home. The two stopped for a hamburger and coffee

and finally at about 11:55 p. m. Mrs. Barringer arrived at her home. Balthrop then proceeded to drive toward his home. He was familiar with the Claus Road crossing, and he knew that he would have to cross it on his way home. Several hundred feet south of the crossing Balthrop stopped and got out of his car. He noticed the pavement warning sign when he reentered his car. He also noticed the disc shaped warning sign at this time. He estimated that visibility was about 15 feet. He drove toward the crossing. He passed a vehicle coming in the opposite direction about 30 feet south of the crossing. The window on the driver's side was down. He listened for, but did not hear, a whistle. He looked for a light but did not see one. Momentarily, before the accident, he saw something and the next thing he knew "was 20 days later." He estimated that his speed at the time of the accident was 10 or 15 miles per hour. He also estimated that he could stop in 4 or 5 feet. He did not stop before crossing the track. On cross-examination he testified that the first time he looked up and down the track was when he was 10 or 12 feet from it. As he said, this was the first time he could see it.

The train was proceeding northwest, or in railroad terms west. It consisted of a diesel engine with a power unit and eight cars. The engine was equipped with a stationary and an oscillating light, an automatic bell and a two-way horn or whistle. The fireman and the engineer both asserted that the bell was working. They both testified that the whistle was sounded about 1 mile south of the crossing and continuously thereafter until the collision occurred.

There was some testimony, though contradicted, that Balthrop was intoxicated. There was testimony from a witness that he had passed Balthrop's car some 30 feet after he had crossed the tracks. This witness testified that when he had stopped at the tracks he saw no lights and heard no whistle. Other facts appearing in the record will be set forth in the course of this opinion.

[1] Appellants' first contention is that respondent was guilty of contributory negligence as a matter of law. We do not agree with this contention. As was stated in Anthony v. Hobbie, 25 Cal.2d 814, at page 848, 155 P.2d 826, at page 829:

> "* * * The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

And as stated in Startup v. Pacific Electric Railway Co., 29 Cal.2d 866, at page 871, 180 P.2d 896, at page 899:

> "There was evidence that the driver of the automobile in which plaintiffs were riding took some precautions before crossing the tracks, and 'where it is shown that a [driver] has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury.' Koch v. Southern California Ry. Co., 148 Cal. 677, 680, 84 P. 176, 177, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795. It was therefore error for the court to instruct the jury that the driver of the automobile was guilty of negligence as a matter of law."

[2] We believe that the record in the instant case show that respondent driver exercised some care and that the question of "whether or not the care actually exercised was due and sufficient" was a question for the determination of the jury. It was a foggy night; visibility was ob-

scured. Balthrop was driving slowly. He testified that he looked and listened. This is certainly evidence of some care and on the rule of the cited case the question would be a matter for the jury to determine. Appellants contend that one must look and listen and stop if necessary. Appellants particularly rely on Lazzarotto v. Atchison, Topeka & Santa Fe Ry. Co., 157 Cal.App.2d 455, 321 P.2d 29, in which plaintiff was found guilty of contributory negligence as a matter of law. In that case the plaintiff was driving home about 1:00 a. m. He was familiar with the railroad crossing which was unguarded. He did not look for warning signs. All the windows on his car were closed. He saw the train some 250 feet away and he could have stopped when he first saw it, but he did not for some reason. He was not listening for a warning or expecting one. However, the facts in the instant case are different. First of all visibility was obscured. Balthrop testified he was listening and looking. The fact that he may not have looked until he was 10 or 12 feet away from the track is not indicative of no care, considering visibility was practically nil. As stated in 42 Cal.Jur.2d, Railroads, sec. 169, "* * * if there is any evidence in the record that he [the plaintiff] exercised some care contributory negligence is a question, not of law, but of fact." See also Toschi v. Christian, 24 Cal.2d 354, 149 P.2d 848.

Appellants' second contention is that the court erred in admitting in evidence over appellants' objections certain letters from the Public Utilities Commission to appellant railroad, which letters contained recitations to the effect that the crossing was deemed dangerous and that there should be an automatic signal installed at the crossing. The letters were offered for the limited purpose of showing that appellant railroad had notice that the crossing was hazardous because of increased traffic conditions; and after they were read to the jury, the court instructed the jury as follows:

> "The Court. Ladies and gentlemen of the jury, I want at this time to admonish you again that the documents which Mr. McCormick has read to you have been admitted in evidence, not to prove the truth of any fact or facts therein contained, but solely and only to show that the Defendant Atchison, Topeka and Santa Fe Railway Company had been put upon its inquiry concerning the potentially hazardous character of this particular crossing and traffic conditions at the crossing."

In the instant case two theories of negligence were pleaded. One was that the company was negligent in its maintenance of the crossing. The standard of care required by the railroad would depend on the conditions at the crossing. No contention was made that the construction of the crossing itself was dangerous. Rather it was the theory of the respondent that the increased traffic conditions at the crossing because of the reopening of the Norris-Thermador plant necessitated the installation of some type of warning device other than those maintained. The letters would have been properly admissible to show that the appellant railroad had notice of the increased traffic conditions even though the letters contained hearsay and opinion matter, for as stated in Jensen v. Southern Pacific Co., 129 Cal.App.2d 67, at page 75, 276 P.2d 703 at page 709 (hearing denied):

> "The applications of the city of Burlingame to the Utilities Commission for an order requiring the railway company to install and maintain gates at this crossing, including Broadway, were, as stated by the court 'not offered for the truth of the statements contained therein, only to show that the city of Burlingame had notified the railroad that they deemed the crossing to be dangerous.' Thus limited, they tended to show that the defendant company had been put upon its inquiry concerning the potentially haz-

ardous character of this particular crossing. As such, they seem relevant.

"The company says that it was chargeable with such knowledge; hence, this evidence was unnecessary, and therefore irrelevant, citing Martindale v. Atchison, T. & S. F. Ry. Co., 89 Cal.App.2d 400, 412, 201 P.2d 48. In that case the defendant had admitted knowledge of previous accidents mentioned in the proffered letters. In the instant case, there was no similar admission on the part of the defendant. Indeed, it denied the existence of any unusual hazard at the Broadway crossing. Moreover, while the defendant was probably chargeable with knowledge of the physical character and condition of its property, it was not necessarily chargeable, to the same degree at least, with knowledge of traffic conditions, including the volume and congestion of traffic at this crossing, which contributed materially to the hazardous condition in question. Thus, it has been held that when the existence of danger is due to causes other than the activity of the defendant, it is necessary to prove that he had actual or constructive notice of that danger. Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P. 2d 841. The degree of care necessary to constitute ordinary care is measured by reference to the circumstances of danger and risk known to the obligor; hence 'it is usually * * * permissible to prove any fact, *known to such person at the time,* which would have a reasonable tendency to increase or decrease the risk and danger of a particular course of action.' Bresee v. Los Angeles Traction Co., 149 Cal. 131, 136, 85 P. 152, 5 L.R.A.,N.S., 1059; (emphasis added.) In Marchetti v. Southern Pac. Co., supra, 204 Cal. 679, 684, 269 P. 529, the court attached significance to the fact that the city authorities had requested the railway company to install an automatic crossing signal. Moreover, a party is not limited to making out a mere prima facie case. People v. McMonigle, 29 Cal.2d 730, 742–743, 177 P.2d 745.

"Under the circumstances, we see no sound reason why plaintiffs should be precluded from showing that defendant had in fact been put upon its inquiry concerning such hazardous condition."

[3] However, the relevance of the notice evidence which the letters were introduced to show depended first on a showing of what the traffic conditions at the crossing were. There was no evidence in the record to indicate whether ten or a thousand cars a day used the crossing. The trial court instructed the jury after the letters were read to them that they were admitted to show that the defendant railroad "had been put on its inquiry concerning the potentially hazardous character of this particular crossing and traffic conditions at the crossing." Without a showing of the traffic conditions, the letters were irrelevant on the issue. It is permissible to show that a person has notice of a fact, but before notice can be shown there must be evidence of the fact itself. Therefore the court erred in admitting the letters in evidence.

The error was compounded because the court also gave the following instruction.

"It is the duty of a railroad company to exercise reasonable care in warning and for the safety of travelers on a public highway that crosses the tracks of the company.

"That duty is not necessarily fulfilled by complying with regulations issued by the Public Utilities Commission which have been read to you.

"Such regulations prescribe only the minimum measure of care that will satisfy the Commission.

"Whether or not compliance with such regulation at the crossing here in question amounted to reasonable care is a question that you must de-

cide according to the following principle:

"Any measure that would have been taken by reasonably prudent railroad management to protect travelers on the highway in question, and at the time in question, from the dangers of the crossing, were measures required of the defendant railroad company."

No regulations of the Public Utilities Commission were received in evidence, nor were any regulations read to the jury at any time. Later in the instructions section 7604 of the Public Utilities Code which required the ringing of a bell or whistle prior to the time a train proceeds through a crossing was read.

Appellants cite Staggs v. Atchison, Topeka & Santa Fe Ry. Co., 135 Cal.App.2d 492, 503, 287 P.2d 817, 823, where the court said: "* * * The instruction * * * is inapplicable * * * The jury had a right to assume that the court deemed it to be applicable to the issues being tried or the court would not have so instructed them. The giving of that instruction may have misled and confused the jury * * * It was therefore prejudicial error."

[4] The general rule is that it is error for the trial court to instruct upon matters which have no support in the evidence. As stated in Rodenberger v. Frederickson, 111 Cal.App.2d 139, at page 142, 244 P.2d 107, at page 109: "Unless instructions find support in the evidence they should not be given, and where there are no supporting facts they may mislead the jury."

In the case of People v. Okada, 14 Cal. App.2d 660, 58 P.2d 967, 969 cited by appellants, the trial court instructed the jury as to the speed limits in business and residential districts. Upon appeal, this instruction was held to be error since there was no evidence in the record as to whether the area in question had been signposted as to the speed limits applicable in a business or residential district. At page 664 of 14 Cal.App.2d at page 969 of 58 P.2d, the court said: "Instructions as to speed in a business district were therefore improper herein without proof from which the jurors might infer that the district where the accident occurred was in fact a business district." See also Clark v. Pamplin, 147 Cal.App.2d 676, 305 P.2d 950.

Appellants argue that the error in giving the instruction was prejudicial because of the fact "that in the evidence were Plaintiff's Exhibits 23–A, 23–B and 23–E—all of which were letters written on the official stationery of the Public Utilities Commission—and since they 'had been read' to the jury it is very probable that the jury understood from the giving of this instruction that the statements and directions contained in said Exhibits were 'regulations' of the Public Utilities Commission and that, accordingly, under this instruction the minimum duty of care required to be exercised by the Santa Fe was complied with only by the installation of automatic signals—as requested by the Commission in said Exhibits." Appellants quote the statement in Staggs v. Atchison, Topeka & Santa Fe Ry. Co., supra, that the jury had a right to assume that the court deemed it to be applicable to the issues or the court would not so have instructed them.

Respondent in reply argues that the instruction was applicable and not misleading; that "the reference to 'regulations' in the instruction obviously had reference to section 7604 of the Public Utilities Code which was read to the jury and which did apply and which did prescribe a minimum standard of care."

We are unable to agree with respondent as we believe that the jury, having been instructed that it was the duty of appellants to comply with the regulations of the Public Utilities Commission "which have been read to you," would be more likely to regard the instruction as referring to the statement of the Commission in the letter that had been read to them to the effect that automatic signals were warranted at the crossing as a regulation of the Commission, than they would to re-

gard it as referring to the provisions of section 7604 of the Public Utilities Code which was not read to them until later. We, therefore, conclude that the giving of the instruction was error.

[5, 6] Ordinarily it is not prejudicial or reversible error for a trial court to instruct upon matters which have no support in the evidence. But in a case which is extremely close and where, as in the instant case, there is strong evidence upon which a finding of contributory negligence on the part of respondent could be based, we believe that the giving of the instruction requires a reversal of the judgment.

We are fortified in this conclusion by the fact that in the former trial in which the letters were not introduced and no such instruction was given, and where the evidence as to the negligence and contributory negligence was substantially the same as in the instant case, the jury returned a verdict in favor of appellants.

[7, 8] Appellants next contend that the court erred in instructing on the doctrine of imminent peril. The rule is that one who is without negligence on his part, who is suddenly confronted with an unexpected imminent danger is not required to exercise the same amount of care as one who acts after a careful deliberation. Where a person is confronted with an immediate choice between alternative courses of conduct he is not necessarily negligent if he makes what turns out to be a wrong choice if he took one of the courses a reasonable man would have taken. Harper & James, The Law of Torts, sec. 16.11; Gamalia v. Badillo, 53 Cal.App.2d 375, 128 P.2d 184. In the deposition of the fireman Cyr, the statement is made that he was watching Balthrop's vehicle until just before the collision. He said that the car got down pretty slow and it never entered his head that he could have gotten hit. From this testimony one could infer that Balthrop could have stopped before he would have been on the track. If so, and if we also consider the evidence contained in the report of the Highway Patrol Officer who investigated the accident that Balthrop said that he saw the train, applied his brakes and then realized he was on the tracks, and then tried to accelerate but could not clear the tracks in time to prevent the collision, there is sufficient evidence in the record to support the instruction. Either Balthrop could have accelerated and passed in front of the train if he had not slowed by applying his brakes, or he could have stopped; but because of the low visibility he misjudged his position in relation to the tracks and by failing to realize that he could have stopped took the wrong course of action.

[9] Appellants next contend that the court erred in instructing the jury that the railroad did not have an exclusive right to travel over the portion of the public road covered by its tracks and also instructed that the railroad train had the right of way. Appellants contend that the instructions are inconsistent. We do not agree. The first instruction is a statement of a mere commonplace proposition within the general knowledge of the jurors that the public has a right to travel over a railroad crossing and does not contradict or conflict with the second instruction that a train has the right of way at a railroad crossing.

Appellants contend further that the court erred in not giving certain instructions offered by them. There is no merit in this contention. We have examined all of the instructions and are satisfied that with the exceptions hereinbefore noted the jury was fully and correctly instructed.

No other points raised require discussion.

The judgment is reversed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

167 Cal.App.2d 584

Warren HAYASHI and Henry Hayashi, individually and as co-partners doing business as Hayashi Greenhouses and Gardens, Plaintiffs and Appellants,

v.

ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, et al., Defendants and Respondents.

Civ. 17915.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1959.

Rehearing Denied March 6, 1959.

Hearing Denied April 1, 1959.

Action by landowners against county flood control and water conservation district for damages to land, buildings and their contents as result of flood waters carried onto land after break in levee constructed by district. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment in favor of district and landowners appealed. The District Court of Appeals, Peters, P. J., held that complaint alleging that district had been notified by plaintiffs of break in levee near plaintiffs' land but that district failed to repair same and both on the 10th and 21st days after notification flood waters flowed through break and onto land causing damage to buildings and contents, was sufficient to state a cause of action in tort against district but was insufficient to state a cause of action for inverse condemnation.

Reversed with directions.

1. States ⇐191(1.3)

Constitutional provision permitting suits to be brought against the state in such manner and in such courts as may be directed by law is permissive in that it permits the legislature to prescribe how and when suits may be brought against the state and its political subdivisions. West's Ann. Const. art. 20, § 6.

2. Levees and Flood Control ⇐10

County flood control and water conservation district, being a governmental agency, is not liable for tort unless legislature has seen fit to impose such liability by statute.

3. Levees and Flood Control ⇐11

Alameda County Flood Control and Water Conservation District is amenable to suit in tort, by statute which necessarily implies that if claim-filing procedure is followed, suit in contract or tort may be filed against the District so long as one-year limitation is observed. West's Ann.Const. art. 20, § 6; West's Ann.Gov.Code, § 53051; West's Ann.Water Code App. §§ 55–1 et seq., 55–5, 55–29.

4. Levees and Flood Control ⇐10

County flood control and water conservation district is not an insurer of property owners.

5. Waters and Water Courses ⇐171(2)

Under the "common enemy" doctrine a landowner, in a period of peril from floods, may erect structures on his land to protect his land from flood waters without liability, even though such structures result in the diversion of water upon a neighbor's land, but after erection of such a structure party erecting it is under duty to maintain it in such a condition as not to cause injury because of negligent maintenance.

See publication Words and Phrases, for other judicial constructions and definitions of "Common Enemy".

6. Levees and Flood Control ⇐19

County flood control and water conservation district erecting levee, not in time of peril but as a permanent installation, was not entitled to benefit of the "common enemy" doctrine providing that in period of peril from floods party may erect structures on land to protect lands from flood waters without liability. West's Ann.Const. art. 20, § 6; West's Ann.Gov.Code, § 53051; West's Ann.Water Code App. §§ 55–1 et seq., 55–5, 55–29.

7. Negligence ⇐44

Under common law landowner is responsible for damages caused by negligent disrepair of an artificial structure.

8. Negligence ⇐44

Landowner is liable for property damage to those outside his premises caused

by negligent maintenance of structures upon his land.

9. Eminent Domain ⇐293(1)
Levees and Flood Control ⇐36

Landowners' complaint against county flood control and conservation district alleging that breaks occurred in levee constructed by district and landowners notified district of such break and requested the repair of same which district failed to do and on the 10th and 21st days after notification flood waters flowed onto owners' land and damaged buildings and their contents, was sufficient to state cause of action in tort against district, but was insufficient to state a cause of action for inverse condemnation. West's Ann.Water Code App. § 55–22; West's Ann.Const. art. 1, § 14.

10. Levees and Flood Control ⇐18

County flood control and water conservation district after having constructed a levee, was under duty to maintain it in as reasonable a manner as a private landowner would be, at least after notice. West's Ann.Water Code App. § 55–22; West's Ann.Const. art. 1, § 14.

11. Eminent Domain ⇐271

Property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency. West's Ann.Water Code App. § 55–22; West's Ann.Const. art. 1, § 14.

Mas Yonemura, Thomas B. Richardson, Oakland, for appellants.

Hagar, Crosby & Rosson, Paul L. May, Edwin A. Heafey, Jr., Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiffs brought this action against the defendant District and others setting forth two causes of action, one alleging negligence, and one purporting to set forth an action in the nature of inverse condemnation. The demurrer to the third amended complaint was sustained without leave to amend, and plaintiffs appeal.

The allegations of the complaint can be briefly summarized as follows: The plaintiffs own certain property in Alameda County upon which they operate their greenhouse and plant growing business. The defendant Flood Control District owns and operates Alameda Creek as part of its operations. Plaintiffs' property is located about 300 yards north of the channel of Alameda Creek, and is within the geographical boundaries of the District. The District owns and operates 8-foot levees along those portions of Alameda Creek here involved. On December 23, 1955, there occurred a 60-foot break in the levee about 300 yards from plaintiffs' property caused by water accumulating in such quantities in the watershed as to run against the levees with great force. At the same time large quantities of debris such as logs, stumps and brush collected in the stream near the break obstructing its flow. Thereafter on numerous occasions and particularly on January 5, 1956, the plaintiffs warned the defendant District of the break and of the obstructions, and informed this defendant that to protect the adjoining property the debris should be removed and the levee repaired. No repairs were made, and on January 15, 1956, and again on January 26, 1956 "as the direct and proximate result of the neglect of the defendants" large quantities of water carrying debris flowed through the break and onto plaintiffs' land, causing damage to plants and greenhouses in the amount of $77,000.

In a second cause of action plaintiffs purported to state a cause of action in inverse condemnation. In addition to the facts alleged in the first cause of action it is averred that, after notice, the defendants continued to operate and maintain the structures in a defective condition, and while these structures were being so maintained and operated the water and debris flowed on plaintiffs' land, causing the damage above alleged.

Within the time required by law a claim for such damages was properly served and filed.

Defendant District demurred to both causes of action. The trial court sustained the demurrer without leave to amend, and judgment was entered accordingly in favor of the District. From this judgment plaintiffs appeal.

The first cause of action sounds in tort, that is, it charges negligence against the District. As to this cause of action the basic question presented is whether defendant District is subject to such tort liability. The respondent District concedes that, in a proper case, it is liable in tort. At page 6 of Respondents' Brief appears the statement "We have no quarrel with the argument that the legislature has waived the sovereign immunity of the District in proper cases." This concession is in accord with the law.

[1] Article 20, section 6 of the California Constitution provides that "Suits may be brought against the State in such manner and in such courts as shall be directed by law." This section, of course, does not create liability. It is permissive, in that it permits the Legislature to prescribe how and when suits may be brought against the State and its political subdivisions. Rose v. State of California, 19 Cal. 2d 713, 123 P.2d 505.

[2, 3] It is true that such a District, being a governmental agency, is not liable for tort unless the Legislature has seen fit to impose such liability by statute. Whiteman v. Anderson-Cottonwood Irrigation District, 60 Cal.App. 234, 212 P. 706. If it be assumed that the Public Liability Act (Gov.Code, § 53051) in imposing tort liability on "local" agencies, does not include flood control districts (see Barlow v. Los Angeles County Flood Control Dist., 96 Cal.App.2d 979, 216 P.2d 903; Brandenburg v. Los Angeles Flood Control Dist., 45 Cal.App.2d 306, 114 P.2d 14), the legislative intent to impose such liability can be found in another statute, that is, in the basic statute creating the District. That statute is the Alameda County Flood Control and Water Conservation District Act. Stats. of 1949, p. 2241, Chap. 1275, as amended; West's Ann.Water Code–Appendix–§ 55–1 et seq., p. 340. Section 5 of that statute grants the power to the District "To sue and be sued in the name of said district," and section 29 consents to liability for tort in the following language: "Claims against the district whether arising out of contract, tort, or the taking or damaging of property without compensation must be made in writing and filed with the board within six months after the cause of action arises. Claims shall be presented in the general form and manner prescribed by general law relating to the making and filing of claims against counties. Such claims may be amended within said six months to correct defects in form or statement of facts. No action against the district shall be commenced or maintained unless such claim relating thereto has been filed as hereinabove prescribed and action thereon commenced within one year after the cause of action arose."

This section clearly makes the District amenable to a suit in tort. The section necessarily implies that if the claim filing procedure is followed, a suit in contract or in tort may be filed against the District so long as the one-year limitation provision is observed. This conclusion is not contrary to the cases holding that the Los Angeles Flood Control District is not liable in tort. Janssen v. County of Los Angeles, 50 Cal.App.2d 45, 123 P.2d 122; Brandenburg v. Los Angeles Flood Control Dist., 45 Cal.App.2d 306, 114 P.2d 14; Barlow v. Los Angeles County Flood Control Dist., 96 Cal.App.2d 979, 216 P.2d 903. Those cases held that the Los Angeles Flood Control District was not liable in tort, either under the then provisions of the Public Liability Act or of any other statute. These holdings were quite correct. An examination of the statute creating the Los Angeles District discloses that there is no section in it comparable to section 29 found in the Alameda Act. See Stats. of 1915, p. 1502, Chap. 755, as amended; West's Annotated Water Code, Appendix § 28–1 et seq., p. 335. Thus the concession of the respondent District to

the effect that it "in a proper case" is liable for tort is in accordance with the law.

It is the contention of the District, however, that this is not "a proper case" for the imposition of such liability. Its theory is somewhat difficult to follow. It states that to allege a "proper case" of tort liability the complaint must allege "that respondent District had a legally imposed duty which it failed to perform and that such failure was the proximate cause of appellants' damages." Res. Br. p. 5. It is claimed that the complaint contains no such allegations. We agree that such allegations are necessary, but believe that the complaint is sufficient in this respect. Essentially the complaint alleges that an unusually heavy flow of water caused a break in the District's levee; that this fact and the danger therefrom were called to the attention of the District; that 10 days after this notice and again 21 days after the notice, water flowed upon plaintiffs' property causing damage, partly because debris had collected in the vicinity of the break; that in spite of the notice the District did nothing to remove the debris or to repair the levee.

[4] Respondent District argues that such allegations do not allege the existence of any duty owed to appellants and its violation. It correctly points out that the District is not an insurer. Curci v. Palo Verde Irr. Dist., 69 Cal.App.2d 583, 159 P.2d 674; Stone v. Los Angeles County Flood Control Dist., 81 Cal.App.2d 902, 185 P.2d 396. But those cases, while recognizing that no insurer's liability exists, also recognized that the districts involved did owe the landowners a duty not to injure their lands or property through any act of neglect on their part that it was under a duty to perform. Thus, the real question is whether the District was under a duty to repair after notice—if so, a cause of action has been pleaded.

[5, 6] The District urges that it was under no duty to take any steps to repair the levee or to protect the lands of plaintiffs because these waters were flood waters, and such waters constitute a "common enemy" which may be repulsed without liability. Under the "common enemy" doctrine it is undoubtedly the law that an owner, in a period of peril from floods, may erect structures on his land to protect his land from the flood waters without liability, even though such structures result in the diversion of water upon a neighbor's land. Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25; see 3 Stanf.L.Rev. 361. But it is equally true that, after the erection of such a structure, the party erecting it is under a duty to maintain it in such a condition as not to cause injury because of negligent maintenance. In the instant case the District undoubtedly had authority to build the levee. But that levee was not constructed at a time of peril. It was not a temporary defensive measure, but a permanent installation. Therefore, contrary to respondent's contention, the construction of the levee does not fall within the "common enemy" doctrine.

But, the District argues, under the terms of the statute creating it, it was under no obligation to protect people from floods, and so had no duty to construct the levee. Based on this premise it is argued that the District owed no duty to appellants. Weck v. Los Angeles County Flood Control Dist., 80 Cal.App.2d 182, 181 P.2d 935, is cited in support of that contention. That case states (80 Cal.App.2d at page 203, 181 P. 2d at page 948): "There is no evidence that the protective structures were inherently defective. No duty rested on the District to keep the water out of plaintiffs' lands, as contended by plaintiffs. The statute creating the District contained no mandatory direction to build public improvements of any particular character or design, or any improvement at all. Its failure to construct an impervious and indestructible wall along the Wash was not an act constituting the taking or damaging of private property."

Under this case, and others that could be cited, it is probably the law that a flood district is under no enforceable obligation to build levees or other public improvements

to keep out floods. But that is not the problem. Here the levee was constructed. The question is, after the public improvement is constructed, is the District, after notice, under an obligation to maintain it in such a manner so as not to injure the adjoining property as the result of negligent maintenance? The fact that the District may not have been under a duty to construct the levee, does not answer this question. Whether such a duty exists is dependent on general common law principles.

[7] Under the general common law there can be no doubt that a landowner is responsible for damages caused by the negligent disrepair of an artificial structure. The applicable principle is thus stated in section 365 of the Restatement of Torts:

> "A possessor of land is subject to liability for bodily harm caused to others outside the land by the disrepair of a structure or other artificial condition thereon, if the exercise of reasonable care by the possessor or by any person to whom he entrusts the maintenance and repair thereof
>
> "(a) would have disclosed the disrepair and the unreasonable risk involved therein, and
>
> "(b) would have made it reasonably safe by repair or otherwise."

The comments to this section are quite significant. They read as follows:

> *"a. Meaning of 'disrepair.'* The word 'disrepair' indicates that the condition of the structure has deteriorated since its creation. It includes dilapidations caused by the usual force of nature, by wear and tear, or by a sudden and previously unexpectable change caused by an unusual and unexpectable natural force, such as a cyclone or flood, by a fire or by the innocent, intentional or negligent acts of the possessor or third persons acting with or against his consent.
>
> *"b.* If a structure suddenly and without the fault of the possessor becomes dangerously dilapidated the possessor is not subject to liability for any harm done thereby to persons outside the land until he has had an opportunity by the exercise of reasonable care to make the structure safe."

[8] This section of the Restatement has been referred to with approval by the California Supreme Court. Lenahan v. Poole, 38 Cal.2d 392, 394, 240 P.2d 276, 34 A.L.R. 2d 481. Moreover, the California cases have definitely held that a landowner is liable for property damage to those outside his premises caused by the negligent maintenance of structures upon his land. Wiedekind v. Tuolumne County Water Co., 83 Cal. 198, 23 P. 311; Bacon v. Kearney Vineyard Syndicate, 1 Cal.App. 275, 82 P. 84.

[9] This principle is decisive of the present appeal. The District, whether required to do so or not, erected a structure, a levee, on its property. A break occurred in the levee because of heavy floods. The District is not being charged with liability for that break. Thereafter, there existed a state of disrepair of a structure on the District's land which it knew or should have known constituted a danger to those in the vicinity of the break. The District was notified of the break and of the danger. Thus, under the allegations, there is no doubt of respondent's knowledge of the defective condition. On this phase of the case see Armstrong v. Luco, 102 Cal. 272, 36 P. 674. The complaint alleges that respondents, after notice, had 10 to 21 days to repair the levee and did not do so. The damage to appellants' property then occurred during a heavy rainstorm. Certainly 10 to 21 days cannot be held, as a matter of law, to be such a short time that the District could not reasonably have repaired. It should be mentioned that section 22 of the Alameda Act specifically gives the District the power to contract for day labor without the necessity of publishing bids for "channel protection" or for "emergency work when necessary in order to protect life and property from impending flood damage."

[10] It seems to be the basic thought of the District that it was under no affirmative duty to act even after notice of the defective condition of the levee and of the danger to the adjoining landowners. This is the basic fallacy of its case. Under the Restatement, which sets forth in succinct form the common law rule, there is such a duty. After having constructed the levee the District was under the same duty to maintain it in a reasonable manner as a private landowner would be, at least after notice. Thus the plaintiffs have stated a good cause of action for negligence.

[11] The plaintiffs also contend that the other count of the complaint states a cause of action for inverse condemnation under Article I, section 14 of the California Constitution. It is their theory that they have stated a good cause of action for the taking or damaging of their property for a public use.

We think that this count does not state a cause of action and that the demurrer was properly sustained as to it. The most recent cases have made a distinction between negligence which occurs when a public agency is carrying out a deliberate plan with regard to the construction of public works, and negligence resulting in damage growing out of the operation and maintenance of public works. These cases hold that the damage resulting from the former type of negligence is compensable under Article I, section 14, whereas damages resulting from the second type of negligence are not recoverable in an inverse condemnation proceeding, but are recoverable, if at all, only in a negligence action. Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1; Ward Concrete Products Co. v. Los Angeles Flood etc. Dist., 149 Cal.App.2d 840, 309 P.2d 546; Youngblood v. City of Los Angeles, 160 Cal.App.2d 481, 325 P.2d 587. It has been definitely held that a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency. Neff v. Imperial Irrigation Dist., 142 Cal.App.2d 755, 299 P.2d 359. In the present case the District did not cause the original break in the levee, nor is it charged that such occurred by reason of negligence. Negligent design or construction is not charged, nor did the District deliberately divert the water onto the plaintiffs' lands. It is charged with negligent failure to act thereafter, that is, with negligence in the operation and maintenance of its property. In our opinion that does not charge a taking of property for public use under the Constitution.

The judgment appealed from is reversed, with instructions to the trial court to overrule the demurrer to the first cause of action.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; PETERS, J., not participating.

167 Cal.App.2d 743

AJAX MAGNOLIA ONE CORPORATION, a corporation, et al., Plaintiffs and Respondents,

v.

SOUTHERN CALIFORNIA EDISON COMPANY, Defendant and Appellant.

Civ. 5959.

District Court of Appeal, Fourth District, California.

Feb. 9, 1959.

Hearing Denied April 8, 1959.

Action against power company seeking declaratory relief with a respect to right of residential lot owners to construct fences across right-of-way easement. From portions of judgment of the Superior Court, Orange County, Ronald Crookshank, J., determining that owners had right to construct fences across right-of-way, the power company appealed. The District Court of Appeal, Stone, J. pro tem., held that under right-of-way easement for construction, maintenance, and servicing of power lines providing that grantee should have right to install and to use gates in any fences which

might be constructed on lands of grantor for purpose of permitting convenient entry to right-of-way strip, purchasers of servient land, which was subsequently subdivided into residential lots, did not have right to construct fences across right-of-way without consent of power company.

Judgment reversed.

1. Electricity ⇐9(1)

Under right-of-way easement for construction, maintenance, and servicing of power lines providing that grantee should have right to install and to use gates in any fences which might be constructed on lands of grantor for purpose of permitting convenient entry to right-of-way strip, purchasers of servient land, which was subsequently subdivided into residential lots, did not have right to construct fences across right-of-way without consent of power company. West's Ann.Civ.Code, § 1650.

2. Easements ⇐12(1)

Entire agreement for the granting of an easement must be construed as a whole and each clause considered in light of all other clauses. West's Ann.Civ.Code, § 1650.

3. Easements ⇐12(1)

An interpretation of an instrument which would thwart fulfillment of an easement and impede its use will not be favored where a reasonable interpretation consonant with purposes of easement as expressed in the document is tenable.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, Milford W. Dahl, Richard M. Barker, Santa Ana, Bruce Renwick and Victor E. Koch, Los Angeles, for appellant.

Mize, Larsh, Mize & Hubbard, Santa Ana, for respondents.

STONE, Justice pro tem.

[1] During the year 1931 the defendant and appellant Southern California Edison Company, a corporation, obtained right of way easements over three parcels of real property in Orange County for the purpose of constructing and maintaining power lines over and across the land described therein. At that time the property consisted of three separately owned parcels all being used for agricultural purposes. During the intervening years the property was sold and subdivided into residential lots.

The plaintiffs, who own lots in the subdivision, filed an action in declaratory relief contending that they had the right to construct fences, clothes lines, patios, fish ponds, swimming pools, swings, and gymnasiums, and to plant trees on the right of way. The defendant denied plaintiffs' right to erect or place any of the enumerated improvements on the right of way and contended that it had the right of full, complete, unobstructed and unrestricted use of the strip of land 90 feet in width covered by the easement.

The court found and by its judgment decreed as follows:

> "That the plaintiffs as owners of the servient tenement may not place, construct or install any building or other structure upon the real property included within the description of the easement owned by the defendant, Southern California Edison Company, or in any way obstruct the necessary and convenient use of said easement and right of way by said defendant without the written consent of the said defendant."

The court also found,

> "That the right to construct fences by the plaintiffs upon or over the real property included within the description of the easement owned by the defendant Southern California Edison Company is given by the terms of the easement with the right to the said defendant to install and use gates."

Plaintiffs did not appeal from the portion of the judgment prohibiting them from building any sort of structure other than a fence upon the easements but the defendant has appealed from that portion of the judgment which permits the construction of fences subject to the right to install and use gates.

Looking first at the two agreements granting the Edison Company a right of way, we find them identical insofar as the language pertinent to this case is concerned. The clauses which define the purposes of the easement and the rights of the grantee are as follows:

"* * * the Grantor hereby gives and grants to the Grantee, its successors and assigns, the right, privilege and authority to construct, erect, alter, enlarge, improve, repair, remove, replace, operate and maintain electric transmission lines consisting of steel or wooden towers or steel or wooden poles, with necessary guys, foundations and anchors, together with overhead and/or underground electric transmission wires, ground cables, telephone and telegraph wires, with insulators and cross-arms placed on said towers or poles, and other necessary or convenient appurtenances connected therewith, across, over, under and upon a strip of land, * * *

"1. That the Grantee, its successors and assigns, shall at all times have ingress to, and egress from, said land for the purpose of constructing, repairing, renewing, altering, changing, enlarging, removing, replacing, patrolling and operating said transmission lines. (Said right of entry may be by trucks, automobiles, or other vehicles, or by foot, as may suit the convenience of the Grantee.) * * *

"6. That the Grantor, his heirs or assigns, will not allow or permit any building or other structure to be erected or placed within the boundaries of said land and/or right-of-way strip, except such as shall be approved in writing by the Grantee, its successors or assigns, or allow or permit any accumulation of explosive or inflammable material within the lines of said land and/or right-of-way strip or so near thereto as to constitute, in the opinion of the Grantee, its successors or assigns, a menace or danger to said transmission lines * * *

"8. That the Grantor, his heirs or assigns, shall have the right to use the lands affected by this easement in any way not inconsistent herewith; but it is understood and agreed that it is the intention of the parties hereto to grant to the Grantee, its successors and assigns, the fullest rights necessary or convenient to enable them to use the same without interference for the purposes hereinbefore set out. This easement shall include any and all rights necessary or convenient over, under and upon said land which the Grantee shall desire to exercise in connection with the construction, maintenance and operation of said transmission lines, whether specifically mentioned herein or not * * *"

The clause concerning gates in fences which the trial court construed as modifying the foregoing grant reads:

"The *Grantee* shall have the right to install and use gates in any fence or fences which shall now or hereafter be constructed across any portion of said land and/or right of way strip * * *

The third easement with which this appeal is concerned was acquired by deed rather than by agreement but the question on appeal is essentially the same. The clauses of the deed expressing the nature of the easement and the rights of the grantee are as follows:

"* * * those permanent and exclusive easements and rights of way to construct, reconstruct, maintain, operate, enlarge, improve, remove, repair and renew an electric transmission line consisting of a line of steel towers, poles, and/or other structures, wires, cables, including ground wires, both overhead and underground, and communication circuits, with necessary and convenient foundations, guy wires and anchors, insulators and cross-arms placed on said structures, and other appurtenances connected therewith, convenient and necessary for the con-

> struction, maintenance, operation, regulation, control and grounding of electric transmission lines for the purpose of transmitting, distributing, regulating, using and controlling electric energy, together with the right and easement for roads, ingress, egress, and other convenient purposes needed or desired at any time by the grantee, and the right and easement to construct, reconstruct, maintain and operate the same, and the right to clear and keep clear said easements and the real property affected thereby, free from explosives, buildings, structures, trees, brush and inflammable materials, for the protection from fire and other hazards; in, under, on, over and across a strip of land * * *

Then follows the clause regarding fences and gates which provides:

> "Grantee shall have the right to install and to use gates in any fences which are now or may be hereafter constructed on said lands of the Grantor, for the purpose of permitting convenient entry to said right of way strip. Any gates which are installed by Grantee on said lands shall be locked with Grantee's locks, and also, if the Grantor so desires, may be locked with the Grantor's locks, in such a manner that either can lock or unlock the gates. Any gates which are installed and locked by the Grantor and used by the Grantee shall be locked also by the Grantee's locks so that either can lock or unlock the gates."

The legal question presented by this appeal is identical as to all three easements as the clauses to be construed are substantially the same in each instrument. The trial court recognized the restriction of the servient tenement as to the construction of any building or structure on the right of way but found that the owners of the servient tenement could construct fences across the right of way and that the owner of the dominant tenement had the right to install gates in any fence constructed. There appears to be no doubt that a fence is a structure. Mendoza v. Central Forest Co., 37 Cal.App. 289, 174 P. 359; Western Electric Co., Inc. v. Colley, 79 Cal. App. 770, 774, 251 P. 331; 36 C.J.S. Fences § 1, P. 636. Hence the sole question is whether the words "The Grantee shall have the right to install and use gates in any fence or fences which shall now or hereafter be constructed across any portion of said land and/or right-of-way strip" modify and qualify the provision forbidding the erection of any structure on the right of way without the consent of the grantee. The right to place a gate in a fence granted to one party is not tantamount to a grant of authority to the other party to build a fence. If the clause pertaining to gates in fences were to have the meaning contended for by respondents the wording would have to be in substance: "The grantors shall have the right to construct fences across any portion of the right of way, subject to the right of the grantee to install and use gates". The wording used in the documents falls short of such a reservation in the grantor.

[2] If it be conceded for the purpose of argument that the clause in each instrument relating to fences and gates, when considered separate and apart from the rest of the document, does cause an ambiguity or a conflict, none the less, such a manner of interpretation would be contrary to the rules of construction of documents. The entire agreement must be construed as a whole and each clause considered in the light of all of the other clauses. Civil Code section 1650 provides: "Particular clauses of a contract are subordinate to its general intent." This rule of law has been amplified and stated in general terms by many decisions, a typical expression being that of the court in Hunt v. United Bank & Trust Co., 210 Cal. 108, 115, 291 P. 184, 187:

> "It is a primary rule of interpretation that contracts must be construed as a whole, that is, from their four corners, and the intention of the parties is to be collected from the entire instrument and not detached portions thereof, it being necessary to consider all of the parts to determine the meaning of any particular part as well as of

the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all of the writing and every word of it will, if possible, be given effect. 13 Corpus Juris, 525." See also 12 Cal.Jur.2d p. 369; Perry v. Gross, 172 Cal. 468, 469, 156 P. 1031; Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772.

The grants of easement which are set forth quite fully hereinbefore reflect that the grantee was granted, among other rights, the right, privilege and authority to construct, erect, reconstruct, alter, enlarge, operate and maintain electric transmission lines consisting of steel or wooden towers overhead and underground. Paragraph 8 of the two agreements is particluarly significant and bears repeating. It provides:

"8. That the Grantor, his heirs and assigns, shall have the right to use the lands affected by this easement in any way not inconsistent herewith; but it is understood and agreed that it is the intention of the parties hereto to grant to the Grantee, its successors and assigns, the fullest rights necessary or convenient to enable them to use the same without interference for the purposes hereinbefore set out. This easement shall include any and all rights necessary or convenient over, under and upon said land which the Grantee shall desire to exercise in connection with the construction, maintenance and operation of said transmission lines, whether specifically mentioned herein or not."

It is clear that the parties to the original grants of easement contemplated a free and unhindered use of the right of way for the purpose of constructing, maintaining and servicing power lines. Considering the entire agreement it is evident that the parties did not intend that fences should be built across the easement at will without the consent of the owner of the dominant tenement.

The evidence disclosed that the right of way carries two 66,000 volt circuits, one known as the Barre-Trask Ocean View Circuit, and the other known as the Barre-Sullivan-Ellis Circuit. These circuits service approximately 100,000 residences. They also carry a responsible part of the service to various industrial users. In order to maintain the circuits and lines in good operating condition, they have to be patrolled approximately every ninety days. This patrol consists of two men in a truck, carrying tools and equipment to make necessary repairs. This patrol is conducted by riding along the lines to look at the structures to determine whether there is a frayed wire, hanging limbs, fallen structures, or any other obstructions. In addition, if a flashover occurs, that is a short in the circuit, the system is put out of service and it is necessary to patrol the line to determine the cause and repair it. Depending upon the degree of damage, in the event of a flashover, as many as three trucks and a holedigger need to get through and upon the easement and right of way for the purpose of repair. The trucks used in repair are four-wheel drive line trucks approximately twenty to twenty-five feet long, with a standard truck width. If a new pole were required, it would also involve a pole dolly, which is a two-wheel dolly, to which a pole is fastened, and the pole in turn fastened to the truck, forming a type of trailer. With the poles in question, it would be a trailer approximately seventy-five feet in length. In order to prevent a flashover between the structure and the wire, the insulators need to be cleaned. The cleaning process occurs at least once a year and under the present trend will occur more often. What is called an insulator washing machine is used to carry on the cleaning operation. This is a heavy piece of equipment, consisting of a boom, a water tank, and a high pressure pump with nozzle, all mounted on a truck, with a total weight of approximately twenty-three tons. This truck is driven down the right of way from pole to pole for cleaning purposes. If the right of way is not kept clear to allow the truck to be driven down the right of way, it is necessary that the cleaning process be performed by hand. In the hand-cleaning process the lines are taken out of service

and deenergized, and a man climbs the pole and wipes the insulators with steel wool. This process requires one day to clean one circuit on six structures, compared to twenty structures a day on both circuits if the washing equipment is used. In the event it became necessary to restring the wire, each pole structure would have to be reached and the wire would have to be protected from obstructions on the ground to prevent damage.

[3] Fences at the property lines of every building lot in the subdivisions even with gates, would materially interfere with the purposes of the easements and prevent the appellant, a public utility, from performing its duty of supplying electric energy to the public by means of the power lines along the easement. An interpretation of an instrument which would thwart the fulfillment of the purposes of an easement and impede its use will not be favored where a reasonable interpretation consonant with the purposes of the easement as expressed in the document is tenable.

The judgment is reversed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.

167 Cal.App.2d 662

Rev. Charles W. HASSELBACH, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Russell S. Munro, Director, Alcoholic Beverage Control Appeals Board, Coleman E. Stewart, Roe One and Roe Two, its members; Von's Grocery Company, a Corporation, Defendants and Respondents.

Civ. 23001.

District Court of Appeal, Second District, Division 3, California.

Feb. 6, 1959.

Rehearing Denied Feb. 25, 1959.

Hearing Denied April 1, 1959.

Mandamus proceeding brought for review of an order of the alcoholic beverage control appeals board affirming an order of the department of alcoholic beverage control granting an on-sale liquor license. The Superior Court, Los Angeles County, Bayard Rhone, J., rendered judgment denying the relief sought, and the petitioner appealed. The District Court of Appeal, Nourse, J. pro tem., held that question as to what is contrary to public welfare and morals is not a static one and that resolution of that question may change with lapse of time or change in physical conditions; and held that even if alcoholic beverage control department's former order might have constituted an estoppel to again litigate question as to whether granting of license would be contrary to public welfare and morals if there had been no change in circumstances, it would not have that effect where traffic on boulevard had increased by 30 per cent, number of customers patronizing market for which license was sought had increased by approximately 18 per cent and at least three new commercial enterprises had commenced operation in neighborhood since denial of prior application.

Affirmed.

1. Intoxicating Liquors ⇐69

In acting as a quasi-judicial tribunal, department of alcoholic beverage control may not exercise its discretion arbitrarily but only in accordance with law; and its decision as to what is contrary to public welfare and morals must be based upon sufficient evidence. West's Ann.Const. art. 20, § 22.

2. Administrative Law and Procedure ⇐496
Intoxicating Liquors ⇐71

Orders of an administrative body, such as the department of alcoholic beverage control, have, in proper cases, same effect and finality as judgments of court.

3. Intoxicating Liquors ⇐69

Question as to what is contrary to public welfare and morals is not a static one and resolution of that question may change with lapse of time or change in physical conditions; and even if alcoholic beverage control department's former order,

in on-sale liquor license case, might have constituted an estoppel to again litigate question as to whether granting of license would be contrary to public welfare and morals if there had been no change in circumstances, it would not have that effect where traffic on boulevard had increased by 30 per cent, number of customers patronizing market for which license was sought had increased by approximately 18 per cent and at least three new commercial enterprises had commenced operation in neighborhood since denial of prior application.

4. Intoxicating Liquors ⇐75(7)

In exercising its discretion in on-sale liquor license case, it was duty of department to take into consideration welfare of public as a whole and to exercise its discretion in light of conditions that existed at time of hearing as those conditions were shown by evidence; and it was not province of court reviewing case to substitute its judgment for that of department as to whether license should issue or as to whether there had been, since prior hearing and order denying application for license, change in circumstances which justified change in decision, providing that there was substantial evidence of change. West's Ann.Const. art. 20, § 22.

5. Intoxicating Liquors ⇐70

Alcoholic beverage control appeals board is without power to make findings of fact. West's Ann.Bus. & Prof.Code, § 23084; West's Ann.Const. art. 20, § 22.

6. Intoxicating Liquors ⇐75(7)

Decision of appeals board, in on-sale liquor license case, being correct, it was immaterial that reasons given for it were erroneous. West's Ann.Bus. & Prof.Code, § 23085.

Irving Sulmeyer, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent State.

Johnson, Bates & Sheffield, Los Angeles, for respondent Von's Grocery Co.

NOURSE, Justice pro tem.

By his petition filed in the superior court, appellant sought to review an order of the Alcoholic Beverage Control Appeals Board, hereinafter called "appeals board," affirming an order of the Department of Alcoholic Beverage Control, hereinafter called the "Department" granting an on-sale liquor license to Von's Grocery Company, hereinafter called "Von's" and sought a writ of mandate to compel the appeals board to reverse its decision and the Department to annul its order and to deny a license to Von's. The superior court having entered judgment denying the relief sought, appellant, hereinafter called "petitioner" appeals.

Von's having filed its application with the board for a license and the board having given the statutory notice of such application, the petitioner on behalf of himself and the church of which he is the pastor, filed a protest with the board; the grounds of the protest being stated as follows: "That said 'Von's' are situated within the immediate vicinity of our church and Christian Elementary School, and that the issuance of this license would be contrary to public welfare and morals." After a hearing in which evidence was introduced by the Department, by the petitioner and by Von's, the hearing officer made findings of fact and from those determined that "[a]lthough the proposed premises are located within the immediate vicinity of a church and a school, issuance of the license would not be contrary to public welfare or morals," and recommended that the protest filed by petitioner be overruled. Thereafter the Department adopted the proposed decision of the hearing officer as its decision. Petitioner then prosecuted an appeal to the Alcoholic Beverage Control Appeals Board and that board affirmed the order of the Department.

By his petition filed in the superior court, petitioner alleged that Von's had made three previous applications for a license;

that petitioner and the church had opposed each of these applications and that the protests had been sustained. He set forth as an exhibit to his petition a copy of the decision of the Department sustaining the protest of Von's third application.[1] This third application was filed in August of 1955 and the decision of the Department sustaining appellant's protest thereto was made on November 25th of that year. The present application for a license was filed in October of 1956.

The only question involved on this appeal as stated by appellant is as follows: "Does the Doctrine of Res Judicata Apply to the Department of Alcoholic Beverage Control in its Determinations of Whether or not to Grant the Issuance of a License to Sell Alcoholic Beverages?" In presenting this question appellant necessarily asserts that the former order of the board estops Von's, by its present application, from again litigating the fact as to whether the granting of a license to it would be contrary to the public welfare and morals. In other words, appellant relies upon the former order as an estoppel and not upon it as a judgment which bars the prosecution of the present application.

"'The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights'" of the parties affected by the order. Hurd v. Albert, 214 Cal. 15, at page 26, 3 P.2d 545, at page 549, 76 A.L.R. 1348; Lunt v. Boris, 87 Cal.App. 2d 694, at page 695, 197 P.2d 568, at page 569; California Employment Stablization Comm. v. Matcovich, 74 Cal.App.2d 398, at page 404, 168 P.2d 702, at page 706; 29 Cal.Jur.2d § 230.

[1] The Department is a constitution-created tribunal with fact finding power and is given the exclusive right to, in its discretion, grant or deny a license to sell intoxicating liquors. Article XX, § 22 of the Constitution of the State of California. In acting as a quasi-judicial tribunal the Department may not exercise its discretion arbitrarily but only in accordance with law and its decision as to what is contrary to the public welfare and morals must be based upon sufficient evidence. Stoumen v. Reilly, 37 Cal.2d 713, at page 717, 234 P.2d 969, at page 971.

In the present proceeding before the Department the evidence established that Von's market was opened at the location in question in the latter part of 1955; that prior to that time and in 1949 and 1950 a grocery store at the same site had held a beer and wine license; that Von's premises consist of a large market building situated in a shopping center at the corners of Riverside Drive and Fulton Avenue; that the same shopping center contains a drug-store, department store and off-street parking facilities; that Riverside Drive is a heavily traveled thoroughfare and that the traffic thereon had increased 30 per cent duing the year preceding the hearing; that the area near the market is predominately commercial; that the church of which appellant here is pastor is situated across Riverside Drive from the market and that the distance from the church to the market is 210 feet. It was erected in 1950; that there is a retail liquor store situated on Riverside Drive, 475 feet from the church; that during the year immediately preceding the hearing upon the present application the people patronizing the market had increased in number by approximately 3,000 per week; that in the same year a medical building which contained professional offices and a pharmacy and a building housing a hardware store and laundry had been erected; that the church has a congregation of approximately 700 and conducts an elementary

1. The findings of fact and decision of the Department in sustaining the protest to Von's former applications were not offered in evidence at the protest to the fourth application and were not a part of the printed record before the superior court.

school which has an enrollment of 130 students ranging in age from 5 to 12 years of age.

Appellant does not contend that these facts were not sufficient to uphold the finding of the Department that the issuance of the license would not be "contrary to public welfare and morals." Its sole contention is that the Department having in November of 1955 made a contrary finding, that finding was conclusive of the fact that the granting of the license was contrary to public welfare and morals and that the Department was precluded thereby from making a finding to the contrary and granting a license to Von's.

[2, 3] The question as to what is or is not contrary to the public welfare and morals is not a static one and the resolution of that question may change with the lapse of time or a change in physical conditions. We are not called upon to decide whether the Department's former order would have constituted an estoppel to again litigate the question as to whether the granting of a license would or would not be contrary to the public welfare and morals had there been no change in circumstances, for even assuming that res adjudicata would have applied to those circumstances, there was a change here and it was not therefore applicable.[2] The traffic on the boulevard had increased by 30 per cent, the number of customers patronizing the market had increased by approximately 18 per cent and at least three new commercial enterprises had commenced operation in that neighborhood. In exercising its discretion as to whether a license should be granted upon the present application of Von's, it was for the Department to determine whether the changes we have noted affected the ultimate fact as to whether the granting of the license would be contrary to the public welfare and morals and justify a different conclusion from the one it had theretofore reached as to the issuance of a license to Von's at the subject property.

[4] In reaching its conclusion and exercising its discretion it was the duty of the Department to take into consideration the welfare of the public as a whole and to exercise its discretion in the light of the conditions that existed at the time of the hearing as those conditions were shown by the evidence. It is not the province of a court reviewing the proceedings of the Department to substitute its judgment for that of the Department as to whether a license should issue or as to whether there had been, since the prior hearing and order, a change in circumstances which justifies a change in decision, providing that there was substantial evidence of the change. To hold otherwise would be to vest in the court the discretion which by the Constitution is vested exclusively in the Department.

Appellant directs our attention, however, to the fact that in its written opinion *affirm-*

2. Counsel for the respondent, by their briefs, earnestly contend that a decision of an administrative body cannot operate as a collateral estoppel under the doctrine of res adjudicata. They rely upon Altadena Community Church v. State Bd. of Equalization, 109 Cal.App. 2d 99, 240 P.2d 322 and Steiger v. Board of Supervisors, 143 Cal.App.2d 352, at page 358, 300 P.2d 210, at page 215 to uphold their contention. While some of the language used by the court in the cases just cited is so broad as to preclude a decision of a constitutionally constituted administrative board operating as a collateral estoppel under the doctrine of res adjudicata, we do not believe that when those cases are read in the light of the question before the court they may be so understood. It is unquestionable that the orders of an administrative body such as the Department have in proper cases the same effect and finality as judgments of a court. People v. Lang Transportation Co., 217 Cal. 166, at page 170, 17 P.2d 721, at page 723; People ex rel. Skelton v. City of Los Angeles, 133 Cal. 338, at page 342, 65 P. 749, at page 750; Mogan v. Board of Police Com'rs, 100 Cal.App. 270, at page 273, 279 P. 1080, at page 1081; see also Davis' "Administrative Law Treatise," Vol. 2 pp. 545–628; 1942 Wisconsin Law Review, pp. 1–42 and pp. 198–235; 40 Illinois Law Review, pp. 56–83; 27 Michigan Law Review, pp. 677–683; 46 Yale Law Review, pp. 1320 et seq.

ing the order of the Department, the Alcoholic Beverage Control Appeals Board stated that the changes which were made were not substantial and placed its affirmance of the Department's findings and decision upon the basis that res adjudicata did not apply but that the Department had the right to reverse its former rulings without change in conditions.

[5] The statement made in the opinion of the appeals board was not a finding of fact for that board is without power to make findings of fact. Its power is limited to determining the following questions: (a) whether the Department had proceeded without or in excess of its jurisdiction, (b) whether the Department had proceeded in the manner required by law, (c) whether its decision is supported by the findings, (d) whether the findings are supported by substantial evidence in the light of the whole record and (e) whether there was relevant evidence which in the exercise of reasonable diligence could not have been produced or which was improperly excluded at the hearing before the Department. Bus. & Prof. Code, § 23084; art. XX, § 22 of the Constitution.

While in his notice of appeal to the appeals board appellant stated several grounds for the appeal, they in reality only presented the question as to whether the findings made by the Department supported its decision. Appellant, by his notice of appeal to the appeals board, did not assert as a ground of reversal that the findings were not supported by substantial evidence but only that the findings were capricious and arbitrary because contrary to the former decision of the board.

[6] By its findings the Department found all of the changes and conditions which we have heretofore noted other than the increase in the patronage of the market and further found that it was not true that the issuance of the license to Von's would adversely affect the functions of the church or school or create any appreciable hazard to the morals or welfare of the children in the church school and that "in view of the nature of the business sought to be licensed and the *increasingly commercial character* of the neighborhood * * * issuance of the license would not be contrary to public welfare or morals." (Emphasis added.) Upon the appeal to it the appeals board had but two alternatives: it might affirm the order of the Department or if it found that the Department's findings did not support its decision it might reverse and remand the matter to the Department for further consideration. Bus. & Prof. Code, § 23085. The board did affirm the decision of the Department and thus ruled that the findings did support the Department's decision and order. The fact that in arriving at its decision affirming the decision of the Department the appeals board erroneously held (if its holding was erroneous) that res adjudicata was under no circumstance applicable in a proceeding such as the one in question here, in nowise affected the validity of its decision, for as we have pointed out, there was a change in conditions and it was for the Department to determine whether those changes were of such a character as to justify the conclusion that the granting of a license would not to be contrary to public welfare and morals. The decision of the appeals board was therefore correct and it matters not that the reasons given by it were erroneous. Sears v. Rule, 27 Cal.2d 131, 140, 163 P.2d 443; Difani v. Riverside County Oil Co., 201 Cal. 210, 217, 256 P. 210; Lincoln v. Superior Court, 22 Cal.2d 304, 315, 139 P. 2d 13.

To sum up, it is our opinion that the evidence before the Department supported its findings of fact, that its findings of fact supported its decision, and that while it was within the province of the appeals board to reverse the Department's decision and remand the matter to the Department, it having affirmed and its affirmance being supported by the record, the lower court was correct in denying the writ prayed for by appellant.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

167 Cal.App.2d 707

In the Matter of the ESTATE OF Edgar Laurence DOW, also known as E. L. Dow, Deceased.

Maxine B. DOW, Administratrix with the Will Annexed, Petitioner and Respondent,

v.

Maxine Patricia HUTCHINSON, Respondent and Appellant.

Civ. 18108.

District Court of Appeal, First District, Division 2, California.

Feb. 9, 1959.

Rehearing Denied March 11, 1959.

Hearing Denied April 1, 1959.

Appeal from an order of the Superior Court, City and County of San Francisco, Thomas M. Foley, J., settling supplemental accounts covering periods from 1955 decree of distribution, granting ordinary and extraordinary compensation to administratrix and her attorney, etc. and from a minute order authorizing sale of shares of stock retained by estate. The District Court of Appeal, Draper, J., held that where Probate Court ordered payment to attorney of $3,250 and such amount was later reduced to $2,500 under a compromise acceptable to attorney, restoration of reduction by probate court through efforts of administratrix was improper.

Minute order reversed and portions of order directing payment of reduced sum to attorney and payment of costs in prohibition proceeding reversed.

1. Executors and Administrators ⇐181

Allowance of $500 per month to widow during progress of settlement of estate and during pendency of appeal from a decree of distribution or until further order of court was not payable only out of widow's half of estate but was payable out of entire estate, and probate court had jurisdiction to assess any charges against estate after such decree.

2. Executors and Administrators ⇐500

Where daughter's appeal from 1955 decree of distribution compelled continuance of administration and delay in administration was not due to administratrix' whim or wrongdoing in any sense, allowance of ordinary and extraordinary compensation to administratrix and her attorneys was proper.

3. Executors and Administrators ⇐497, 501

Occasion for and amount of extraordinary compensation to an administratrix is a matter for discretion of trial court and reviewing court will interfere only for abuse.

4. Executors and Administrators ⇐216(2)

Ordinary and extraordinary compensation may be allowed an attorney for defending administratrix' account.

5. Executors and Administrators ⇐316

Probate court did not abuse its discretion in directing administratrix to withhold assets worth approximately $50,000 to take care of charges due or to become due, when principal item so withheld was corporate stock upon which substantial taxable capital gains would be realized when reduced to cash.

6. Executors and Administrators ⇐197

Where Supreme Court directed that order for family allowance should continue until approximate time when widow might come into possession of her distributive share, and portions of estate were distributed on May 28, and on June 26, and on July 17, which was day after Supreme Court's affirmance of family allowance became final, probate court entered its order terminating allowance, election of July 2, as the date for determination of family allowance was not error.

7. Executors and Administrators ⇐256(8)

Where probate court ordered payment to attorney of $3,250 and such amount was later reduced to $2,500 under a compromise which attorney was willing to accept and reduction was affirmed on appeal by administratrix, restoration of reduction by probate court through efforts of administratrix was improper.

8. Costs ⇐73

Where administratrix secured a writ of prohibition concerning an order direct-

ing administratrix to deliver certain assets of estate within ten days to a beneficiary and no costs were awarded by district court in that original proceeding, such costs were not recoverable by administratrix from such beneficiary in settlement of estate.

9. Costs ⇐32(1), 73

In an original proceeding, costs are not awarded to prevailing party as of course, and, in absence of specific order therefor by reviewing court, they are not recoverable.

10. Executors and Administrators ⇐337

Where notice of hearing of petition by administratrix for order authorizing sale of shares of stock retained by estate was neither given to a beneficiary nor dispensed with by court order, order authorizing sale of shares of stock was improper. West's Ann.Prob.Code, § 771.

Hutchinson & Quattrin, William A. White, San Francisco, for appellant.

Rogers & Clark, Webster V. Clark, San Francisco, for respondent.

DRAPER, Justice.

This is one more appeal in the prolonged and bitter dispute between mother and daughter over distribution of the estate of the husband and father. Testator died in 1930. The intervening years have not cooled the acrimony of his survivors. The case has often been before the appellate courts. In re Estate of Dow, 91 Cal.App.2d 420, 205 P.2d 698 [hearing denied by Supreme Court]; In re Estate of Dow, 120 Cal.App. 2d 296, 260 P.2d 970; Dow v. Superior Court, 140 Cal.App.2d 399, 297 P.2d 30 [hearing denied]; In re Estate of Dow, 149 Cal.App.2d 47, 308 P.2d 475 [hearing denied]; In re Estate of Dow, 149 Cal.App.2d 67, 308 P.2d 488; In re Estate of Dow, 149 Cal.App.2d 69, 308 P.2d 489; Hutchinson v. Superior Court, 149 Cal.App.2d 73, 308 P. 2d 492; In re Estate of Dow, 48 Cal.2d 649, 312 P.2d 1. Thus it is not surprising that the present appeal turns largely upon the interpretation and application of previous decisions.

[1] On February 2, 1955, the probate court entered its order settling third and fourth accounts of respondent as administratrix with the will annexed and its decree of distribution. The present appellant appealed from that order and decree, later restricting her appeal from the decree to those portions directing distribution to Mrs. Dow. April 13, 1955, the probate court ordered payment of an allowance of $500 per month to respondent "during the progress of the settlement of the Estate, and the Appeal now pending * * *, or until the further Order of this Court." The present appellant appealed from that order. On September 7, 1955, the probate court ordered respondent administratrix to deliver to Mrs. Hutchinson, within 10 days, certain of the assets described in the decree of distribution. Respondent administratrix appealed from that order. The appellate court modified and affirmed the order settling accounts and the decree of distribution (149 Cal.App.2d 47, 66, 308 P.2d 475) and the order of September 7, 1955 (149 Cal.App.2d 69, 308 P.2d 489). Thereafter the order granting family allowance was affirmed (48 Cal.2d 649, 312 P.2d 1). By order filed July 17, 1957 the probate court settled supplemental accounts which covered the period after the 1955 decree, terminated the family allowance, granted ordinary and extraordinary compensation to administratrix and her attorneys, directed retention in the estate of cash and 758½ shares of River Farms Company, and directed distribution of the remaining assets in equal shares to the parties hereto. The daughter now appeals from portions of this latest order.

Appellant's basic argument is that the decree of distribution filed February 2, 1955 determined the rights of the parties. Since she appealed only from the portions directing distribution to respondent, she contends that the decree became final as to appellant's distributive share on respondent's failure to appeal therefrom. Thus, she as-

serts, the court in 1957 had no jurisdiction to charge her distributive share with any part of the family allowance and other expenses of administration arising after February 2, 1955.

But this issue has been determined against appellant's contention. The Supreme Court (48 Cal.2d 649, 653, 312 P.2d 1, 4) held that under "[t]he particular circumstances of this case" the family allowance after decree of distribution was a proper charge against the estate. Appellant suggests that this decision must be construed to award respondent a family allowance only from respondent's own half of the estate. This view is clearly contrary to the holding implicit in the Supreme Court decision, as appellant recognized in petitioning for rehearing in that case. In that petition, she described as "incontestable" the fact that "50 cents of every dollar paid under this order is abstracted from appellant's distribution." Similarly, the estate as a whole is chargeable with proper expenses incurred while the appeals from the 1955 orders necessarily extended the period of administration. The Supreme Court specifically noted that when the daughter appealed from the decree of distribution the "estate was therefore no longer in a condition to be 'immediately' closed" (48 Cal. 2d at page 652, 312 P.2d at page 3) and that "the decree, while denominated a decree of final distribution, specifically provides * * * for further proceedings, including the payment of all obligations of the estate * * *" (48 Cal.2d at page 653, 312 P.2d at page 4). The District Court of Appeal recognized that the decree of distribution "did not fully take into account the fact that it might be followed by an appeal" (149 Cal.App.2d at page 71, 308 P.2d at page 491), specifically contemplated "payment of all charges and claims not provided for in the decree of distribution" (149 Cal.App.2d at page 71, 308 P.2d at page 491) and modified the order to require withholding of additional assets to meet "the foreseeable contingencies during the final determination of all estate matters" (149 Cal.App.2d at pages 71–72, 308 P.2d at page 491). The probate court was directed to "determine at once what assets of the estate, money or stock or both, are required to be withheld to meet all foreseeable contingencies" (149 Cal.App.2d at pages 72, 308 P.2d at page 491; 149 Cal. App.2d at page 66, 308 P.2d at page 487). This language completely disposes of appellant's claim that the probate court lacked jurisdiction to assess any charges against the estate after the 1955 decree. However, she attacks individual items upon other grounds.

[2–4] Appellant argues that the allowance of ordinary and extraordinary compensation to administratrix and her attorneys is improper. As suggested above, the appeal of the present appellant from the 1955 decree compelled continuance of administration. We do not seek to apportion responsibility for the delay in administration over its whole period. It is implicit, however, in the appellate decisions of 1957 that the delay since February 2, 1955 has not been due to respondent's whim or wrongdoing in any sense which should deprive her or her counsel of reasonable compensation. The occasion for and the amount of extraordinary compensation is a matter for the discretion of the trial court, to be interfered with on appeal only for abuse. In re Estate of Scherer, 58 Cal.App.2d 133, 142, 136 P.2d 103. Such compensation may be allowed an attorney for defending the administrator's account. In re Estate of Raphael, 128 Cal.App.2d 92, 97, 274 P.2d 880. We have reviewed the allowances made to the administratrix and her attorneys, and find no reason to disturb them.

[5] Appellant asserts that the probate court abused its discretion in directing administratrix to withhold assets worth approximately $50,000 to pay "charges due or to become due." While this amount seems somewhat large, we must note that the principal item so withheld is corporate stock upon which substantial taxable capital gains will be realized when it is reduced to cash. This fact, and the long history of this case, which the probate court might

well fear would be still further lengthened, lead us to feel that there has been no abuse of discretion.

[6] Appellant complains that the family allowance should have terminated at an earlier date than July 2, 1957. Decision modifying and affirming decree of distribution was filed March 11, 1957 (149 Cal.App. 2d 47, 308 P.2d 475), hearing by the Supreme Court was denied May 8, 1957 and remittitur was issued May 13, 1957. The Supreme Court decision affirming order for family allowance (48 Cal.2d 649, 312 P.2d 1, 4) pointed out that the allowance was to continue "until the approximate time when the widow might come into possession of her distributive share." Portions of the estate were distributed May 28, 1957 and on June 26, in accordance with the order of the District Court of Appeal, respondent filed her second supplemental account and sought determination of the amount to be withheld from distribution for closing costs. On July 17, the day after the Supreme Court's affirmance of the family allowance became final, the probate court entered its orders fixing the amount to be withheld and terminating the family allowance after payment of $500 which had become due July 2. Full distribution could not be had at an earlier date because of the several appeals. In fact, the present appeal has still further delayed the date when the widow may come into possession of her distributive share. We find no error in selection of the termination date.

[7] In 1955, the probate court had ordered payment to attorney Caubu of $3,250, and had later reduced this amount to $2,500, a compromise which the attorney was said to be willing to accept. The administratrix appealed from the order reducing the allowance, and the reduction was affirmed, the court noting that the criticisms by the administratrix "are captious and unfounded" (149 Cal.App.2d 72, 308 P.2d 489, 491). Undaunted, respondent again sought payment of the same sum of $750 to attorney Caubu, and it was granted by the probate court. We find no reason for this restoration of the previous deduction, and it is not sought by the attorney involved. This allowance must be reversed.

[8, 9] The order now appealed from also directs payment by appellant to respondent of $338.61 as costs in a proceeding in which respondent secured a writ of prohibition concerning the order of September 7, 1955. No costs were awarded by the District Court of Appeal in that original proceeding. Dow v. Superior Court, 140 Cal.App.2d 399, 297 P.2d 30. In an original proceeding, costs are not awarded to the prevailing party as of course, and, in the absence of specific order therefor by the appellate court, they are not recoverable. (3 Witkin, California Procedure, 2564 and cases there cited.)

Appellant complains of reduction of the bond of administratrix to $10,000. But the record does not negative application of Probate Code, § 541.1. Thus there is no basis for reversal or modification of the order here. The remaining detailed attacks are based principally upon the claim that distribution to appellant was final with the decree of February 2, 1955, and that the court had no jurisdiction thereafter. This contention has been fully discussed, and cannot be sustained.

[10] Appellant also has appealed from minute order of September 12, 1957, authorizing sale of 300 shares of stock retained by the estate. The two appeals are consolidated. The record before us indicates that notice of hearing of the petition for the latter order was neither given to appellant nor dispensed with by court order. But the personal representative can secure such an order only on notice, unless the court makes its order dispensing with notice. Prob. Code, § 771. Thus this order must be reversed.

The minute order of September 12, 1957 is reversed. The portions of the order of July 17, 1957 directing payment of $750 to attorney Caubu, and payment to respondent by appellant of $338.61 for costs in the prohibition proceeding are reversed. In all

other respects that order is affirmed. Costs are awarded to respondent, Maxine B. Dow.

KAUFMAN, P. J., and DOOLING, J., concur.

Tony DADDINO and Bonnie Daddino et al., Plaintiffs and Respondents,

v.

BUILDERS CONCRETE, INC., a corporation, Defendant and Appellant.

Civ. A. 58.

Appellate Department, Superior Court, Fresno County, California.

Feb. 2, 1959.

Action to recover a certain sum as liquidated damages for breach of contract, under which defendant waived its appeal from decree, enjoining its plant operation as a nuisance, in consideration for plaintiffs' agreement to permit continuance of operations for a limited period. The Municipal Court rendered judgment for plaintiffs, and defendant appealed. The Appellate Department of the Superior Court, Popovich, J., held that evidence sustained finding that provision in contract for payment of $50 per day in event of operation of plant after extension date was fair compensation for plaintiffs' loss and that provision should be construed as one for liquidated damages rather than as a provision for a penalty.

Affirmed.

1. Damages ⇐83

Whether damages would be impracticable or extremely difficult of precise appraisal, for purposes of Civil Code section invalidating contract provision fixing amount of damages in anticipation of breach except when it would be impracticable or extremely difficult to fix actual damages, is largely a question of fact. West's Ann.Civ.Code, §§ 1670, 1671.

2. Damages ⇐157(3)

In order to recover on contract providing for liquidated damages, plaintiff must plead and prove that at time contract was entered into damages in event of breach would have been impracticable or extremely difficult of ascertainment and that sum agreed upon represented a reasonable endeavor to ascertain what such damages would be and that a breach of contract has occurred. West's Ann.Civ.Code, §§ 1670, 1671.

3. Damages ⇐80(1)

To satisfy statute invalidating contract provision attempting to fix amount of damages in anticipation of breach of obligation except when it is impracticable or extremely difficult to fix actual damages, amount agreed upon must have resulted from a reasonable endeavor by parties to estimate fair compensation for any loss that might be sustained because of breach. West's Ann.Civ.Code, §§ 1670, 1671.

4. Damages ⇐78(2)

Stipulation that amount was agreed upon as liquidated damages and not as a penalty is not conclusive, but is entitled to some weight in determining validity of contract provision under statute invalidating provision attempting to fix amount of damages in anticipation of breach except when it would be impracticable or extremely difficult to fix actual damages. West's Ann. Civ.Code, §§ 1670, 1671.

5. Damages ⇐189

In action to recover a certain sum as liquidated damages for breach of contract, under which defendant waived its appeal, from decree enjoining its plant operation as a nuisance, in consideration for plaintiffs' agreement to permit continuance of operations for a limited period, evidence sustained finding that provision in contract

for payment of $50 per day in event of operation of plant after extension date was fair compensation for plaintiffs' loss and that provision should be construed as one for liquidated damages rather than as a provision for a penalty. West's Ann.Civ. Code, §§ 1670, 1671.

Savage & Shepard, Fresno, for plaintiffs and respondents.

Rowell, Lamberson & Thomas, Fresno, for defendant and appellant.

POPOVICH, Judge.

The defendant and appellant appeals from a judgment of the Municipal Court, awarding plaintiffs and respondents $2,750 as liquidated damages for breach of contract.

Appellant operated a transit mix concrete plant in the City of Clovis on property adjacent to the poultry ranch and residence of respondents. On the basis that the operation of this plant constituted a nuisance, respondents had secured a judgment in the Superior Court of Fresno County, permanently enjoining appellant from continuing the operation of its plant, effective July 18, 1956, together with damages in the sum of $6,600. Subsequent to the entry of the judgment, the parties entered into the contract upon which this suit is brought extending the effective date of the injunction to October 17, 1956, to enable appellant to continue its concrete business while it was establishing a new plant at a new location. The contract provided that, in consideration for the extension, appellant waived its appeal, agreed to keep the nuisance of its operation to a minimum, and in the event it operated past the extension date, it would pay to respondents the sum of $50 per day as liquidated damages for each of certain defined acts of operation, including loading or unloading of a transit mix truck or bulk cement truck with either sand or gravel. It also recited that said sum was "in lieu of monetary damages and as liquidated damages for the violation hereof," and the parties "agree to this specified amount of damages per day since the effect of the injury and damage by continued operation of the plant on first parties is difficult and impracticable to ascertain."

Respondents alleged that appellant breached this contract by continuing its operation after October 17, 1956, until December 2, 1956. Appellant admitted this breach. Respondents further alleged and the evidence shows that dust, noise, etc., from the operation of the plant affected the peaceful and quiet enjoyment of their residence, impaired their sleep, soiled their laundry, caused their chickens to become frightened and run and break their wings, causing loss of chickens and egg production, and the cement dust injured their fruit trees causing some of them to die.

The evidence further showed that all negotiations leading to the execution of said contract was through the attorneys who had handled the injunction suit. Mr. Underdown, President of the appellant company, admitted on cross-examination that the litigation had been long and involved and he had, therefore, left to his attorney the matter of the negotiations. He conceded that he sought the time for extension and was willing to waive his right of appeal therefor and had concluded the amount of $50 per day as liquidated damages after such negotiation.

Appellant contends that the judgment of the lower court should be reversed because respondents failed to plead and prove that the contract sued upon is within the exception set forth in Civil Code, § 1671; that the sum of $2,750, awarded, was by way of penalty rather than of liquidated damages; that as a matter of law the court could not have properly found that it was impracticable or extremely difficult to fix actual damages.

[1] In this state, a contract which attempts to fix the amount of damages in anticipation of a breach of an obligation is void to that extent (Civil Code, § 1670), except when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. Whether or not the damage would be impracticable or

extremely difficult of precise appraisal is largely a question of fact. Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, at page 593, 189 P. 445.

[2, 3] In order to recover on a contract providing for liquidated damages, a plaintiff must plead and prove that at the time the contract was entered into, damages in the event of a breach would be impracticable or extremely difficult of ascertainment and that the sum agreed upon represented a reasonable endeavor to ascertain what such damages would be, and that a breach of the contract had occurred. The amount agreed must result from a reasonable endeavor by the parties to estimate a fair compensation for any loss that may be sustained because of a breach. McCarthy v. Talley, 46 Cal. 2d 577, at page 587, 297 P.2d 981.

[4] The parties did stipulate that they agreed upon an amount as liquidated damages and not as a penalty. While not conclusive, such a stipulation is entitled to some weight. Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18.

[5] From the evidence adduced before the trial judge, it would appear that in view of the circumstances which existed at the time the contract was executed, considering the nature of the damages suffered by the respondents, its cause, the effect upon the poultry, the difficulty of evaluating the loss of production, the extent of tree and fruit damages, the variations from day to day of the operations of the appellant's plant, the number of trucks used and the other factors which were obviously experienced in the trial by both the parties and their counsel, that the parties deliberated carefully through their attorneys in the negotiations of the contract in question, it would appear that there was sufficient difficulty encountered by the parties in estimating the damages, and it was, therefore, reasonable for them to agree upon the amount stated in their contract.

The record amply supports the Court's Findings, both as a matter of fact and law, that the provision in the contract for $50 per day to respondents, under the circumstances, was a fair compensation for respondents' loss, and said provision should be construed as a valid enforceable provision for liquidated damages.

It is, therefore, ordered the judgment of the lower court be, and it hereby is, affirmed.

CONLEY, P. J., and DE WOLF, J., concur.

167 Cal.App.2d Supp. 835

Paul W. COWLES, Plaintiff and Appellant,

v.

CITY OF OAKLAND, Defendant and Respondent.

Civ. A. No. 268.

Appellate Department, Superior Court, Alameda County, California.

Feb. 2, 1959.

Action was brought to recover charge or fee alleged to have been wrongfully exacted from plaintiff by defendant-city. The Municipal Court of the Oakland-Piedmont Judicial District, Frederick M. Van Sicklen, J., entered judgment adverse to the plaintiff, and the plaintiff appealed. The Appellate Department of the Superior Court, Richard H. Chamberlain, J., held that charge or fee exacted from plaintiff by defendant-city for issuance of annual permit pursuant to city ordinance requiring payment of annual license tax or fee by any person carrying on any business within the city was a "tax" within meaning of statute defining original jurisdiction of municipal courts and providing that municipal courts shall not have jurisdiction of cases involving legality of any "tax", impost, assessment, toll, or municipal fine, and that therefore municipal court did not have jurisdiction of the action.

Judgment reversed, and action remanded to municipal court with direction to transfer action to Superior Court for Alameda County.

1. Courts ⇐190(6)

Appellate Department of the Superior Court would be justified in dismissing contention of respondent that appellant should not be heard to allege that judgment was erroneous because appellant had allegedly requested rendition of the judgment, where the appellate record disclosed no such "request" by appellant, since the Appellate Department of the Superior Court was required to decide the case on the appellate record.

2. Courts ⇐190(8)

Where plaintiff, a layman, appeared in his own behalf without an attorney, and was obviously desirous of attaining from municipal court a ruling from which he could appeal to Appellate Department of the Superior Court, and application of doctrine of invited error, because plaintiff allegedly requested municipal court to enter the judgment, would not be fair or equitable to plaintiff, Appellate Department of the Superior Court, in exercise of its discretion, would not apply the doctrine on appeal by plaintiff.

3. Courts ⇐188(2)

Charge or fee exacted from plaintiff by defendant city for issuance of annual permit pursuant to city ordinance requiring payment of annual license tax or fee by any person carrying on any business within the city was a "tax" within meaning of statute defining original jurisdiction of municipal courts and providing that municipal courts shall not have jurisdiction of cases involving legality of any "tax", impost, assessment, toll, or municipal fine, and therefore municipal court did not have jurisdiction of action to recover back from city the charge or fee exacted from him by city. West's Ann.Code Civ.Proc. § 89, subd. 1(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Tax".

4. Courts ⇐483

Where municipal court did not have original jurisdiction of action to recover charge or fee which defendant city had exacted from plaintiff, because the action involved a "tax," municipal court should have transferred the action to the superior court, instead of rendering judgment that plaintiff take nothing. West's Ann.Code Civ.Proc. §§ 89, subd. 1(a), 396.

5. Courts ⇐190(9)

Where municipal court, which did not have original jurisdiction of action, improperly rendered judgment that plaintiff take nothing from defendant, instead of transferring the action to superior court, it was not proper for Appellate Department of Superior Court on appeal by plaintiff to order a transfer to superior court for exercise of superior court's original jurisdiction, but judgment should be reversed, and action should be remanded to municipal court with direction to transfer action to superior court. West's Ann.Code Civ.Proc. §§ 89, subd. 1(a), 396.

Paul W. Cowles, in pro. per.

John W. Collier, City Atty., and Frederick M. Cunningham, Deputy City Atty., Oakland, for respondent.

RICHARD H. CHAMBERLAIN, Judge.

This is an appeal by the plaintiff from a judgment in favor of the defendant, rendered after the Municipal Court had sustained defendant's demurrer to the complaint without leave to amend.

By the complaint and an amendment thereto, neither of which is a model of pleading, the plaintiff seeks to recover from the defendant the sum of $12 which he alleges he paid to the City License Fee Collector "under duress and fear of criminal prosecution" for the issuance of an annual "Municipal Permit" in October, 1957, pursuant to the provisions of a 1932 City Ordinance.

The further allegations of the complaint and amendment may be summarized as follows: In 1932 the City enacted an

ordinance (sections 5–1.02 et seq. of the Oakland Municipal Code) requiring the payment of an annual "license tax" or fee by any person carrying on any business within the city, the amount of the tax or fee being computed upon the number of persons employed in the business. Although the ordinance expressly provided—and still provides—that the payment required was "a tax for revenue purposes and are not regulatory permit fees," the true primary purpose of the ordinance "is for regulation and not revenue." Since 1933 plaintiff has been and is carrying on a printing business in the city and has each year paid for and obtained a license as required by the ordinance. Since 1940 plaintiff has had a State Sales Tax License, issued pursuant to the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.). In 1946 the City enacted an ordinance levying a city sales tax and requiring that every person selling tangible personal property at retail within the city obtain a city permit upon the payment of a fee. In 1946 the City Treasurer issued to plaintiff, pursuant to the 1946 ordinance, Business Permit No. 439, which has never been revoked or cancelled. After plaintiff had under protest paid the $12 and received a license under the 1932 ordinance, he returned the license to the City and filed a claim for the return of the $12. On August 19, 1958, his claim was denied when the City Council adopted Resolution No. 37392, reciting that "said fee was not a tax, percentage or cost erroneously or illegally collected."

In its essence, plaintiff's action to recover the $12 fee is based upon two theories: (1) that, since he already had the 1946 permit, the City was without power to exact from him a fee for the 1957 permit; and (2) that the 1932 Ordinance levying a business tax was "for regulation and not for revenue" and the $12 paid by the plaintiff was "a permit fee and not a tax fee," and therefore the City was without power to require the plaintiff to purchase the "Seller's Permit" because, by enacting the Sales and Use Tax Law the State had entered and occupied the field of regulating business to the exclusion of municipal power to do so.

The trial court sustained defendant's demurrer to the complaint as amended, without leave to further amend, on the ground that it appeared from the complaint that the action involved the legality of a "tax, impost, assessment, toll or municipal fine," as those words are used in Section 89, subd. 1(a), of the Code of Civil Procedure defining the original jurisdiction of municipal courts, and therefore the Municipal Court did "not have jurisdiction over the proceedings and for the relief sought in the Complaint."

[1, 2] At the outset it is appropriate to discuss a preliminary contention made by the City on this appeal: In the City's brief it is asserted that, after the Municipal Court had sustained the City's demurrer without leave to amend, plaintiff "orally advised said court he wished judgment entered thereon so that he might commence this appeal." Nowhere does it appear in the record on appeal that plaintiff-appellant made any such request, but the statement in defendant's brief is not controverted. Based on the assumption that such an oral request was made by the plaintiff-appellant, the City invokes the doctrine of "invited error" and, because plaintiff requested the rendition of the judgment from which this appeal is taken, contends he should not now be heard to allege that the judgment was erroneous. Since no such "request" is disclosed by the appellate record upon which we must decide this case, this Court would be justified in dismissing the defendant's contention without further discussion, but in our opinion the contention should not be sustained for the additional reason that throughout the proceedings in this action plaintiff, a layman, has appeared in his own behalf without an attorney and was obviously desirous of obtaining a ruling from the Municipal Court from which he could appeal, and an application of the doctrine of invited error would not be

fair or equitable to him. As was said in Pete v. Henderson, 1954, 124 Cal.App. 2d 487, at page 491, 269 P.2d 78, at page 80, 45 A.L.R.2d 58, "While the fact that a layman litigant elects to represent himself does not relieve him of the duty of observing legal rules, * * * that fact should be considered in determining whether, in a situation where the trial court has discretion to act to relieve the lay litigant from his default, that discretion should be exercised." A similar discretion should, we believe, be exercised by the appellate court in this case.

Plaintiff contends on appeal that the Municipal Court did have jurisdiction of the action because the controversy does not involve the validity of a "tax," but rather the validity of a "permit fee." In other words, plaintiff construes the words "tax," "impost," "toll," and "municipal fine" as they appear in C.C.P. § 89, subd. 1(a) to exclude the fee paid by him under protest because—he says—said fee was a "permit fee" exacted by a regulatory measure rather than by a true tax-raising ordinance.

The appellate jurisdiction of the Supreme Court is described in Section 4 of Article VI of the Constitution as including "all cases at law which involve * * * the legality of any tax, impost, assessment, toll, or municipal fine * * *." The words just quoted are exactly the same language as is used in C.C.P. § 89, subd. 1(a) to exclude such cases from the original jurisdiction of municipal courts. That language has received the attention of the appellate courts of this State in a number of cases.

In City of Madera v. Black, 1919, 181 Cal. 306, 184 P. 397, the plaintiff city was seeking to recover $23 as monthly sewage rates due from a property owner under a municipal ordinance requiring the payment of rates for connecting a city sewer system with private dwellings; the defendant resisted the action on the ground that the ordinance was invalid and that the rates or charges were extravagant and exorbitant and were imposed for the purpose of raising revenue to defray general municipal expenses rather than to pay for the actual cost and maintenance of the sewer system. The complaint in that case was filed in a Recorder's Court, a court of limited jurisdiction just as is the Municipal Court in the case at bar. In considering the jurisditional question whether the case involved the validity of a "tax, impost, assessment, toll or municipal fine," the Supreme Court said (181 Cal. at page 310, 184 P. at page 400):

> "A 'tax,' in the general sense of the word, includes every charge upon persons or property, imposed by or under the authority of the Legislature, for public purposes. Perry v. Washburn, 20 Cal. [318] 350; People v. McCreery, 34 Cal. [432] 454. The word 'impost,' in its broader sense, means 'any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on [property].' * * * The money for which the plaintiff sued was a charge upon persons; it was imposed by the legislative authority of the city of Madera for public purposes, and under these definitions it was a tax; also, it was a tribute or contribution required by legislative authority and to be used for public purposes, and so comes within the definition of the word 'impost.' * * *
>
> "The general purpose of that provision obviously is to give to the sovereign power of the state, whether exercised generally or locally, the protection of having the legality of any exaction of money for public uses or needs cognizable in the first instance in the superior courts alone. In view of this purpose, it is apparent that the words used should be applied in their broadest sense with respect to moneys raised for public purposes or needs. The conclusion necessarily follows that the particular charge here involved comes within the constitutional provision and that any case in which the legality of such a charge is involved is within the exclusive original jurisdiction of the superior court. Upon the filing of the answer it fully ap-

peared that the legality of the charge was involved in the action. The recorder should thereupon have certified the papers and transferred the cause to the superior court."

The Madera case was cited and quoted with approval in Unemployment Reserves Commission v. St. Francis Homes Association, 1943, 58 Cal.App.2d 271, 281, 137 P.2d 64, 69. In the latter case, in which the Supreme Court denied a hearing, the District Court of Appeal said:

"The 'legality' of a 'tax' is involved when the taxpayer contends that the tax is illegally assessed or levied against him. It is the essence of the contention of the taxpayer in such a situation that the tax is illegal. To say that such a case does not involve the 'legality' of a 'tax,' is to fail to give effect to the language used in the statute.

"Practical considerations lead to the same conclusion. The provision was inserted in the Municipal Court Act for the same reason that the Supreme Court is given, by art. VI, sec. 4, of the Constitution, appellate jurisdiction of such cases. The intent was that municipal courts should not decide such cases because there would then be no appeal to the higher appellate courts. Most tax cases are test cases. Few involve the validity of the statute. Most tax cases involve the interpretation of the taxing statute and the legality of a levy against a particular taxpayer. It is in the public interest that the Supreme Court should decide such cases in order that such questions can be finally determined for the entire state. If it should be held that municipal courts have jurisdiction of such cases with appeal to the appellate department of the superior court there would be no way of securing a decision that would be binding authority in the state. On close questions there would always be the possibility of conflicting decisions with consequent confusion in the enforcement of tax statutes. It was undoubtedly for these reasons that the Legislature saw fit to deny jurisdiction of such cases to municipal courts."

See also California Employment Stabilization Commission v. Citizens Nat. Trust & Savings Bank, 1946, 73 Cal.App.2d 915, 167 P.2d 752; Yosemite Lumber Co. v. Industrial Acc. Comm., 1922, 187 Cal. 774, 783, 204 P. 226, 20 A.L.R. 994; 13 Cal. Jur.(2d) Courts § 69; and Witkin's California Procedure, Vol. I, pp. 303–305.

[3] In our opinion the narrow construction of the words "tax, impost, assessment, toll or municipal fine" contended for by plaintiff is not correct. "Tax," as used in C.C.P. § 89, subd. 1(a), must be held to include the charge or fee which the plaintiff alleges was unlawfully exacted from him by the City, and the complaint must be held to disclose on its face that this case involves the legality of a tax and was therefore outside the original jurisdiction of the Municipal Court.

Plaintiff places great reliance on the cases of Davis v. City of San Diego, 1939, 33 Cal.App.2d 190, 91 P.2d 640; County of Plumas v. Wheeler, 1906, 149 Cal. 758, 87 P. 909; and City and County of San Francisco v. Boss, 1948, 83 Cal.App.2d 445, 189 P.2d 32. In each of those cases, however, the question discussed was whether a complaint seeking either the payment or the recovery of a fee or charge, stated a cause of action, not whether the trial court had jurisdiction over the action. Since we conclude that the defendant's demurrer in this case was properly sustained on the ground that the Municipal Court did not have jurisdiction of the action, we do not reach the question whether the complaint herein stated a cause of action; as we said at the outset, neither the complaint nor the amendment thereto is a model of pleading.

[4] The question remains, whether the Municipal Court here properly rendered judgment "that plaintiff, Paul W. Cowles, take nothing from the defendant" and that the defendant recover costs. At the oral argument defendant's counsel conceded that the Municipal Court should have transferred this action to the Superior Court

pursuant to C.C.P. § 396 when it appeared that the Court lacked "jurisdiction of the subject matter thereof, as determined by the complaint." We concur in that view. That code section provides that in such a situation the action *"shall,* on the application of either party, *or on the court's own motion,* be transferred to a court having jurisdiction * * *." (Emphasis added.)

See Booge v. First Trust & Savings Bank, 1941, 46 Cal.App.2d Supp. 879, 883, 116 P.2d 503; California Employment Stabilization Comm. v. Citizens' Nat. Trust & Savings Bank, supra; and 13 Cal.Jur. (2d) Courts § 101.

[5] However, it would not be proper for this Appellate Department to order a transfer to the Superior Court for the exercise of the latter court's original jurisdiction. Rather, we believe, the judgment should be reversed and the action remanded to the Municipal Court, with direction to transfer this action to the Superior Court of Alameda County under the provisions of C.C.P. § 396, and it is so ordered.

WAGLER, P. J., and HOYT, J., concur.

167 Cal.App.2d Supp. 825

William H. THOMPSON, Plaintiff and Appellant,

v.

Vincent Chew QUAN, Defendant and Respondent.

Civ. A. 9616.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 12, 1959.

Action was brought for damages in amount of $371.31 resulting from automobile collision. The Municipal Court of Los Angeles Judicial District, Arthur S. Guerin, J., entered judgment adverse to the plaintiff because plaintiff did not counterclaim for such damages in small claims court action, and the plaintiff appealed. The Appellate Department of the Superior Court, David, J., held that statute providing that at, or before trial of small claims court action, one having cross-demand exceeding $100 may commence action against small claims plaintiff in court of competent jurisdiction, file affidavit to that effect, and secure transfer of small claims action to such court, for consolidation with that which he had commenced, does not operate to bar cross-claims not asserted in manner therein permitted, particularly since statute makes mandatory only such counterclaims as are within jurisdictional $150 limit in small claims court, thus limiting, as applied to small claims court, statute providing that if defendant omits to set out counterclaim on cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain action against plaintiff therefor.

Judgment reversed.

1. Statutes ⇐227

Ordinarily, word "may" in a statute is permissive and not compulsive.

See publication Words and Phrases, for other judicial constructions and definitions of "May".

2. Action ⇐55

Word "may" as used in statute providing that at or before trial of small claims court action, one having cross demand exceeding $100 "may" commence action against small claims plaintiff in court of competent jurisdiction, file affidavit to that effect, and secure transfer of small claims action to such court, for consolidation with that which he had commenced, is permissive and is not to be construed as "must." West's Ann.Code Civ.Proc. § 117r.

3. Judgment ⇐585(4)

Statute providing that at or before trial of small claims court action, one having cross demand exceeding $100 may com-

mence action against small claims plaintiff in court of competent jurisdiction, file affidavit to that effect, and secure transfer of small claims action to such court, for consolidation with that which he had commenced, does not operate to bar cross-claims not asserted in manner therein permitted, particularly since statute makes mandatory only such counterclaims as are within jurisdictional $150 limit in small claims court, thus limiting, as applied to small claims court, statute providing that if defendant omits to set out counterclaim on cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain action against plaintiff therefor. West's Ann.Code Civ.Proc. §§ 117h, 117r, 439.

Robert H. Powsner, Los Angeles, for appellant.

Goebel & Donovan, Los Angeles, for respondent.

DAVID, Judge.

Quan unsuccessfully sued plaintiff Thompson for damages arising from an automobile collision in the small claims court. The plaintiff Thompson later sued Quan in the municipal court for his damages from the collision, amounting to $191.-31 for property damage and an additional $180 for loss of use of his automobile. Plaintiff was denied recovery upon the sole ground that he had not counterclaimed for such items in the small claims court action, and appeals.

If by Code Civ.Proc. § 117h, the operation of C.C.P. § 439 bars counterclaims not asserted in the small claims courts, it is limited to counterclaims "within their jurisdiction." Plaintiff's claim exceeds the $150 jurisdiction of that court. Thus it was not mandatory under C.C.P. § 439 that he counterclaim. While plaintiff's claim arises out of the same transaction, it constitutes a separate cause of action, upon which he may bring a separate action. Todhunter v. Smith, 1934, 219 Cal. 690, 694, 28 P.2d 916, 918. In that case, involving the jurisdictional relationships between the municipal and the superior court, it was stated, the one having the cross-demand "may permit the action in the inferior court to go to judgment. If he adopts this course, the final judgment of the inferior court, although not a complete bar to subsequent prosecution in the superior court of his cause of action arising from the same accident is nevertheless conclusive and binding upon him in so far as the subsequent action involves issues adjudged and determined in the prior action."

This rule of *res judicata*, while applied in reference to proceedings in all other courts and some administrative bodies, was later expressly negatived in reference to small claims court proceedings. In Sanderson v. Niemann, 1941, 17 Cal.2d 563, 573, 110 P.2d 1025, applying C.C.P. § 117j, it was recognized that as to a plaintiff, a small claims court judgment is final and *res judicata*. But it was held that the small claims court judgment was neither an estoppel nor *res judicata* on the issues of negligence or contributory negligence upon trial of a cross-demand prosecuted in another court.

In Todhunter v. Smith, supra, 219 Cal. 690, 28 P.2d 916, it was indicated that one having a cross-demand to a claim prosecuted in the small claims court in an amount exceeding its jurisdiction, could enjoin the proceeding, or separately litigate the claim. This perhaps contemplated the filing of the action on the claim in a court which could issue a restraining order, *pendente lite*, rather than institution of a formal injunction proceeding. Following this case, C. C.P. § 117r was added to the code in 1933, providing that at, or before trial of the small claims court action the one having a cross-demand exceeding $100 "may commence an action against said [small claims] plaintiff in a court of competent jurisdiction", file an affidavit to that effect, and secure transfer of the small claims action to such court, for consolidation with that which he had commenced.

[1, 2] Ordinarily, the word "may" is permissive and not compulsive. In re Williamson, 1954, 43 Cal.2d 651, 655–656, 276 P.2d 593; Realty Construction & Mortgage Co. v. Superior Court, 1913, 165 Cal. 543, 546, 132 P. 1048; Ostrander v. City of Richmond, 1909, 155 Cal. 468, 470, 101 P. 452; Marshall v. Foote, 1927, 81 Cal.App. 98, 102–103, 252 P. 1075; Chaney v. Los Angeles County Peace Officers' Retirement Board, 1943, 59 Cal.App.2d 413, 415, 138 P.2d 735. In view of the judicial and legislative history, we find nothing in the code provisions nor the situation to impel the construction of "may" as "must." Had any other construction been thought controlling, it most assuredly would have been considered in Sanderson v. Niemann, supra, 17 Cal.2d 563, 110 P.2d 1025.

There is a policy, on the one hand, that all causes of action arising from one transaction be tried in a single action in a single court. On the other hand, there is a definite public policy to maintain and operate an informal court for small claims, (Sanderson v. Niemann, supra, 17 Cal.2d 563, 110 P.2d 1025), and it is for the legislature to balance such policies where they conflict, as they do here.

[3] We conclude that C.C.P. § 117r does not operate to bar cross-claims not asserted in the manner therein permitted, particularly as C.C.P. § 117h makes mandatory only such counterclaims as are within the jurisdictional $150 limit in the small claims court, thus limiting C.C.P. § 439 as applied to such inferior court.

The judgment is reversed.

BISHOP, P. J., and SWAIN, J., concur.

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